Iowa Room
under Workers Comp.

State of Iowa

1974

ROBERT D. RAY
Governor

THIRTY-FIRST BIENNIAL REPORT OF THE

Industrial Commissioner

For the Period Ending June 30, 1974
and
REPORT OF DECISIONS
ON SELECTED CASES

ROBERT C. LANDESS
Industrial Commissioner

Published by
STATE OF IOWA
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SP 18108

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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 Thirty-first Biennial Report of the Iowa Industrial Commissioner is submitted. This report covers the period beginning July 1, 1972, and ending June 30, 1974.

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.

Respectfully submitted,

ROBERT C. LANDESS
Industrial Commissioner

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.

Some very substantial changes in Iowa's Workmen's Compensation Law were enacted by the Sixty-fifth General Assembly.

Responding to a study made by the National Commission on State Workmen's Compensation Laws, an ad hoc committee composed of representatives of insurance, labor, management, farm bureau and the legal profession, in conjunction with the Iowa Industrial Commissioner, drafted legislation to present to the general assembly to correct deficiencies in the Iowa law as recommended by the National Commission.

The National Commission made 84 recommendations for an effective state workmen's compensation program. 19 of these recommendations were determined as "essential" and the states were encouraged to implement these standards by deadlines extending into 1975. Of these 19 "essential" recommendations, Iowa was already in compliance with 8, leaving 11 which needed either clarifying or new legislation.

Legislation which was drafted and later enacted by the general assembly brought the Iowa law into compliance with 9 of the 11 deficiencies and covered the other 2 to a lesser extent than recommended. The legislation also went further and covered many of the other recommendations made by the National Commission.

The new law brought agricultural employers under the Act on a mandatory basis after January 1, 1974, if they had an annual cash payroll in the prior year of $2,500 or more. Also covered are employees who work for an agricultural employer who employs at least one person full time for thirteen consecutive weeks, during any twelve month period.

Agricultural employers which have been mandatorily under the Workmen's Compensation Act since January 1, 1974 will, after January 1, 1975, no longer have to consider wages paid to or the employment of family members or exchange labor in determining whether or not they meet the mandatory requirements of $2,500 cash payroll in the previous calendar year, or the employment of at least one person regularly for thirteen consecutive weeks.

As of July 1, 1974, domestic and casual workers, making at least $200 in a thirteen consecutive week period from the same employer, were afforded coverage.

Extensive revision was made in the amount of allowable benefits to which an injured employee is entitled. The individual benefit level after July 1, 1973 is 80% of the worker's average weekly spendable earnings, rather than 66 2/3% of his weekly gross earnings, as before. Spendable earnings are basically the worker's net earnings after deduction of state and federal income tax and social security withholdings based upon the worker's dependents.

In addition, the maximum allowable benefit for all but permanent partial disability was increased to 66 2/3% of the state average weekly wage, beginning July 1, 1973. As the state average weekly wage was then $136.28, the maximum benefit allowable for all but permanent partial disability was $91 per week for injuries received between July 1, 1973 and July 1, 1974. The maximum for permanent partial disability for the same period was $84 per week. This is based upon 61 2/3% of the state average weekly wage. The increases were $23 and $21, respectively, over the maximum rates in effect prior to July 1, 1973.

Effective July 1, 1974, the maximum allowable weekly benefit rate for workmen's compensation was raised to $97 for temporary disability, healing period, permanent total disability and death benefits. The maximum rate for permanent partial disability is now $89. These rates, which are in effect for injuries received after July 1, 1974, are based upon 66 2/3% and 61 1/3%, respectively, of the state average weekly wage of $145.74 for the calendar year 1973.

Legislation further provided for an increase of 33 1/3% in the maximum allowable benefits every two years until 1981, when the maximum allowable benefit will reach 200% of the state average weekly wage. The individual benefit, however, is still limited to 80% of the individual's own spendable earnings.

A new method of computing the wage of a person who receives less than the regular full-time adult laborer in the line of industry in the locality in which they are employed has also been adopted. Instead of determining their wage to be the same as the full-time laborer in that industry, their wage shall be computed as one-fiftieth of all earnings received from all employments during the prior twelve months, but shall not be less than $45 per week.

The time limitations placed upon certain disabilities was also removed. A permanent total disability incurred after July 1, 1973 will receive benefits for life, instead of the previous limitation of 500 weeks. Death benefits will be payable to the surviving spouse for life or until remarriage, instead of the previous limitation of 300 weeks. In the event of remarriage, the surviving spouse will be entitled to a payment of two years benefits in a lump sum, as long as there were no dependent children.

When there is no surviving spouse, or the spouse has remarried, dependent children shall be entitled to the death benefits during the period of their dependency and at least until age 18, or until age 25 if enrolled in an accredited educational institution. A dependent child who is physically or mentally incapacitated from earning shall be entitled to compensation for the duration of the incapacity from earning.

Statutory authority was provided to the parties to a contested case to settle the matter subject to the approval of the Industrial Commissioner, if a bona fide dispute as to liability exists. The settlement then bars further action under the Workmen's Compensation Act for that injury.

Other provisions provided an unlimited healing period for permanent partial disabilities; full coverage for work related diseases; removed any statute of limitations for medical care related to work injuries; provided for the payment of 500 weeks of compensation for the loss of two major members of the body from a single injury with an allowance for permanent total disability benefits if conditions warrant, and extended jurisdiction to injured workmen whose employment is principally localized in this state or the contract of hire was made in this state, even if the injury was incurred in another state.

Recent legislation also makes workmen's compensation not only the exclusive remedy of an injured worker as against his employer, but also as against a co-employee for any injury which arises out of and in the course of his employment. An action may, however, be maintained against a co-employee if it was caused by the other employee's "gross negligence amounting to such lack of care as to amount to wanton neglect for the safety of another."

As a multitude of changes have been made in the workmen's compensation law along with the passage of the Iowa Administrative Procedure Act which will become effective July 1, 1975, it is known that additional personnel will be necessary to carry out the scope and intent of the law. At this time, it is not possible to determine the total amount of additional staff that will be necessary so a minimal increase is being requested.

We are again requesting that the responsibility for determining the validity of state employees' claims be transferred from this department, as recommended by the Governor's Economy Committee in 1970. It is not the cost that is the important consideration as much as it is the potential conflict that is present as a result of continuing this practice. At the present time, if a state employee is injured it is the duty of this office to determine in the first instance the compensability of the claim. If we deny the claim, then the employee must pursue his claim through litigation before this same agency. It is somewhat the same as having a claims adjuster turn down your claim and then having to try your case to one of his fellow adjusters in the same company. We feel this is not a proper manner to insure justice.

Legislation to continue improvement in the workmen's compensation field is being considered by several groups which will be reviewed by the Workmen's Compensation Advisory Committee before submission to the general assembly.

RESULTS ON CASES APPEALED DURING THE LAST BIENNIUM REPORTED IN THE THIRTIETH BIENNIAL REPORT

9733 **GARLAND LOVELADY -VS- OWENS CONSTRUCTION COMPANY**
Review Decision appealed to District Court by Defendant.
Dismissed

10215 **VELMA ANDERSON -VS- SILAS-MASON & HANGER CO., INC.**
Review Decision appealed to District Court by Claimant.
Affirmed/was not appealed to Supreme Court

10051 **HELEN C. GRAGG -VS- MAYTAG PLANT NO. 2**
Review Decision appealed to District Court by Claimant.
Dismissed

10333 **THEODORE FREDERICK -VS- THE MEN'S REFORMATORY**
Review Decision appealed to the District Court by Defendant.
DC **Reversed**
SC **Affirmed District Court Decision**

10377 **WALTER KAESER -VS- BRANNAN BROTHERS CONSTRUCTION CO.**
Review Decision appealed to District Court by Claimant.
Affirmed/was not appealed to Supreme Court

10412 **R. C. WILLIAMS -VS- GODBERSON-SMITH**
Review Reopening Decision appealed to District Court by Claimant.
Dismissed

8599 & 10404 **JESSE E. LAND -VS- RICHARD H. CARLSON**
Review Reopening Decision appealed to District Court by Claimant
Affirmed/was not appealed to Supreme Court

11127 **MARK SNOPEK -VS- A. J. CROMER & SONS, INC.**
Review Reopening Decision appealed to District Court by Defendant.
Dismissed

10258 **NORMA GREGERSON -VS- SHERMAN ROE d/b/a SKIP'S TAP**
Review Decision appealed to District Court by Claimant.
Dismissed

STATISTICAL DATA

INJURY REPORTS RECEIVED FOR BIENNIAL PERIOD

July 1, 1972 to June 30, 1973 (includes 110 fatal reports)	17,214
July 1, 1973 to June 30, 1974 (includes 127 fatal reports)	19,011

MEMORANDUM OF AGREEMENTS RECEIVED FOR BIENNIAL PERIOD

July 1, 1972 to June 30, 1973	12,120
July 1, 1973 to June 30, 1974	14,169

STATISTICAL DATA

ARBITRATIONS

July 1, 1972 to June 30, 1973

Cases carried over from previous year	203	
Arbitration petitions filed	256	
Arbitrations dismissed		83
Arbitration decisions		64
Arbitrations settled		123
Arbitrations carried over to July 1, 1973*		189
	459	459

July 1, 1973 to June 30, 1974

Cases carried over from previous year	189	
Arbitration petitions filed	287	
Arbitrations dismissed		59
Arbitration decisions		63
Arbitrations settled		109
Arbitrations carried over to July 1, 1974*		245
	476	476

REOPENINGS

July 1, 1972 to June 30, 1973

Cases carried over from previous year	151	
Reopenings filed	274	
Reopenings dismissed		47
Reopening decisions		53
Reopenings settled		159
Reopenings carried over to July 1, 1973*		166
	425	425

July 1, 1973 to June 30, 1974

Cases carried over from previous year	166	
Reopenings filed	232	
Reopenings dismissed		57
Reopening decisions		72
Reopenings settled		97
Reopenings carried over to July 1, 1974*		172
	398	398

* 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 1972-1973		July 1 1973-1974	
Cases carried over from previous year	24		30	
Review petitions filed	38		35	
Review decisions filed		23		15
Review settled		1		8
Reviews dismissed		8		17
Reviews carried over*		30		25
	62	62	65	65
Review cases appealed to District Court		9		3
Review Reopenings appealed to District Court		13		21
Cases appealed to Supreme Court		2		4

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

Fatal Reports July 1, 1972 to June 30, 1973	(115)
Fatal Reports July 1, 1973 to June 30, 1974	(123)

SUMMARY OF RECEIPTS AND DISBURSEMENTS

July 1, 1972 to June 30, 1973

	Appropriation and/or Receipts	Disbursements	Balance June 30, 1973
SALARIES, GENERAL OFFICE AND MAINTENANCE — Sch. 1	$173,450.00	$169,784.37	$ 3,665.63
HIGHWAY COMMISSION — Sch. 2	161,592.56	131,274.14	30,318.42
STATE EMPLOYEES — Sch. 3	455,203.38	455,203.38	
PEACE OFFICERS — Sch. 4	19,171.49	19,171.49	
	$809,417.43	$775,433.38	$33,984.05

SECOND INJURY FUND

	Appropriation and/or Receipts	Disbursements	Balance June 30, 1973
Balance July 1, 1972	$45,777.49		
Interest on Investments	1,954.26		
Paid to Claimants		$13,612.13	
Balance Carried Forward			$34,119.62

Schedule 1
Salaries, General Office and Maintenance

	Appropriation and/or Receipts	Disbursements	Balance June 30, 1973
Appropriation	$173,450.00		
Salaries		$135,825.50	
Social Security (state's share)		6,301.65	
Retirement (state's share)		3,700.66	
Hospital Benefits (state's share)		1,729.94	
Life Insurance (state's share)		481.32	
Travel		5,002.50	
General Office		8,594.45	
Printing		4,170.29	
Telephone		2,443.42	
Equipment		1,534.64	
Balance Reverted to General Revenue			$3,665.63
	$173.450.00	$169,784.37	$3,665.63

Schedule 2
Highway Commission

Transfer from Primary Road Fund	$150,000.00		
Outstanding Warrants & Cancellations	1,449.12		
Refunds	18.00		
Third Party Settlements	10,125.44		
Death Claims		$13,715.88	
Disability Claims		46,333.54	
Medical Claims		71,224.72	
Balance Carried Forward			$30,318.42*
	$161,592.56	$131,274.14	$30,318.42

*Transferred to Primary Road Fund

Schedule 3

Claims for State Employees under Section 85.58

Third Party Settlements	$18,535.91	
Refunds	3,293.11	
Outstanding Warrants	91.00	
Cancellations	6,643.99	
Warrant Corrections	341.84	
Death Claims		$ 36,798.71
Disability Claims		191,560.76
Medical Claims		255,749.76
	$28,905.85	$484,109.23
		$455,203.38

Charles Archibald, Claimant

vs.

Jimmy Nantista, Employer
and

Bituminous Casualty Corporation, Insurance Carrier, Defendants

Review — Reopening Decision

Mr. Tom Hyland, Attorney at Law, 3232 Hubbell Avenue, Des Moines, Iowa 50317, For the Claimant.

Mr. John A. McClintock, Attorney at Law, 803 Fleming Building, Des Moines, Iowa 50309, For Defendants.

This is a proceeding in Review-Reopening brought by the claimant, Charles Archibald, against his employer, Jimmy Nantista, and its insurance carrier, Bituminous Casualty Corporation, to recover benefits under the Iowa Workmen's Compensation Act on account of an injury sustained on June 24, 1972. The case came on for hearing before the undersigned at the Offices of the Iowa Industrial Commissioner in Des Moines, Iowa, on Thursday, July 12, 1973, at 11 a.m. The record was left open for the submission of medical testimony. The record was closed on October 2, 1973.

The issue to be determined in this matter is whether or not the claimant sustained compensable disability and medical expenses as a result of an injury occurring June 24, 1972.

The claimant indicated that he was hospitalized and sent to Dr. Arnis B. Grundberg, M.D., the day following the injury. The records submitted and the observation of this deputy commissioner show the claimant's recollection is poor. The hospitalization occurred some time later.

The testimony indicates three episodes have occurred involving Claimant's back. One incident some four years ago involved a fall while carrying eggs. No medical treatment was sought. The second incident is the fall at the defendant's place of employment which is in issue in the instant case. The third incident occurred in January or February of 1973. The greater weight of evidence indicates the claimant slipped at home and twisted his back at that time. It should be noted that the greater weight of evidence indicates the claimant has degenerative disc disease of long standing.

Dr. Arnis B. Grundberg, M.D., an orthopedic surgeon, testified on Claimant's behalf. His testimony does not have great clarity and consistency. However, on page 17 of his deposition, line 13, he does indicate that some disability will occur when there is a lifting restriction due to a ruptured disc and long history of back difficulty. Dr. Grundberg feels Claimant sustained a ruptured disc which has healed as a result of the fall of June 24, 1972. He feels Claimant has a degenerative disc disease of some duration. The fall of January or February, 1973, aggravated the degenerative disc disease. No percentage of disability is given by the doctor.

Claimant did not have great troubles in the autumn of 1972, after returning to work. Some complaints occurred. Claimant has intermittent complaints at present. The claimant was fifty-five (55) years old at the time of the accident. He has been able to obtain other employment. Evidence of Claimant's work history is sparse. It does not appear that, at least in the recent years, he has been engaged in heavy labor.

The defendants have admitted Claimant was off work from August 9, 1972, through September 27, 1972, due to the injury of June 24, 1972. The remaining evidence tends to corroborate this.

No medical bills or testimony concerning medical expenses were introduced. The defendants have acknowledged payment of certain medical expenses.

The parties have indicated the maximum rate for permanent partial disability compensation and healing period compensation for an injury occurring on June 24, 1972, would apply.

WHEREFORE, it is found that the claimant sustained a five percent (5%) permanent partial disability to the body as a whole as a result of the injury of June 24, 1972, compensable at the rate of fifty-nine dollars ($59) per week. While the disability may be greater, other causes are involved. No finding of fact herein should be construed as establishing that any worsening of Claimant's condition which may or may not occur is due to any particular cause.

It is further found that Claimant sustained seven and one-seventh (7 1/7) weeks of healing period disability compensable at the rate of sixty-four dollars ($64) per week.

THEREFORE, Defendants are ordered to pay Claimant twenty-five (25) weeks of permanent partial disability compensation at the rate of fifty-nine dollars ($59) per week. Defendants are further ordered to pay Claimant seven and one-seventh (7 1/7) weeks of healing period compensation at the rate of sixty-four dollars ($64) per week. Credit is to be given for amounts previously paid.

Defendants are further ordered to pay the costs of this proceeding.

Signed and filed this 27 day of November, 1973.

ALAN R. GARDNER
Deputy Industrial Commissioner

Appealed to District Court; Dismissed.

Loren Hilldred Baugher, Claimant

vs.

Foote Mineral Company, Employer
and

Travelers Insurance Co., Insurance Carrier, Defendants.

Review — Reopening Decision

Mr. John H. Smith, Attorney at Law, 511 Blondeau Street, Keokuk, Iowa 52632, For the Claimant.

Mr. Richard R. McMahon, Attorney at Law, 609 Putnam Building, Davenport, Iowa 52801, For the Defendants.

This is a proceeding in Review-Reopening brought by the claimant, Loren H. Baugher, against his employer, Foote Mineral Company, to recover benefits under the Iowa Workmen's Compensation Act on account of an injury on April 22, 1967. The case came on for hearing before the undersigned Deputy Industrial Commissioner at the courthouse of Lee County in Keokuk, Iowa, on March 8, 1974. The case was fully submitted on April 22, 1974.

A Memorandum of Agreement was filed by Defendants on May 8, 1967. The parties stipulated that Defendants have paid Claimant 188 weeks of compensation at the rate of forty dollars ($40) per week.

The issue to be determined is the extent of compensable disability sustained by Claimant as a result of the injury of April 22, 1967.

Claimant began work for Defendant Employer on February 11, 1934. On April 22, 1967, Claimant fell twenty to twenty-five feet (20'-25') from the ladder of a crane. During July, 1968, an operation was performed upon Claimant's left ankle. Additional surgery was performed on Claimant's left ankle on November 18, 1969. Following this surgery, Claimant described problems relating to vision, hearing, and memory. Claimant stated that his present complaints consist of vision, hearing, and memory difficulties as well as an inability to stand very long on his legs. He further testified that he takes nerve and pain pills and that his health was "good" prior to his accident.

A number of medical reports were submitted by Defendants. Chronologically, the first report was by Leo F. Wallace, M.D., an orthopedic surgeon. Dr. Wallace was asked by John Rankin, M.D., on November 1, 1967, for a consultation about Claimant. Dr. Wallace's physical examination revealed the following:

> "...edema around the medial malleolus and posteriorly around the heel cord and posterior aspect of the tibia. There is some swelling around the heel also. With weight bearing, the foot pronates or everts and abducts. There is also tenderness of oscalsis (sic) over the deltoid ligament."

He concurred with the proposed application of a brace with a T. strap. However, if Claimant continued to have pain, Dr. Wallace recommended consideration of surgical procedures consisting of osteotomizing the fibula, repairing the deltoid ligament, and advancing the posterior tibial tendons.

On June 22, 1968, Claimant was referred by Dr. Rankin to Lucius C. Hollister, Jr., M.D., an orthopedic surgeon. Dr. Hollister noted that Claimant had sustained a fracture of the left os calcis with arthritis of the talocalcaneal joint and disruption of the joints between the calcaneus cuboid talus and navicular. He recommended that Claimant be admitted to the hospital for evaluation and a triple arthrodesis.

X-rays were taken by a Dr. Theobald on June 28, 1968. His findings were as follows:

> **"RIGHT FOOT AND RIGHT OS CALCIS:**
> AP, lateral and oblique films of the foot and tangential view of the Os Calcis show no bone, joint or soft tissue abnormality.
>
> **"LEFT FOOT AND LEFT OS CALCIS:**
> Similar views as on the right show an old healed fracture of the Os Calcis with marked reduction of Boehler's angle. In addition, there is an old healed fracture involving the distal fibular shaft. There is moderate disuse demineralization of the bones of the foot.
>
> **"CHEST [PA]:**
> Stereoscopic PA films show heart and great vessels to be within normal limits. No active pulmonary disease."

On July 3, 1968, Dr. Hollister surgically performed a triple arthrodesis on the right foot and removed a piece of graphite from the ulnar portion of the left palm. Stitches were removed

from Claimant's left hand and left foot on July 2, 1968. Additionally, Dr. Hollister on this date placed a boot cast on his left foot and leg. Claimant was discharged from the hospital to his home on July 15, 1968.

Claimant returned to Dr. Hollister on July 22, 1968, with complaints concerning the cast. The cast was loosened at the top and bottom. An x-ray report was obtained on this date from S. L. Casper, M.D. Dr. Casper stated:

> **"LEFT FOOT:**
> AP, lateral and oblique views were made of the left foot through a heavy plaster cast. The bony phalanges are not included in the lateral projection. There is evidence of an apparently recent triple arthrodesis with the employment of six metallic staples. Because of partial obscuration of the osseous structures by the cast, no opinion can be expressed as to the status of the various operative sites. However, the recent date of surgery (7/3/68) would indicate that there is no fusion of these articulations at this time. Because of the presence of the cast, no additional comment is warranted on the basis of this study."

The cast was removed on August 12, 1968. Another x-ray was obtainted by Dr. Hollister on this date. The report by R. E. Hurley, M.D., indicated the following:

> **"LEFT FOOT:**
> A three view examination of the left foot is compared with the previous examination of 7/22/68 which was made through a plaster cast. As noted previously, there has been a triple arthrodesis performed using six metallic staples, two each between the calcaneus and cuboid, talus and navicular, and talus and calcaneus. The joint spaces between the talus and calcaneus, and calcaneus and cuboid are not distinctly seen, but the joint between the talus and navicular is still fairly well delineated. No change in the position of the metallic staples or osseous structures has occurred."

Dr. Hollister also advised Claimant how to walk.

Claimant returned to Dr. Hollister's office on September 5, 1968. Claimant stated that the swelling was subsiding in his left foot and leg and that he still had pain which was relieved by aspirin. Once again, Dr. Hollister obtained an x-ray report. The report by Dr. Casper indicated the following:

> **"LEFT FOOT:**
> Re-examination of the left foot consisted of AP, lateral and oblique projections, the distal 25 per cent of the tibia and fibula having been included on the lateral projection. These films were compared with those made on 8/12/68.
>
> "Apropos of the previously described triple arthrodesis that was performed 7/3/68, there is no evidence of abnormal osseous reaction incident to the six metallic staples employed for this procedure. There is a marked indistinctness of the joint space of both the subastragalar articulation and the calcaneocuboid joint. The talonavicular joint space is still undesirably distinct in the various projections.
>
> "There is a pronounced flattening of the longitudinal arch of the foot that is probably related to an old fracture of the calcaneus which has apparently undergone firm bony union but has resulted in a complete loss of the tuber joint angle. The lateral view also shows this patient sustained a rather long linear fracture through the distal portion of the shaft of the fibula. This fracture is presumably firmly healed, although the upper extremity of the distal fracture fragment is rather sharply delineated as seen in the lateral projection.
>
> "There is considerable demineralization of the bones of the foot that has shown a slight progression since the last examination of 8/12/68. Although I would assume this demineralization is in large part the result of the fractures the patient sustained approximately seventeen months ago, the type of demineralization noted in the first metatarsal head and the phalanges of the great toe necessitates consideration of Sudeck's atrophy. I also note at least a moderate pronation of the foot. There is also a slight to moderate degree of arteriosclerotic calcification of the vessels of the foot."

On November 9, 1968, Claimant was once again seen by Dr. Hollister. Although no x-ray report was mentioned by Dr. Hollister or submitted as part of the medical reports, Dr. Hollister commented that:

> "...x-rays revealed progressive healing of the respective talocalcaneal talonavicular and calcaneo cuboid joints. They also showed more pronounced osteoporosis than had been present previously. The corresponding views of the right foot, taken for comparison, showed no abnormalities of the bones or joints.***"

Claimant was advised to have a wedge placed on his heel.

The report of Dr. Hollister of November 16, 1968, further indicated that he did not believe an accurate estimate of temporary disability or permanent disability could be made at that time. However, for reserve purposes, he estimated permanent partial disability to be fifty percent (50%) of the left foot.

The next report submitted by Defendants was a report by Dr. Hollister dated May 7, 1969, concerning his examination of Claimant on April 30, 1969. Again an x-ray report was not submitted but Dr. Hollister stated that the x-rays revealed the following:

> "AP of both feet dated 4/30/69 still shows osteoporosis of the left foot and no change in the position of the staples. There appears to be progressive fusion of the talonavicular calcaneo-cuboid joints. Laterals of the left foot with the right for comparison show essentially the same findings. There is solid bony fusion between the talus and calcaneus. The superior portion of the talonavicular joint is still apparent. The staples have not changed. There is moderate osteoporosis of the left. The right is normal. Obliques show the same findings previously described."

Physical findings by Dr. Hollister indicated the following:

> "The circumference of his right thigh is 16 1/2"; right knee, 14 1/8"; right calf, 11 3/8"; right ankle, 9 3/4"; heel to ankle, 12"; apex of arch, 8 3/4". The circumference of the left thigh is 16"; left knee, 14 3/8"; left calf, 11"; left heel to ankle (at level of ankle), 9 3/4"; heel to ankle, 11 7/8"; apex of arch, 9 1/8". He has an area of pigmentation about the lateral malleolus measuring 4 x 3 3/4". Range of motion of the right ankle, 80-115; left, 80-95. He has a fixed eversion deformity on the left of 25°. The left foot is cooler than the right as is the calf. I am unable to feel the dorsalis pedis and the posterior tibial is palpable on the right but is diminished compared to the left. He has a strong posterior tibial on the left but I do not feel the dorsalis pedis."

Dr. Hollister gave Claimant an appointment to return in three months.

On November 17, 1969, Claimant was admitted to Blessing Hospital for further surgery by Dr. Hollister. Dr. Hollister had recommended to Defendant Carrier that Claimant be reoperated to revise the triple arthrodesis to bring the os calcis more directly under the talus. Claimant was operated by Dr. Hollister on November 18, 1969. The operation began at 8:29 and ended at 12:05. Dr. Hollister noted postoperatively the following:

> "Postoperatively the patient felt miserable all over; it was noted that his red count, hb were decreasing and the WBC was increasing. The possibility of a stress ulcer was considered. Patient complained of gastric discomfort and was placed on Bentyl 10 mg with Phenobarbital capsule 1 t.i.d. Subsequently was placed on Keflin ½gm deep I.M. every 6 hours."

After the surgery, Claimant developed complications. Dr. Hollister described the events as follows:

> "On the night of 11-23-69 the patient apparently got out of bed, dragged his bed in front of the doorway, was incoherent and had a convulsive type of shaking. He was seen briefly by Dr. Castillo who felt that it might be a reaction to Vistaril. The patient was also seen by Dr. Roger Clarke in regard to his general medical situation. Dr. Clarke noted that his abdomen was quite tender, his bowel sounds were normal, there was no rebound, no obvious icterus. Rectal, he found that his prostate was 2-3 times enlarged. Dr. Clarke saw the patient at a time when there were continuous clonic convulsive seizures of a mild type, primarily involving the upper extremeties. Skull films were done which were negative. Echo Encephalogram was normal. Dr. Castillo found no overt neurological findings.
>
> "On 11-25-69 the patient appeared more alert and stable. At times the patient appeared to get agitated, appeared as if he would cry particularly if his family or relatives were mentioned. His temp during these periods had risen as high as 102 rectally. By 11-30-69 he had no further apparent seizures. He had been placed on Dilantin and the patient has no recollection of the previous events. The possibility of fat embolus was considered."

Claimant was subsequently seen by W. U. McReynolds, M.D., an ophthalmologist. Although Dr. McReynolds' report for this examination was not submitted by Defendants, Dr. Hollister stated that Dr. McReynolds "found evidence of definite fat emboli in the eyegrounds."

Dr. Hollister discharged Claimant from the hospital on December 21, 1969. At the time of discharge, Claimant was prescribed the following medication: "Dilantin 1/10 gm 4 times daily, Valium 2 mg t.i.d., Thiamine Hydrolchloride 100 mg t.i.d., Iberol tab 1 twice daily as well as Somnos 500 mg bedtime, Alophen tabs two as desired." Dr. Hollister's diagnosis on discharge was:

> "Triple arthrodesis left foot, unsatisfactory position.
> Osteoporosis generalized left foot
> Retained metallic staples left foot
> Fat embolism"

Dr. Hollister in his report to Defendant Carrier stated:

> I am enclosing bills which Mr. Baugher has received from Dr. Clarke, Dr. Castillo and Dr. McReynolds. In my opinion, these were necessitated by the complications described above, and I feel they should be incorporated in his industrial account."

On February 28, 1970, Dr. Hollister reported that Claimant had returned to his office on February 27, 1970. Dr. Hollister further stated that Claimant had not reached maximum recovery and that Claimant should return in three months.

The next report submitted by Defendants was a report of Dr. Hollister dated September 25, 1970. Claimant was examined by Dr. Hollister on September 23, 1970. Dr. Hollister noted Claimant's complaints on this occasion to be as follows:

> "Patient states that in the last three months he has been about the same. Still notices some improvement but it is extremely slow. He states he still gets shaky and once in a while his eyes blur. He states the ankle still swells to the same extent and the swelling goes down some over night. He states that when he gets up in the morning he feels overbalanced - like the inner half of his foot is dead and weighs about 50#. He also notices this when riding in a car. He states he still has trouble with frequent yawning. He states that at times at night he has sharp pains in the foot."

Again an x-ray report was not submitted by Defendants but Dr. Hollister stated:

> "Multiple views of the left foot and ankle show there has been solid bony healing of the osteotomy site of the previous talonavicular fusion and there is solid bony union of the talo-navicular and calcaneocuboid fusions. The degree of osteoporosis noted today is less than three months ago. Antero-posterior view of the ankle and oblique view of the ankle show progressive narrowing of the lateral talotibial joint with a valgus of the foot in relation to the distal tibia. There is some sclerosis of the distal tibia. There is also evidence of the previous oblique fracture of the fibula."

Dr. Hollister expressed the opinion that Claimant's "symtoms now are coming from the ankle joint rather than the triple arthrodesis." Dr. Hollister also indicated that Claimant still had the cerebral symptoms from the fat embolism. Dr. Hollister prescribed the following medication for Claimant: "Darvon Comp. 65 (100) PRN Q 4-6 hr., Thiamin Hydrochloride (100) 100 mgm TID and Dilantin 100 mgm. TID as well as for Meprospan 400 (60) 1 BID."

The next report submitted by Defendants was by Dr. Hollister dated November 26, 1970. Dr. Hollister examined Claimant on November 23, 1970. On this occasion, Dr. Hollister rated Claimant for permanent disability as follows:

> "Purely on the basis of the left lower extremity and assuming that Mr. Baugher were still of an age where he could return to employment, I would estimate his permanent disability at 50% of the left lower extremity."

He further stated that Claimant's fat embolism limits him physically by blurring of vision and difficulty in remembering and making decisions. However, Dr. Hollister preferred not to rate Claimant's visual changes.

Sequentially, the next report was by Dr. McReynolds dated December 28, 1970. Dr. McReynolds examined Claimant on December 23, 1970. Dr. McReynolds noted the following complaints by Claimant concerning his vision.

> "He is still complaining, as he was last February 27, 1970, of intermittent blurring of his vision. He complains that while driving along a road his vision will suddenly seemingly blur and he has to pull to the shoulder and rest until his vision improves. He also complains of intermittent diplopia mostly at night, where he will see a set of headlights vertically, one above another. He has the additional complaint that his eyes are just generally uncomfortable and he feels a pulling sensation in them."

Dr. McReynolds noted the following abnormalities in Claimant's vision:

1) A slight temporal pallor to the right optic nerve as compared to the left; and

2) A generalized contraction of the visual field.

He commented that the generalized contraction of the visual field was characteristic of hysteria or neurasthenia. Dr. McReynolds also stated that Claimant was not consciously malingering or deceiving him.

He concluded in summary:

> "...that the visual difficulties of this patient are certainly partially hysterical; they may be on an organic basis due to cerebral arteriosclerosis or rather, cerebral damage due to the fat emboli. There is, as I mentioned, a slight pallor of the right optic nerve I feel as a result of the fat emboli to the right eye. But, insofar as I can determine, there is no direct definite loss of vision that I could ascribe to the patient's accident."

Dr. McReynolds recommended a neurological consultation.

Claimant was examined by Julio del Castillo, M.D., on March 9, 1971. Dr. Castillo first saw Claimant on November 24, 1969, for convulsive seizures shortly after his surgery. He stated that the seizures were probably the result of a fat embolism.

Dr. Castillo in his report dated March 11, 1971, indicated as his "Impression and Recommendation" that:

> "The neurological examination essentially is negative except for the arthrodesis. The comparison between my gross visual fields and Dr. McReynolds, I think confirms his impression of conversion reaction. I think that this is an element that is playing an important role in this man's clinical picture. I also think that he has a very discreet and early senile chronic brain syndrome which might respond to the use of vasodilators such as Pavabid and of medication like Ritalin 10 mg. T.I.D. I am making these suggestions to Dr. VanWerden who is the patient's regular physician.
>
> "I would like to have an E.E.G. and an echo done particularly because I would like to compare with his previous findings. Whether I have any additional recommendations will depend on the findings of these tests.
>
> "The patient is, at the present time, taking Dilantin 100 mg. t.i.d., Vitamin B, 100 mg. t.i.d. and Meprospan 400. If the E.E.G. allows it, I would suggest that the Dilantin be discontinued as well as the Meprospan and that these be substituted by the Elavil and vasodilators."

No additional reports were submitted by Defendants indicating whether or not the electroencephalogram was performed.

The deposition of Robert R. Kemp, M.D., a general practitioner was submitted by Defendants. Dr. Kemp testified that he had minimal contact with claimant in 1967. His contact consisted of stopping by Claimant's room while he was under the care of his associate at that time, Dr. Rankin. Dr. Kemp did not have further contact with Claimant until his examination of him on November 15, 1973. Claimant was seen again by Dr. Kemp on March 12, 1974. Dr. Kemp indicated that he reviewed the hospital and medical reports pertaining to Claimant as a result of the injury of April 22, 1967, after his initial examination of Claimant on November 15, 1973.

Two reports of Dr. Kemp were submitted by Claimant. The first report dated November 30, 1973, stated:

> "Loren Baugher suffered a severe injury to his left ankle in 1967; he had three surgical procedures done on his foot to arrive at his present status of partial fusion with residual pain and restricted mobility of the extremity.
>
> "Certainly this is a permanent disability entirely work related.
>
> "After the second of his operations he had a central nervous system problem apparently due to a fat embolus, which left him with some memory difficulties, intellectual slowing, and visual changes. This is a secondary effect, and less definite in its relationship to workman's compensation."

This second report dated March 5, 1974, indicated:

> "I have reviewed the Specialists reports on this man and this plus a prior interview form the basis for my opinion.
>
> "As I understand the situation, some opinion as to degree of disability is a necessity here, naturally he was completely disabled all the while he was acutely injured and through all surgery up to some point in recuperation at which point he reached a plateau of ultimate recovery. I would have to review further to establish this point in time from an opinion standpoint.
>
> "From that time forward I would regard him as 80% disabled."

Dr. Kemp testified concerning a "fat embolus" as follows:

> Q "What is a fat embolus, Doctor?
>
> A "Well, when you have fractures of larger bones usually—Bone marrow actually is a rather fatty structure, and the particles of fat can actually get into the bloodstream and be transported to other parts of your body, and they shouldn't be in the bloodstream in the first place. And when they get to your brain, why they can lodge there and cause rather serious neurological findings.
>
> Q "You can get that blockage any place in the bloodstream, can't you, Doctor?
>
> A "That's right.
>
> Q "And of course a fat embolus does not necessarily come from—as a result of trauma, does it?
>
> A "No, it can actually come as a result of surgery, too, where you're again—especially the type of procedure that, like he was having where he was having bony structures actually scarred and traumatized in a fashion that gets bones to heal together that normally don't heal together."

Concerning his rating of eighty percent (80%), Dr. Kemp testified that he considered Claimant's age, subjective complaints, history, ability to work, and neurological situation. He further commented that it is difficult to say that major movement of a joint is the whole story.

The claimant has the burden of proving by a preponderance of the evidence that the injury of April 22, 1967, was the cause of his disability on which he bases his claim. **Lindahl v. L.O. Boggs,** 236 Iowa 296, 18 N.W. 2d 607. A possibility is insufficient; a probability is necessary. **Burt v. John Deere Waterloo Tractor Works,** 247 Iowa 691, 73 N.W. 2d 732. The extent of compensation payments to which a claimant may be entitled is determined by the loss (disability) resulting from the injury and not by the producing cause (injury), **Barton v. Nevada Poultry Co.,** 235 Iowa 285, 110 N.W. 2d 660.

The question of causal connection is essentially within the domain of expert testimony. **Bradshaw v. Iowa Methodist Hospital,** 251 Iowa 375, 101 N.W. 2d 167. However, expert medical evidence must be considered with all other evidence introduced bearing on the causal connection between the injury and disability. **Burt v. John Deere Waterloo Tractor Works,** supra. Such medical evidence merely relates to the question of the whole burden of proof of the claimant.

Considering the evidence offered in light of the foregoing principles, Claimant sustained his burden of proof by a preponderance of the evidence that his disability is to the body as a whole. The evidence is undisputed that Claimant sustained injuries to his left ankle which resulted in surgery on July 12, 1968, and November 18, 1969. As a result of the second injury, complications evolved which were diagnosed as relating to a fat embolus. Dr. McReynolds found evidence of fat emboli in Claimant's eyegrounds and Dr. Hollister made the diagnosis of fat embolus. Dr. Hollister also recommended to Defendant Carrier that the medical bills incurred as a result of the complications be incorporated in Claimant's industrial account.

Additionally, Dr. Kemp's testimony concerning a fat embolus buttressed the causal connection between Claimant's surgery of November 18, 1969, and the resultant fat embolus.

On November 23, 1970, Dr. Hollister rated Claimant's disability to his left lower extremity to be fifty percent (50%). He further indicated that as a result of the fat embolism, Claimant is limited physically by a blurring of his vision and difficulty in remembering and making decisions.

Although Dr. Hollister declined to rate Claimant's visual changes, Dr. McReynolds in his report of December 28, 1970, and Dr. Castillo in his report of March 11, 1971, found evidence of conversion hysteria or reaction as contributing to Claimant's visual complaints.

Conspicuously absent from the evidence submitted to the undersigned were medical reports or testimony concerning Claimant's progress after his examination by Dr. Castillo on March 9, 1971, until his examination by Dr. Kemp on November 15, 1973. However, Claimant's complaints at the hearing on March 8, 1974, included an inability to stand more than five or ten minutes without pain and problems with his vision, memory, and hearing. Such testimony is indicative of the permanency of the physical limitations noted by Dr. Hollister on November 23, 1970. The medical evidence and Claimant's testimony further indicated that Claimant's permanent partial disability was not confined to his left lower extremity.

Since the claimant's disability is to the body as a whole, it must be evaluated industrially and not merely functionally. In determining industrial disability, consideration may be given to the injured employee's age, education, qualifications, experience, and his inability because of the injury to engage in employment for which he is fitted.

Olson v. Goodyear Service Stores, 255 Iowa 1112, 125 N.W. 2d 251. It is the reduction of earning capacity, not merely functional disability which must be determined. **Barton v. Nevada Poultry Co.,** supra.

Claimant began work for Defendant Employer in 1934. At the time of the injury Claimant was approximately two years from Defendant Employer's retirement age of sixty-five (65). Since the injury, Claimant has not returned to any gainful employment.

Dr. Kemp rated Claimant as being eighty percent (80%) disabled. Dr. Kemp's rating appeared to include both industrial disability and functional disability since he took into consideration Claimant's age, history, subjective complaints, and neurological situation in determining Claimant's disability. Dr. Kemp failed to testify as to what "neurological situation" contributed to his rating and if it was causally connected to the injury of April 22, 1967. In November of 1970, Dr. Hollister rated Claimant as having a fifty percent (50%) permanent partial disability to his left lower extremity as well as some physical limitations resulting from the fat embolus.

Applying the evidence offered in this case in respect to Claimant's industrial disability to the considerations outlined in **Olson v. Goodyear Service Stores,** supra, Claimant has proved a thirty-five percent (35%) permanent partial disability to the body as a whole as a result of his injury.

WHEREFORE, it is found that Claimant on April 27, 1967, sustained an injury which arose out of and in the course of his employment and resulted in permanent partial disability to the body as a whole in the amount of thirty-five percent (35%) at the rate of forty-seven and 50/100 dollars ($47.50) per week. It is further found that Claimant was incapacitated from working for at least one hundred five (105) weeks and entitles Claimant to healing period compensation at the rate of forty dollars ($40) per week.

THEREFORE, Defendants are ordered to pay Claimant one hundred seventy-five (175) weeks of permanent partial disability compensation at the rate of forty-seven and 50/100 dollars ($47.50) per week. Defendants are further ordered to pay Claimant one hundred five (105) weeks of healing period compensation at the rate of forty dollars ($40) per week.

Credit is to be given to Defendants for compensation already paid by them.

Costs of the hearing are taxed to the defendants.

Interest on the award pursuant to §85.30, Code of Iowa, is to accrue from the date of this decision.

Signed and filed this 10 day of June, 1974.

DENNIS L. HANSSEN
Deputy Industrial Commissioner

No Appeal

Rickey Lee Briggle, Claimant

vs.

R. L. Koder Company, Inc., Employer,
and

Aetna Casualty & Surety Co., Insurance Carrier,
Defendants.

Review-Reopening Decision

Mr. James A. Jackson, Attorney at Law, 427 Fleming Building, Des Moines, Iowa 50309, For Claimant.

Mr. E. J. Giovannetti, Attorney at Law, 510 Central Nat'l Bank Bldg., Des Moines, Iowa 50309, For Defendants.

This is a proceeding in Review-Reopening brought by the claimant, Rickey Lee Briggle, against his employer, R. L. Koder Company, Inc., and its insurance carrier, Aetna Casualty & Surety Co., to recover benefits on account of an injury sustained on August 28, 1969. The matter came on for hearing before the undersigned at the offices of the Iowa Industrial Commissioner in Des Moines, Iowa, on Thursday, May 31, 1973, at 8:30 a.m. The record was left open for the submission of a stipulation concerning medical evidence. The record was completed on December 17, 1973.

The issue to be determined in this matter is whether or not the claimant sustained permanent disability as a result of the injury of August 28, 1969. A twenty-three dollar ($23) medical bill was accepted as compensable by the defendants.

The only evidence presented as to the existence of a problem was the testimony of the claimant. The claimant has indicated problems in a history to Dr. Sidney H. Robinow, M.D., an orthopedic surgeon. The only apparent complaint is in Claimant's left arm. As the difficulty is to a scheduled member, factors bearing on Claimant's ability to earn wages are irrelevent, **Barton v. Nevada Poultry Co.,** 253 Iowa 285, 110 N.W. 2d 660.

The claimant testified concerning complaints of numbness in his left arm. He testified as to interference of a limited nature in performing tasks.

Dr. Robinow indicates no permanent disability. The EMG taken was negative for problems.

Any conflict between Dr. Robinow's statements and the claimant's complaints is resolved in favor of the doctor's statements. It should be noted that Dr. Robinow was aware of Claimant's complaints in giving his opinion of no permanent impairment. No problems sufficient to impair Claimant's functions are, therefore found.

THEREFORE, the relief sought in Claimant's Application for Review-Reopening is denied.

Costs of the proceeding are taxed to the defendants.

Signed and filed this 29th day of March, 1974.

ALAN R. GARDNER
Deputy Industrial Commissioner

No Appeal

James Robert Burkett, Claimant,

vs.

Larew Company, Employer,
and

Iowa Mutual Insurance Company, Insurance Carrier, Defendants.

Review-Reopening Decision

Mr. John P. Sizemore, Attorney at Law, P. O. Box 858, Iowa City, Iowa 52240, For Claimant.

Mr. Gene V. Kellenberger, Attorney at Law, 615 Merchants Nat'l Bank Bldg., Cedar Rapids, Iowa 52401, For Defendants.

This is a proceeding in Review-Reopening brought by the claimant, James Robert Burkett, against his employer, Larew Company, and their insurance carrier, Iowa Mutual Insurance Company, to recover benefits under the Iowa Workmen's Compensation Act on account of an injury on March 20, 1973. The case came on for hearing before the undersigned Deputy Industrial Commissioner at the courthouse of Johnson County in Iowa City, Iowa, on October 3, 1973. The case was fully submitted on February 5, 1974.

The issue to be determined is the extent of compensable disability sustained by Claimant as a result of the injury of March 20, 1973.

A Memorandum of Agreement was filed by Defendants on May 24, 1973. The Memorandum with the rate of sixty-eight dollars ($68) per week for temporary disability and healing period was approved on the same date by this office.

Claimant is married, age twenty-eight (28) and has two dependent children under the age of sixteen (16). While working for Defendant Employer, Claimant attained a journeyman plumber's license. On March 20, 1973, Claimant injured his back while attempting to locate a septic tank by digging with a shovel.

At the hearing Claimant testified that he attempted to return to work on one occasion but was unable to perform the work. He further testified that he continues to have pain in his lower back with any activity.

Claimant was examined on March 21, 1973, by Larry L. Collingwood, D.C., a chiropractic orthopedist. Dr. Collingwood noted the following subjective complaints:

(a) Pain centrally located in his low back,
(b) Headaches, and
(c) Pain in the midthoracic area between the shoulders.

Dr. Collingwood testified concerning his objective findings as follows:

> The positive objective findings on orthopedic and neurological examination showed central tenderness, very acute, over the L-4, L-5 and L-5, S-1 interspinous spaces and bilateral gluteal tenderness on pressure. There was present a decreased thoracic kyphosis and hypersensitivity on the right atlanto-axial and 4th cervical musculature and articular joints. Patient could flex the neck only 15 degrees without pain. Normal flexion of the neck is 40 degrees. No other orthopedic tests were positive in the neck region. Upon further lumbar spine examination, the following orthopedic examinations were positive: Lumbar flexion 15 degrees. Normal is 95 degrees. Lumbar extension was only 5 degrees, and the normal is 30 degrees. Bechterews test was positive. This is an orthopedic test to differentiate between sciatic nerve root and muscle symptomatic etiology. Bechterews test is nearly always positive in lesions of the lumbar spine involving the intervertebral disc. There was no abnormality in other orthopedic tests performed, and all lower extremity reflexes were intact.

X-rays were also taken by Dr. Collingwood. Dr. Collingwood's original diagnosis was "acute

lumbosacral strain secondary to traumatic injury the day prior." According to Dr. Collingwood, Claimant's condition subsquently developed into an early degenerative disc disease complicated by a facet syndrome of the lumbosacral region.

Dr. Collingwood testified that Claimant was placed on chiropractic therapeusis on March 21, 1973, and still remains under his care. The dates and nature of Dr. Collingwood's treatment to April 11, 1973, are as follows:

Date	Treatment
03-21-73—	No treatment
03-26-73—	Mobilizing Manipulation and placed in lumbosacral brace.
03-27-73—	Mobilizing manipulation and pain control procedures.
03-28-73—	Postdiathermy and manipulation
03-29-73—	Postdiathermy and manipulation
03-30-73—	Postdiathermy and manipulation
03-31-73—	Mobilization and postdiathermy
04-02-73—	Manipulation and ultrasonic therapy
04-04-73—	Manipulation and ultrasonic therapy
04-05-73—	Manipulation and cervical traction
04-10-73—	Manipulation and postdiathermy
04-11-73—	Manipulation and postdiathermy

Dr. Collingwood testified that treatment was reduced at this time due to objections by the insurance carrier. Subsquently, Claimant was referred to the Orthopedic Department of University Hospitals. Dr. Collingwood reported to the insurance carrier on April 17, 1973, that further treatment of Claimant would be determined by the findings of the Orthopedic Department.

Since May 1, 1973, Dr. Collingwood has seen Claimant weekly under a welfare program which authorizes chiropractic care once a week. On these occasions Dr. Collingwood was paid by the welfare program. With only one visit a week, Dr. Collingwood indicated that he can attempt to do little more then reduce the pain pattern. Concerning the treatment Claimant has needed since May, 1973, Dr. Collingwood stated:

> Mr. Burkett needs rehabilitation. He needs physical therapy. He needs guidance in exercise programs and developing the reduction of strain to that lower back. None of these have been provided, other than just suggestion, because of the limit that we have had on the treatment we can give.

Dr. Collingwood testified that he has recommended to Claimant: corrective exercises, control of his posture with the lumbosacral support, and compliance with recommendations of the Orthopedic Department at University Hospitals. Dr. Collingwood added that Claimant has not followed his recommendations as well as he would like. On cross-examination, Dr. Collingwood stated that even if Claimant had followed explicitly the exercise program outlined to him, he could not have returned to his job as a plumber's helper due to the injury to his posterior joints.

Claimant was seen in the emergency room at University Hospitals on March 23, 1973. X-rays were interpreted to be normal. A diagnosis of low back strain was made on this date. He was subsequently seen at University Hospitals on April 13, 1973. The impression of the hospital on this occasion was chronic low back strain with weak abdominal muscles. Claimant was advised as to the care of his back and the use of a corset. In addition, an exercise program was recommended to him.

Claimant returned to the hospital on June 12, 1973, with complaints of persistent low back pain. E. S. Willett, M.D., an orthopedic surgeon, noted that Claimant was performing the exercises recommended to him on an occasional basis rather than on a routine basis. In his clinical note of June 12, 1973, Dr. Willett stated:

> I reemphasized to him the importance of doing sit ups in particular. He is unable to do a sit up today and I showed him specifically how to do this with the knees and the hips bent. In addition to this I told him to go back to the use of his brace during the day but to not let this substitute for the exercise program. I have instructed him in the use of Aspirin, 600 to 900 milligrams with meals and at bedtime on a regular daily basis. He seems to understand this and I have asked him to come back to the Clinic in three months so that we can check his progress if any.

On July 23, 1973, Claimant was examined by the Orthopedic Department for complaints in his knee, left hand, and low back. On this occasion, pain on palpation and instability was noted at L4-5 and L5-S1 levels. Complaints referrable to the left hand were termed "supertentorial." No evidence of pathology was found in Claimant's knee. The hospital noted on this date that Claimant had been doing his exercises approximately once every two days and had been occasionally wearing his corset. They further noted that Claimant had not been taking aspirin daily. Once again, Claimant was asked to return in three months.

Dr. Willett requested Claimant to return to the hospital on September 12, 1973. On examination, Dr. Willett recorded the following:

> On examination he has a full range of motion of his cervical spine with some discomfort at the limits of motion. His neurological exam-

ination in the upper extremities is normal and I cannot reduplicate any of his previous complaints of numbness in the hands. Examination of the lower back shows him to have essentially a full range of motion of the lumbosacral and thoracic spine with mild discomfort at the extremes of hyperextension. He continues to have what I would interpret as a positive instability sign at L-4,5 and L-5, S-1. This discomfort is relieved by hyperextension of the back. His straight leg raising is normal to 85° bilaterally. His neurological exam including muscle strength, sensation and reflexes was objectively normal to all modalities with the exception of complaints of decreased sensation on the medial side of both feet in a spotty pattern.

Repeat radiographs of the cervical and lumbar spine were obtained and these were within normal limits.

Dr. Willett further noted on this date that ". . . he has participated in sit ups and hyperextension exercises, 10 to 20 every two or three days, he uses the low back brace about forty percent of the time by his admission and says that this does not help." Again, Claimant stated that he was not utilizing aspirin.

Dr. Willett's impression was that Claimant had a preexisting degenerative disc disease which was aggravated by the March 20, 1973, incident. Due to Claimant's complaints, Dr. Willett advised him that he could not return to his work as a plumber's helper. Dr. Willett declined to give a rating of permanent disability until he was satisfied Claimant was following the treatment program recommended to him. Once again, Claimant was advised to return in several months for a re-evaluation.

The burden is upon the claimant to establish by a preponderance of the evidence a causal connection between his injury and subsequent disability. The question of causal connection is essentially within the domain of expert medical testimony, **Musselman v. Central Telphone Co.**, 261 Iowa 352, 154 N.W. 2d 128.

Considering the evidence offered in light of the foregoing principles, Claimant sustained his burden of proof that the injury of March 20, 1973 resulted in compensable temporary disability. The testimony of Dr. Collingwood, Dr. Willett, and Claimant established that Claimant was temporarily disabled from March 20, 1973, to the date of the hearing on October 3, 1973.

Defendants argued that no additional temporary disability compensation was owed to Claimant because he failed to follow a prescribed course of treatment which may have reduced his disability. In support of this proposition, Defendants cited the case of **Stufflebean v. City of Fort Dodge**, 233 Iowa 438, 9 N.W. 2d 281. In **Stufflebean,** the claimant received an injury arising out of and in the course of his employment which resulted in a hernia. He subsequently refused an open operation or injection treatment to cure the hernia. The Supreme Court in that case stated:

> ". . .In most of the states, the compensation statutes specificially provide that an arbitrary or unreasonable refusal to submit to offered medical or surgical treatment, which does not seriously endanger claimant's life or health and which is shown to be reasonably certain to minimize or cure the disability for which compensation is sought, will warrant reduction, suspension, or forfeiture of such compensation. In a number of states where there is no such express statutory provision a similar rule appears to prevail by reason of judicial decision. (cases cited)"

In the instant case the testimony of Claimant, Dr. Collingwood, and Dr. Willett established that Claimant did not follow the prescribed treatment to the extent desired by either Dr. Collingwood or Dr. Willett. However, there was no evidence of "an arbitrary or unreasonable refusal to submit to offered medical or surgical treatment" by Claimant. Claimant testified that he attempted to follow the treatment prescribed by the doctors but experienced pain with some of the exercises and gastric problems from the aspirin. He also testified as of the date of the hearing that he is exercising two or three times per week and that he wears the back brace approximately forty percent (40%) of the time.

Conspicuously absent from the prescribed treatment of Dr. Collingwood and of University Hospitals is supervision and guidance. Dr. Collingwood's treatment has been substantially reduced due to Defendant Carrier refusing to authorize further care. Apparently, University Hospitals has determined that Claimant does not need supervision and guidance in following their prescribed treatment. On three occasions, June 12, 1973; July 23, 1973; and September 12, 1973, University Hospitals noted a failure on the part of Claimant to follow their prescribed treatment. However, Claimant on these occasions was told to return in three months or in several months. Such a lack of supervision and guidance does not meet the obligation placed on Defendants by §85.27, Code of Iowa, of providing reasonable medical services. Until such supervision and guidance is provided, no determination can be made of Claimant's permanent disability or to the possible application of **Stufflebean.**

WHEREFORE, it is found that Claimant is entitled to temporary disability compensation at the rate of sixty-eight dollars ($68) per week from

March 20, 1973, to October 3, 1973. No finding is made to permanent partial disability or temporary disability after October 3, 1973.

THEREFORE, the defendants are ordered to pay the claimant twenty-eight (28) weeks of temporary disability compensation at the rate of sixty-eight dollars ($68) per week.

Credit is to be given to Defendants for compensation already paid by them.

Costs of the proceeding are taxed to Defendants.

Interest on the award pursuant to §85.30, Code of Iowa, is to accrue from the date of this decision.

Signed and filed this 29th day of March, 1974.

DENNIS L. HANSSEN
Deputy Industrial Commissioner

Appealed to District Court, Affirmed.

Daniel Catalfo, Claimant

vs.

Firestone Tire and Rubber Co., Employer
and

Liberty Mutual Insurance Co., Insurance Carrier,
Defendants.

Review-Reopening Decision

Mr. W. C. Hoffmann, Attorney at Law, 1040 Des Moines Building, Des Moines, Iowa 50309, For the Claimant.

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

This is a proceeding in Review-Reopening brought by the claimant, Daniel Catalfo, against his employer, Firestone Tire and Rubber Company, and its insurance carrier, Liberty Mutual Insurance Company, for the recovery of benefits for injuries sustained by him on December 15, 1966. The case was remanded to the Industrial Commissioner with instructions by the Supreme Court of Iowa. Arguments by counsel were heard by the undersigned at the Offices of the Industrial Commissioner on February 28, 1974.

On December 15, 1966, Claimant was injured when he caught his left arm in a conveyer belt of a machine he was operating at the Des Moines plant of Defendant Employer. Following the injury, Claimant was taken to Iowa Lutheran Hospital where he was seen by F. M. Burgeson, M.D., plant physician for Defendant Employer. Dr. Burgeson found Claimant to be suffering from multiple abrasions to the scalp and back, lacerations to the left arm, and fractures to the left ulna and left humerus, Dr. Burgeson immediately called Marvin H. Dubansky, M.D., an orthopedic surgeon, as a consulting physician.

Dr. Dubansky's examination of Claimant on December 15, 1966, revealed a comminuted fracture of the left humerus, a fracture of the left ulna, a laceration of the left forearm, a radial nerve palsy, and some blistering of the upper back. At this time Dr. Dubansky debrided and closed Claimant's laceration, placed his arm in a hanging cast, and treated the blistering on his back with dressings and ointments. On December 22, 1966, Claimant was placed in cervical traction as indicated by the hospital records at Iowa Lutheran. Since Claimant's radial nerve palsy did not materially improve, Dr. Dubansky called Robert Jones, M.D., a neurosurgeon, into consultation.

Dr. Jones first saw Claimant on January 31, 1967. His examination revealed that Claimant had a marked atrophy of the deltoid superior and inferior spinatous muscle on the left, a numbness of the fifth cervical dermatone, a complete radial nerve palsy probably at the site of the fracture of the humerus, and a brachial plexus stretch injury with a possible root evulsion in the neck.

On February 10, 1967, Drs. Jones and Dubansky performed surgery on Claimant. They found that the radial nerve had been divided by the fracture of the humerus. The surgery performed by the doctors included a bone graft, repair of the fractured bone, and repair of the radial nerve. On March 13, 1967, additional surgery consisting of a bone graft, plating of the left ulna and a skin graft to Claimant's back was done by Dr. Dubansky. Dr. Burgeson discharged Claimant from the hospital on May 6, 1967. Thereafter, Claimant's humerus did not heal and on August 22, 1967, the humerus and bone graft were reexplored surgically by Dr. Dubansky.

Claimant returned to light work at Defendant Employer's plant on October 18, 1967. Dr. Dubansky on April 15, 1968, authorized Defendant Employer to return Claimant to full work.

Dr. Dubansky testified by deposition on behalf of Defendants. He last saw Claimant on February 11, 1969. On this date Dr. Dubansky evaluated Claimant in respect to permanent partial disability. He concluded that Claimant had a twenty percent permanent partial physical impairment of the left upper extremity which

would contribute about twelve percent physical impairment of the body as a whole.

Dr. Dubansky stated that Dr. Burgeson made a note in the record on the date Claimant was injured that indicated: "Traumatic injury to left forearm and shoulder, also chest wall, neck and skull." He further stated that Dr. Victor Parson in a preanesthetic note of February 9, 1967, stated: "Has some stiffness of neck." However, Dr. Dubansky stated that since Claimant was referred to Dr. Jones in regard to his neck injury and dizziness, he deferred to the opinion of Dr. Jones concerning these problems.

Prior to December 15, 1966, Claimant was treated by Dr. Dubansky in 1961 for a neck injury resulting from an automobile accident. Treatment for the injury of 1961 was terminated by Dr. Dubansky on January 8, 1963. On this date Dr. Dubansky noted complaints of headaches and problems with his hip, back, buttocks, neck, and knee. However, Dr. Dubansky on examination could not find anything "very objective." Dr. Dubansky did not see Claimant again until December 15, 1966.

Dr. Jones testified by deposition on behalf of Claimant. His most recent examination of Claimant was on February 11, 1969. Complaints by Claimant to Dr. Jones on this date were posterior neck pain, headaches, low back pain, slight numbness of the left upper leg, dizziness on bending over, numbness of the entire left arm, and poor dexterity of the left hand. Dr. Jones' findings on this date were:

> "He had some decrease in supination of the left arm, some weakness of the digital extensors, and he couldn't quite fully straighten out his elbow. I didn't really try to judge him regarding the dexterity of the left hand and I didn't put him through various tests in which he might have to stand on his head or get into various positions with his neck and low back in order to see what the effect was on his neck and low back, so I didn't really evaluate some of these complaints with regard to his neck as thoroughly as I might if I had been watching him on the job where he would go through some of these various maneuvers."

Dr. Jones further testified as follows:

Q. "Doctor, are the complaints that he has with respect to his dizziness, his neck, his back, are these complaints consistent with the injuries that he had in the first place?"

A. "The dizziness on bending over is difficult to evaluate. We do see this complaint in people with neck injury and I would say that the pain in the neck and the headaches he complained of were related to his neck injury and therefore, it is possible that the dizziness may also be related to his neck injury."

He indicated that the following restrictions would be placed upon this man as a result of the above conditions:

> "Well, I would think that this man might find difficult any and all tasks with regard to bending, stooping, squatting, working in tight places, craning of the neck and low back. Also, I would think that he might have trouble using his left arm in situations requiring acts of repetitive strength demonstration; and by that, I mean application of very forceful grip or some other forceful repetitive act in some type of machinery and or difficulty with acts requiring a lot of dexterity with the left arm. The anesthesia might prevent sensation of damaging warmth and cold which might arise."

Dr. Jones indicated that he anticipated no significant improvement in Claimant.

On cross-examination, Dr. Jones denied prescribing traction for Claimant and indicated that he did not at any time make a diagnosis of low back pain or of a cerebral concussion. Dr. Jones testified concerning Claimant's complaints of posterior neck pain as follows:

Q. "Now, in your later examinations, in February of 1969, for example, these complaints of posterior neck pain and headaches were subjective, I presume; and did you do anything to try to confirm such complaint or find the causes of such complaints?"

A. "No. I was probably more concerned about the function of the left arm and the examination of the neck in regard to these complaints is somewhat difficult unless you perhaps put the patient through some rigors that would coincide with their industrial situation."

Dr. Jones further testified on cross-examination as to permanent physical impairment. He stated:

Q. "As a matter of fact, Doctor, it is your impression, is it not, that this man's problems, or more specifically, his physical impairment relates to the problems which arise out of the original fractures rather than any other conditions which this man has?"

A. "Well, not necessarily. I think that the problem with regard to the left arm is improved since the original injury, but I am led also to understand that his incapacity

with regard to the left arm is fairly well matched by his incapacity with regard to the neck pain and the headaches."

Q. "Doctor, I would like to read you a portion of your report of December 2nd, 1968, 'as to permanent physical impairment here, I would defer to Dr. Dubansky's judgment since most of his physical impairment relates to his bony changes, contractures and problems related to the original fractures.' "

"Was that your opinion at that time?"

A. "Yes---at that time."

Q. "I gather that that is not your opinion now?"

A. "Well, you see, back at that time, this man has been---I should say since that time that this man has been doing more in the way of work and putting himself more to the test, so to speak, or a test; and it has been since he has been working that he has been getting more problems with his neck, dizziness on bending over, and his headaches that I have referred to."

Claimant testified that since the date of his injury in 1966, he has had complaints relating to his left arm, head, neck, back, and wrist which were not present before the injury. With specific reference to his head injuries, he described headaches located in the upper right portion of his head which begin when he bends or stretches his head. He indicated that the headaches he experienced after the automobile accident were not in the same general area as his present headaches. He further indicated that the headaches as a result of the accident went away with time.

As to his neck, Claimant testified that he has pain at the base of it and across his shoulders. Lifting, bending, and turning activities cause pain in his neck and produce the above described headaches. Claimant stated that certain things at work cause problems or difficulty with his neck and head.

The claimant has the burden of proving by a preponderance of the evidence that the injury of December 15, 1966, was the cause of his disability on which he bases his claim. **Lindahl v. L. O. Boggs,** 236 Iowa 296, 18 N.W. 2d 607. A possibility is insufficient; a probability is necessary. **Burt v. John Deere Waterloo Tractor Works,** 247 Iowa 691, 73 N.W. 2d 732. The extent of compensation payments to which a claimant may be entitled is determined by the loss (disability) resulting from the injury and not by the producing cause (injury). **Barton v. Nevada Poultry Co.**, 235 Iowa 285, 110 N.W. 2d 660.

The question of causal connection is essentially within the domain of expert testimony. **Bradshaw v. Iowa Methodist Hospital,** 251 Iowa 375, 101 N.W. 2d 167. However, expert medical evidence must be considered with all other evidence introduced bearing on the causal connection between the injury and disability. **Burt v. John Deere,** supra. Such medical evidence merely relates to the question of the whole burden of proof of the claimant.

Considering the evidence offered in light of the foregoing principles, Claimant sustained his burden of proof by a preponderance of the evidence that his disability is to the body as a whole. The evidence is undisputed that Claimant sustained injuries to his head, neck, back, and arm on December 15, 1966. Dr. Dubansky on July 15, 1969, found Claimant to have a permanent partial disability to his left arm. The testimony of Dr. Jones indicated that permanent partial disability was not confined to the left arm. Dr. Jones testified that the pain in Claimant's neck and his headaches were related to his neck injury. He further indicated a change of opinion concerning Claimant's disability after his report of December 2, 1968, and after Claimant was "...doing more in the way of work." He stated that "...since he has been working that he has been getting more problems with his neck, dizziness on bending over, and his headaches that I have referred to." These particular findings of Dr. Jones were buttressed by the testimony of Claimant as to his problems resulting from the injury of December 15, 1966.

Since Claimant's disability is to the body as a whole, it must be evaluated industrially and not merely functionally. In determining industrial disability, consideration may be given to the injured employee's age, education, qualifications, experience, and his inability because of the injury to engage in employment for which he is fitted. **Olson v. Goodyear Service Stores,** 255 Iowa 1112, 125 N.W. 2d 251. It is the reduction of earning capacity, not merely functional disability which must be determined. **Barton v. Nevada Poultry Co.**, supra.

Claimant's date of birth is March 18, 1925. He served in the U.S. Navy as a dental technician and achieved the rank of Pharmacist's Mate Second Class. From 1938 to 1940 Claimant attended a barber and beauty school in New York. He subsequently received a B. A. in psychology from Drake University in 1949. Graduate work in psychology was pursued by Claimant for one year at Brooklyn College. In addition to the above education, Claimant has accumulated approximately 30 hours at Drake Community College and 20 hours at Drake Law School. He testified that he

has never used his education in his employment. Since 1952, Claimant has been an employee of Defendant Employer.

Ronald D. Hampton, employment manager at Defendant Employer's Des Moines plant, testified concerning Claimant's earnings. He testified that Claimant earned the following amounts during the respective periods of time:

Year	Wage Per Hour	Earnings
1965	$ --	$11,447.26
1966	3.10	10,671.05
1967	3.25	2,510.49
(partial year)		
1968	3.40	7,787.36

As of the date of the hearing, Claimant was earning $3.53 per hour with a utility classification. This classification was the same as his classification prior to the injury. Hampton further testified that Claimant was offered a supervisory job at a higher rate of pay which elicited no affirmative response from Claimant. He indicated that Claimant was earning less either as a result of his injury or as a result of working less overtime.

Claimant testified that the work he presently is performing for Defendant is lighter than the work he was performing on the date of the injury. After trying his old job for a week, Claimant indicated that he was physically unable to perform it. No testimony was offered by Claimant as to whether overtime work was available or whether he was unable to perform overtime work.

Dr. Dubansky rated Claimant's functional disability to his arm to be 20% or 12% of the body as a whole. No percentage of functional disability was given by Dr. Jones.

Applying the evidence offered in this case in respect to Claimant's industrial disability to the considerations outlined in the case of **Olson v. Goodyear Service Stores,** supra, Claimant has proved a 15% permanent partial disability to the body as a whole.

WHEREFORE, it is found that Claimant on December 15, 1966, sustained an injury which arose out of and in the course of his employment and resulted in permanent partial disability to the body as a whole in the amount of fifteen percent (15%) at the rate of forty-seven and 50/100 dollars ($47.50) per week. It is further found that Claimant was incapacitated from working for forty-three and five-sevenths (43 5/7) weeks which entitles Claimant to healing period compensation at the rate of fifty-six dollars ($56).

THEREFORE, Defendants are ordered to pay Claimant seventy-five (75) weeks of permanent partial disability compensation at the rate of forty-seven and 50/100 dollars ($47.50) per week. Defendants are further ordered to pay Claimant forty-three and five-sevenths (43 5/7) weeks of healing period compensation at the rate of fifty-six dollars ($56) per week.

Credit is to be given to Defendants for compensation already paid by them.

Costs of the hearing are taxed to the defendants.

Interest on the award pursuant to §85.30, Code of Iowa, is to accrue from the date of this decision.

Signed and filed this 16 day of May, 1974.

DENNIS L. HANSSEN
Deputy Industrial Commissioner

Appealed to District Court; Reversed and Remanded

Appealed to Supreme Court; Affirmed in part, Reversed in part and Remanded to Industrial Commissioner.

Charles M. Collins, Claimant,

vs.

Bruce Motor Freight, Inc., Employer,
and

American Mutual Liability Insurance Company,
Insurance Carrier, Defendants.

Review-Reopening Decision

Mr. Joseph B. Joyce, Attorney at Law, 400 Central National Bank Bldg., Des Moines, Iowa 50309, For the Claimant.

Mr. W. N. Bump, Attorney at Law, 510 Central National Bank Bldg., Des Moines, Iowa 50309, For the Defendants.

This is a proceeding in Review-Reopening brought by the claimant, Charles M. Collins, against his employer, Bruce Motor Freight, Inc., and its insurance carrier, American Mutual Liability Insurance Company, to recover benefits under the Iowa Workmen's Compensation Act on account of an injury he sustained on or about June 16, 1967. The case came on for hearing before the undersigned Deputy Industrial Commissioner at the offices of the Industrial Commissioner in Des Moines, Iowa, on Wednesday, September 5, 1973. The case was fully submitted at that time.

On March 19, 1973, Robert C. Landess, Industrial Commissioner, held in a Review of Ruling that the statute of limitations had run with

respect to any claim for disability compensation benefits under the Iowa Workmen's Compensation Act but had not run with respect to the claim for medical benefits under Section 85.27, Code of Iowa. Therefore, the sole issue to be determined in this matter is the claim for medical benefits under Section 85.27.

Claimant was injured on June 16, 1967, as a result of a truck accident. Claimant was running between 55-60 miles per hour when his front wheels locked while he was passing a Pabst Blue Ribbon truck. Complaints by Claimant at this time were pain in his right arm and right leg. He returned to work in 1967 and worked until April, 1968, when he experienced back problems and numbness in his legs. From June 16, 1967, to April, 1968, Claimant had not sought any medical attention concerning his back.

Claimant testified that he broke his back in 1955 and was unable to return to work until 1958. In 1960 a steering sector fell from Claimant's International Harvester tractor which caused him to wrench his back. Claimant next injured his back on June 16, 1967. He stated that since the injury in 1955 he has never been without back spasms and has periodically worn a corset-type support.

In April of 1968 Claimant saw Paul From, M.D., an internist, concerning a bowel problem. Dr. From referred Claimant to Sidney H. Robinow, M.D., an orthopedic specialist, for Claimant's complaints referrable to his back.

Claimant saw Dr. Robinow from June 18, 1968, until November 26, 1968. Dr. Robinow indicated that he saw the claimant seven or eight times during that period. He diagnosed Claimant's back complaints as being chronic low back sprain. Dr. Robinow, when asked on direct examination whether the condition diagnosed by him was causally connected with the accident of June 16, 1967, testified:

> "From the history that was given to me, I would have to feel that there is a causal relationship between—between the two, between the accident in '67 and the back problem, but he also gave the history that in 1956 his troubles actually began following a semi-trailer accident. So it is not inconceivable that it first began in '56 and then in '67 this thing was aggravated by the semi-trailer accident."

On cross-examination Dr. Robinow testified that he had no indication that Claimant was seen by Dennis J. Walter, M.D., until September 3, 1968. He further indicated that he was basing the opinion expressed on direct examination solely on what the claimant told him. Additionally, Dr. Robinow did not obtain the history taken by the referring physician, Dr. From, nor the history taken after the accident of June 16, 1967, by W. D. Eidbo, M.D., the treating physician.

Claimant first saw Dennis J. Walter, M.D., on July 25, 1968, for an evaluation regarding employment for Defendant Employer. Claimant was examined and found to have muscle spasm of the right lumbar muscle with limitation of motion of the lumbar spine. On August 26, 1968, Dr. Walter rechecked Claimant and found right lumbosacral tenderness with limited motion of the spine. He was next seen by Dr. Walter on September 20, 1968, and found his right lumbar muscle to be in spasm and tender. On December 6, 1968, Dr. Walter saw Claimant and could find no disabling reason that he could not return to work for Defendant Employer.

Dr. Walter completed a Surgeon's Report on September 20, 1968, and attributed Claimant's complaints to an injury of April 25, 1968. The parties to this action stipulated that there was no incident in April, 1968, causing injury to Claimant. No opinion was expressed by Dr. Walter as to the causal connection between the condition diagnosed by him and the accident of June 16, 1968.

The following medical bills were offered by Claimant:

Iowa Lutheran Hospital, July 16, 1968	$ 10.00
S. H. Robinow, M.D., June 18, 1968, to January 15, 1969	65.00
Robert C. Jones, M.D., October 9, 1968	25.00
S. H. Robinow, M.D., February 26, 1969	7.50
Robert C. Jones, M.D., October 15, 1968	15.00
Iowa Lutheran Hospital (Check August 30, 1968)	63.75
Winkley Artificial Limb, September 3, 1968	22.66
Urbandale Pharmacy, August 16, 1968	5.25
Dahl's, October 8 (no year)	1.95
Fifield Drug, July 2, 1968	2.47
Fifield Drug, July 22, 1968	2.48
Paul From, M.D., April 26, 1968, and May 24, 1968	62.00

The law is well settled that it is the burden of the claimant to prove that he sustained an injury arising out of and in the course of his employment by a preponderance of the evidence as well as his burden to show a causal connection between his injury and disability. While the question of medical causation is primarily within the domain of expert medical evidence, the Deputy Commissioner is free to reject the testimony of an expert medical witness when his opinion is based upon an incomplete or inaccurate history. **Musselman v. Central Telephone Co.**, 261 Iowa 352, 154 N.W. 2d 128. In addition, expert medical evidence must be considered with all other evidence introduced bearing on the causal connection between the injury and the disability.

Burt v. John Deere Waterloo Tractor Works, 247 Iowa 691, 73 N.W. 2d 732.

Considering the evidence offered in light of the foregoing principles, Claimant has not shown that any of the medical bills offered were necessitated by the injury of June 16, 1968. Dr. Robinow's opinion as to the causal connection between the condition diagnosed by him and the injury of June 16, 1968, was based upon an incomplete history. He did not have the benefit of the histories and diagnoses taken by Dr. Eidbo, Dr. From, and Dr. Walter. He testified that he based his opinion solely on what the claimant had told him. Dr. Robinow's history from the claimant failed to mention:

(1) That Claimant has not been without back spasms since 1955.

(2) That Claimant returned to work in 1967 after the accident and worked until April, 1968.

(3) That Claimant's complaints at the time of the accident of June, 1967, were in his right arm and leg.

(4) That Claimant had not sought any medical attention for his back until April, 1968.

Claimant testified that the bowel problem diagnosed by Dr. From was not related to the accident of June, 1967. Dr. Robinow in his deposition mentioned that Claimant was hospitalized at Iowa Lutheran by Dr. From. No medical testimony was offered to indicate that the bills of Dr. From and Iowa Lutheran were necessary for the treatment of an injury resulting from the June, 1967, accident. Furthermore, no medical testimony was offered by Claimant that the bills of Robert C. Jones, M.D., Urbandale Pharmacy, Dahl's, Winkley Artificial Limb, and Fifield Drug were necessary for the treatment of an injury resulting from the June, 1967, accident. Consequently, Claimant has not sustained his burden of proof.

WHEREFORE, it is found that Claimant has not sustained his burden of proof that the following medical bills are fair, reasonable, and necessitated by the June 16, 1967, injury:

Iowa Lutheran Hospital, July 16, 1968	$ 10.00
S. H. Robinow, M.D., June 18, 1968, to January 15, 1969	65.00
Robert C. Jones, M.D., October 9, 1968	25.00
S. H. Robinow, M.D., February 26, 1969	7.50
Robert C. Jones, M.D., October 15, 1968	15.00
Iowa Lutheran Hospital (Check August 30, 1968)	63.75
Winkley Artificial Limb, September 3, 1968	22.66
Urbandale Pharmacy, August 16, 1969	5.25
Dahl's, October 8 (no year)	1.95
Fifield Drug, July 2, 1968	2.47
Fifield Drug, July 22, 1968	2.48
Paul From, M.D., April 26, 1968, and May 24, 1968	62.00

THEREFORE, recovery must be and is hereby denied to the claimant.

Signed and filed this 22 day of October, 1973.

DENNIS L. HANSSEN
Deputy Industrial Commissioner

Appealed to District Court. Dismissed by Claimant.

Jean Crabbs, Claimant

vs.

AMF Western Tool Division, Employer,
and

Hartford Insurance Group, Insurance Carrier, Defendants.

Review Decision

Mr. Charles L. Roberts, Attorney at Law, 414 Savings and Loan Bldg., Des Moines, Iowa 50309, For the Claimant.

Mr. Marvin E. Duckworth, Attorney at Law, 510 Central Nat'l Bank Bldg., Des Moines, Iowa 50309, For the Defendants.

This is a proceeding brought by Claimant, Jean Suckow Crabbs, against her employer, AMF Western Tool Division, and its insurance carrier, Hartford Insurance Group, for Review pursuant to Section 86.24 of the Workmen's Compensation Act, of an Arbitration Decision wherein she was denied benefits for an alleged occupational disease she allegedly received on or about January 12, 1972, while in the course of her employment.

Reference should be made to a Review-Reopening Decision filed April 4, 1972, in the case of Jean Suckow, n/k/a Jean Suckow Crabbs v. AMF Western Tool and Liberty Mutual Insurance Company. As a result of that decision, the claimant was awarded seventy-five (75) weeks of permanent partial disability benefits for an industrial disability of fifteen percent (15%) of the body as a whole for tenosynonitis and collateral problems.

Claimant contends that she experienced continuing difficulty with her wrists and shoulders between the Review-Reopening hearing on December 16, 1971, and January 12, 1972, her

last day of employment with the defendant employer. For this, she filed an Application for Arbitration.

Whether an injury is a new injury or an aggravation of a previously existing condition is irrelevant, since both are viewed as a "personal injury". **Farrow v. What Cheer Clay Products Co.,** 198 Iowa 922, 200 N.W. 625(1924). Both are, therefore, proper subjects for an Arbitration proceeding. When a Memorandum of Agreement has been filed, the matter may be reopened for review of the prior award or agreement, if the condition of the employee warrants it. Code of Iowa §86.34(1973). This has been interpreted to mean a "change of condition." **Stice v. Consolidated Indiana Coal Co.,** 228 Iowa 1031, 291 N.W. 452(1940). Additionally, an agreement or award may be reopened if new evidence is now available which was neither available nor discoverable with reasonable diligence, at the time of the previous agreement or award. **Gosek v. Garmer & Stiles Co.,** 158 N.W. 2d 731(Iowa 1968).

Since Claimant brought an Arbitration, this issue is whether or not she sustained a "personal injury" between December 16, 1971 and January 12, 1972. 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. Claimant has the burden of establishing she sustained such an injury by the preponderance of the evidence. **Almquist v. Shenandoah Nurseries, Inc.,** 218 Iowa 724, 254 N.W. 35. The evidence presented did not relate to a new injury or aggravation and is not the proper subject matter for an Arbitration proceeding.

As a caveat, perhaps a Review-Reopening would be in order if Claimant's condition has changed since the date of the prior Review-Reopening proceeding or evidence of her condition, neither known to exist nor discoverable with reasonable diligence at that time, is now available. It should be noted, however, that if the evidence was known or could have been discovered with reasonable diligence at the time of the previous Review-Reopening hearing, the doctrine of **res judicata** would probably apply.

WHEREFORE, the Arbitration Decision is hereby affirmed.

It is found and held as finding of fact:

That the claimant did not sustain a "personal injury" arising out of and in the course of her employment with AMF Western Tool Division between December 16, 1971, and January 12, 1972.

THEREFORE, recovery must be and is hereby denied to the claimant.

Each party shall pay the costs incurred by them, except the defendants shall pay the costs of the court reporter at the Arbitration hearing.

Signed and filed this 1 day of May, 1974.

ROBERT C. LANDESS
Industrial Commissioner

No Appeal

Hubert M. Cragg, Claimant,

vs.

Lewis Bros. Welding Co., Employer
and

The Travelers Insurance Company, Insurance Carrier, Defendants.

Review-Reopening Decision

Mr. George A. Goebel, Attorney at Law, 102 Professional Arts Building, Davenport, Iowa 52803, For the Claimant.

Mr. Richard M. McMahon, Attorney at Law, 609 Putnam Building, Davenport, Iowa 52801, For the Defendants.

This is a proceeding in Review-Reopening brought by the claimant, Hubert M. Cragg, against his employer, Lewis Bros. Welding Co., and its insurance carrier, The Travelers Insurance Company, to recover benefits on account of an injury sustained on September 8, 1969. The matter came on for hearing before the undersigned at the courthouse in Davenport, Iowa, on Monday, August 20, 1973, at 1:30 p.m. The record was left open for the submission of medical testimony. The record was completed on October 22, 1973.

The issue to be determined in this matter is whether or not the claimant sustained compensable disability and medical expenses as a result of an industrial accident sustained on September 8, 1969.

It is apparently the claimant's position that as a result of improper medical diagnosis, treatment and surgery, parts of Claimant's body other than that allegedly involved in the injury of September 8, 1969, were impaired. A malpractice action has been filed against the allegedly wrong doing parties in the District Court of Tulsa County, Oklahoma. To the knowledge of this deputy

commissioner that proceeding is still pending as of the date of this decision. Under proper circumstances, negligent treatment of a compensable injury can result in additional compensation, see Iowa Law of Workmen's Compensation monograph series No. 8, at page 143.

The claimant testified that on September 8, 1969, while welding, he raised up suddenly striking the back of his neck below the collar line on an I beam. The claimant testified he wore a cervical collar for several weeks. When he returned to work he had difficulty of a "tingling" nature in his left hand. Claimant states he had no difficulty in the neck area prior to September 8, 1969. He testified he was never free of neck and arm pain from the date of the injury to the time of a disc surgery in December of 1970. He testified he noticed the "tingling" after the accident. Substantial relief was obtained by the disc surgery.

Claimant has sustained numerous physical difficulties in his life time. He has sustained two auto accidents. The early accident caused severe damage to the liver and pneumothorax. The latter accident resulted in a "whiplash" type injury. When he was young he suffered from petit mal epilepsy seizures. He apparently suffered a "heart attack" in 1966. No permanent damage seems to have resulted. His history indicates that perhaps he has cirrhosis of the liver from excessive drinking. In 1969 and 1970, he suffered from gastrointestinal problems. This was attributed to excessive drinking. He has been hospitalized for the drinking problems. In 1961, he suffered from hepatitis. He has sustained several head injuries causing unconsciousness.

In May of 1970, the claimant had a left scalenotomy to relieve a diagnosed thoracic outlet syndrome. It was apparently thought by the treating doctors at that time that the left hand complaints were a result of the thoracic outlet syndrome. Further surgery for relief of the diagnosed thoracic outlet syndrome in the nature of a left first rib resection was performed in July, 1970.

In some manner, allegedly as a result of surgery, the left branch of the phrenic nerve appears to have been severed. The phrenic nerve operates the diaphragm. As a result Claimant has great difficulty in breathing.

Disc surgery for a degenerated disc at the C5-C6 interspace was performed in December of 1970. The area was fused with a bone graft. This relieved most of the left hand symptoms.

In March of 1971, Claimant had suffered grand mal seizures. This was apparently induced in part by the shortness of oxygen due to the inability to breathe. An attempt to perform anastomosis of the phrenic nerve was unsuccessful as the phrenic nerve could not be found.

It is the claimant's position that the cervical problems resulting in the degenerative disc were a result of the September 8, 1969, incident. It appears further that he claims that due to faulty diagnosis concerning the source of the left arm problems, a scalenotomy and rib resection were performed. He apparently claims that due to faulty surgical techniques the phrenic nerve was severed thus resulting in the breathing problems and grand mal seizures. As the finding of this deputy commissioner is that the initial blow of September 8, 1969, did not result in any permanent difficulties such as a cervical disc problem, no other findings concerning subsequent developments and competency of medical services is necessary.

Parties have indicated that the reports of Dr. William M. Catalona, M.D., dated September 8, 1969, and December 3, 1969, are to be considered part of the evidence in this matter. Dr. Catalona treated Claimant immediately following the injury. The patient's history in item No. 5 of the September 8, 1969, report corresponds to Claimant's testimony. X-rays were negative. No permanency is indicated. On the December 3, 1969, report Dr. Catalona indicates Claimant was to return to work on October 29, 1969. No permanent disability was noted.

Claimant was in University Hospitals at Iowa City, Iowa, from October 11, 1969, through October 23, 1969. See Claimant's Exhibit "1" and also portions of Claimant's Exhibit "6". The principal complaints were of the gastric pain. He had severe pains after hospitalization in the chest area and between the shoulder blades. Claimant's history mentions a "back sprain" at work a "couple of weeks ago." The incident as described by Claimant's testimony was then related to the doctors. The history indicates the condition had improved at the time of hospitalization. Claimant's orthopedic problems were diagnosed as strain of the upper thoracic spine. Other problems are in no way related to this injury by any opinion. X-rays of Claimant's cervical spine were normal except for "minimal lipping to the body at C6." Good strength was noted in Claimant's hands. Tenderness existed over the T1-T3 spinous processes.

The history given to St. John's Hospital in Tulsa, Oklahoma, in May of 1970, indicates presence of "tingling" in the left hand and arm. This is the first mention of this complaint in a history. He indicates the problem was present for several months. The apparent diagnosis of this problem was a thoracic outlet syndrome.

In November of 1970, Claimant was again hospitalized. The chief complaint was chest

discomfort and soreness and pain in the upper abdomen. The orthopedic consultation notes indicate the symptoms in Claimant's left arm and neck are present. The diagnosis was a cervical disc problem or nerve root irritation. This could be due to trauma to the nerves or an arthritic spur. The history of the September 8, 1969, injury was related to the neurosurgeon doing the neurological evaluation. His diagnosis was a degenerated herniated intervertebral disc at C5-C6 due to repeated trauma.

The history of December, 1970, notes that Claimant had pain in the posterior aspect of his neck of "several years" duration. The diagnosis following the cervical fusion was a degenerative disc disease at C5-C6 secondary to trauma. It is noted that x-rays taken over an eight month period preceding December of 1970, show a marked progression in the degenerative spine disease.

In the hospitalization of March of 1969, Claimant made some complaint of neck and arm pain. The primary treatment at this time was for convulsive seizures. In April of 1971, it was indicated by the claimant in the history taken that the disc removal had taken care of most of his symptoms.

Claimant testified at the hearing to continuous neck and arm problems dating at least from his return to work in October of 1969. He also testified to having no neck problems prior to September 8, 1969. He denied problems following the 1963 "whiplash" injury. The history given indicates different times of appearance of problems. The areas of injury are lower in the spine and the cervical area. Any conflict in Claimant's testimony at the hearing, the history given, and the thoracic location of the injury is resolved in favor of the following facts.

The observations of the initial treating doctor, Dr. Catalona, as to the nature of the injury are that no permanency occurred. Some six weeks after the injury a thoracic sprain and tenderness was noted at Iowa City. Claimant's condition was said to have improved. The claimant testified he hit his neck below the collar line. The left arm "tingling" appeared a few months prior to May of 1970. Claimant indicated in the history in December of 1970, that the neck pain was of several years' duration.

It should also be noted that while various opinions in the hospital records would indicate the source of the cervical disc degeneration is trauma or repeated trauma, no indication of any certainty that the incident of September 8, 1969, was even a contributing or aggravating factor is shown.

The claimant submitted the depositions of Dr. Joe Burge, M.D., a thoracic and cardiovascular surgeon, and Dr. Milton R. Workman, M.D., an orthopedic surgeon. Defendants submitted no medical evidence.

Dr. Burge received no history of an injury while Claimant was employed on his initial examination in November of 1970. However, he was aware of this fact. Complaints of "tingling" in the left arm were present. A history of auto accidents with "whiplash" type neck injuries was noted. Dr. Burge states he is not an expert in the neurosurgical or orthopedic area. He does state that an injury to a cervical disc is usually a bending or compressive injury to the neck such as a "whiplash" or blow on the head in a dropping manner. Dr. Burge states the injury to a cervical disc is consistent with injuries apparently of the nature sustained by the claimant. It is not clear to which injuries Dr. Burge refers. Dr. Burge defers any opinion to neurosurgeons concerning any causal relationship between the disc problem and the accident of September 8, 1969.

Dr. Burge's testimony as a whole does not establish a sufficient relationship between the injury of September 8, 1969, and Claimant's difficulties. At best, Dr. Burge indicates that Claimant's disc difficulties are consistent with his "injury". In view of the many incidents and injuries sustained by the claimant and the finding of a thoracic sprain following the injury, an insufficient relationship of a sufficient certainty is made between the September 8, 1969, injury and Claimant's permanent difficulties.

Dr. Workman first saw Claimant in December of 1970. He was given the history of the injury of September 8, 1969. The history was also given of pain in the neck of two or three years' duration which increased significantly after September 8, 1969. Dr. Workman's diagnosis was degenerative disc disease of the cervical disc between C5 and C6. This is opposed to a herniated disc. He participated in the removal of the disc and fusion at that level. Dr. Workman, at best, states the symptoms presented and objective findings noted "could be consistent" with the injury of September 8, 1969. However, no history of the auto accident, in particular a "whiplash" type injury, was given to Dr. Workman. However, upon being made aware of this fact in a hypothetical question, Dr. Workman had no opinion within a reasonable degree of medical certainty as to the causal relationship between the injury of September 8, 1969, and resultant difficulties. At best, an aggravation "could be" consistent.

The number of injuries involved when considered with the lack of certainty on the part of Dr. Workman as to the causal relationship between the September 8, 1969, injury and resultant problems, causes this deputy commissioner to find that a sufficient relationship

has not been established between the alleged injury and permanent difficulties. This lack of certainty by the doctors exists even with an awareness of Claimant's history of neck problems prior to September 8, 1969, with more difficulty developing later. Again, the presence of a thoracic sprain and absence of a cervical sprain in months following the injury is considered significant by this deputy commissioner. It should be noted that any conflict in testimony is resolved by a finding that the "tingling" in Claimant's left arm had its onset at a time some weeks or months subsequent to the date of injury.

Special note should again be made that nothing in this opinion is to be considered as a finding concerning the skill exercised in diagnosing a thoracic outlet syndrome. Nothing in this opinion is to be considered as a finding concerning care exercised in performing the surgical procedures of a left scalenotomy and rib resection. In accordance with previous findings any ailments which may or may not be a direct or indirect result of a degenerated cervical disc are of no interest in this proceeding.

The claimant was released to return to work by Dr. Catalona on October 29, 1969, a period of seven and one-seventh (7 1/7) weeks following the injury. Claimant's temporary total disability rate is forty-eight dollars($48) per week.

No medical bills were introduced into evidence.

THEREFORE, Defendants are ordered to pay the claimant seven and one-seventh(7 1/7) weeks of temporary total disability compensation at the rate of forty-eight dollars($48) per week for payment of temporary total disability resulting from the injury of September 8, 1969, arising out of and in the course of the claimant's employment with the defendant employer. Credit is to be given the defendants for the seven and one-seventh(7 1/7) weeks of temporary total disability previously paid.

Costs of this proceeding are taxed to the defendants.

Signed and filed this 20 day of March, 1974.

ALAN R. GARDNER
Deputy Industrial Commissioner

Appealed to District Court; Dismissed

Martha Cratty, Claimant

vs.

Hiland Potato Chip Company, (Perky-Jerky Co.), Employer,
and
Employers Mutual Casualty Co., Insurance Carrier, Defendants.

Review - Reopening Decision

Mr. Roy M. Irish, Attorney at Law, 729 Insurance Exchange Bldg., Des Moines, Iowa 50309, For Claimant.

Mr. E. J. Giovannetti, Attorney at Law, 510 Central Nat'l Bank Bldg., Des Moines, Iowa 50309, For Defendants.

This is a proceeding in Review-Reopening brought by the claimant, Martha Cratty, against her employer, Hiland Potato Chip Company, and its insurance carrier, Employers Mutual Casualty Co., to recover benefits under the Iowa Workmen's Compensation Act on account of an injury sustained on January 18, 1972. The matter came on for hearing at the Offices of the Iowa Industrial Commissioner on Monday, July 16, 1973, at 10:30 a.m. The matter was left open for the submission of medical testimony. The record was completed on September 13, 1973.

The issues to be determined in this matter are whether or not the claimant sustained compensable disability and medical expenses as a result of the injury sustained January 18, 1972; whether or not any disability suffered is confined to a scheduled member; and whether or not certain medical expenses are to be allowed under §85.27, Code of Iowa.

Claimant's testimony indicates the situs of the injury was to her left hip, left arm, and shoulder. The original diagnosis of Dr. Larry L. Richards, D.O., is cervical sprain with dorsal and lumbar myofascitis. Dr. Donald W. Blair, M.D., an orthopedic surgeon, initially diagnosed Claimant's difficulty as cervical sprain and left elbow ulnar nerve irritation. Dr. Richards treated Claimant through May of 1972. Dr. Blair continued treatment through two surgeries. Dr. Blair last saw Claimant on June 22, 1973. The original injury thus involved more than a scheduled member.

At the time of the hearing, Claimant complained of pain in areas outside the scheduled arm. Dr. Blair's deposition indicates Claimant had ceased to complain of these matters to him. He goes further and states "these areas (neck and back complaints) did clear." Her complaints had grown less during the time she saw Dr. Blair. Any conflict in the evidence concerning the existence of complaints is thus resolved against the claimant. No disabling complaints are found outside Claimant's left arm.

Dr. Blair performed two surgeries on the claimant. He performed an ulnar nerve transplant in the left elbow. He performed surgery on Claimant's shoulder removing a portion of the

acromion. The acromion forms part of the shoulder blade. This is on the "body" side of the shoulder joint. Dr. Blair notes some pulling and aching apparently in the area on both sides of the shoulder. The inference is taken from Dr. Blair's testimony that this problem will clear. The inference is also taken that this is the natural result of the surgery in the shoulder area.

Dr. Blair does not indicate any physical impairment of a permanent nature beyond the left upper extremity. He indicates the disability is only fifteen percent (15%) of the left upper extremity. Other complaints appear to be of a temporary nature. Most of the complaints were in the early periods of treatment.

It is a finding of this deputy commissioner, based upon the above interpretation of Dr. Blair's testimony, that the trauma occurred to other than a scheduled member. However, the resultant disability is to the left upper extremity only. It was previously found that the conflict between the claimant's testimony concerning complaints and the absence of complaints in the history given Dr. Blair was resolved against the claimant. The only area of complaint other than that in the left upper extremity found to be in existence is in the "shoulder" area. This means both sides of the shoulder. This complaint will clear and is not a functional impairment. It is a natural result of the injury to the left upper extremity.

In the case of **Kellogg v. S. & L. Coal Co.**, 256 Iowa 1257, 130 N.W. 2d 667, the actual impact resulted in a broken leg and bruises and abrasions on the claimant's ribs. The ribs were apparently of no concern as a disabling factor. The ultimate disability or physical effect was only to the leg. The burden was placed on the claimant to show that the trauma resulted in an ailment extending beyond the scheduled area. The claimant must establish that the ailment is more than the natural consequence of the injury and that an impairment actually exists beyond the scheduled member. See also **Barton v. Nevada Poultry Co.**, 253 Iowa 285, 110 N.W. 2d 660. The term "natural consequence" is to be distinguished from the natural effect which is studied in the context of "proximate cause." An award can be given for an unusual ailment extending beyond a scheduled member which is proximately caused by an injury to a scheduled member. See **Barton v. Nevada Poultry Co.**, supra.

In view of the above findings that no disabling effects exist which are more than the natural result of the injury to the left upper extremity, the disability must be limited to the scheduled member. The functional disability is found to be fifteen percent (15%) of the left upper extremity.

The charges of Dr. Larry L. Richards, D.O., are objected to in part as being unauthorized by the employer. It is argued by the defendants that tendering of Dr. Blair by the employer and insurance carrier automatically cuts off the right to see Dr. Richards at the employer's expense from that date forward. This argument is not accepted. Under §85.27, Code of Iowa, the employer is to furnish the listed services. The employer furnished Dr. Richards. Subsequently the employer furnished Dr. Blair. Claimant was never informed by an employer's representative that continued contact with Dr. Richards was no longer authorized and to be furnished. Her continued contact in no way was unreasonable. She sought treatment for pain from a convenient doctor initially furnished by the employer. The claimant relied on the initial furnishing of Dr. Richards' care in a reasonable manner.

Claimant was informed by Dr. Blair to cease seeing Dr. Richards. Without a showing that Dr. Blair's comments were in the context of cessation of authorization by the employer and insurance carrier as opposed to personal medical opinion, Dr. Blair's comments to the claimant did not cease the employer's financial responsibility for Dr. Richards' charges. Dr. Richards' bill is three hundred sixty-one dollars($361).

It should be noted that no statement of a member of the Iowa Industrial Commissioner's Office causes medical treatment not otherwise authorized, to be authorized without notice and opportunity for hearing on benefits under §85.27, Code of Iowa.

It appears from Dr. Blair's testimony and reports that Claimant was incapacitated from work for at least twenty and seven-tenths(20.7) weeks.

It has been stipulated that Claimant took eighteen(18) trips to see Dr. Blair for treatment of the instant injury at fifty-two(52) miles per trip. The claimant took twenty-four(24) trips to see Dr. Richards for treatment of the instant injury at twenty-four (24) miles per trip. The total travel distance is one thousand five hundred sixty(1,560) miles. The mileage rate is ten cents(10¢) per mile. The claimant is to be paid one hundred fifty-six dollars($156) in travel expenses incurred in seeking medical treatment. Any question of authorization of the trips to Dr. Richards has been previously discussed.

In summary, the above findings are that Claimant sustained a permanent partial disability to the left upper extremity of fifteen percent(15%). Claimant is thus entitled to thirty-four and five-tenths(34.5) weeks of permanent partial disability compensation at the rate of fifty-nine dollars($59) per week. Claimant

was incapacitated from working due to the injury of January 18, 1972, for at least twenty and seven-tenths(20.7) weeks compensable at the rate of sixty-one and 54/100 dollars($61.54) per week. Claimant incurred authorized medical expenses to Dr. Richards in the sum of three hundred sixty-one dollars($361) for treatment of the January 18, 1972, injury. Claimant incurred travel expenses in the sum of one hundred fifty-six dollars($156) for treatment of the January 18, 1972, injury.

The total amount due Claimant is two thousand thirty-five and 50/100 dollars($2,035.50) for permanent partial disability and one thousand two hundred seventy-three and 88/100 dollars ($1,273.88) for healing period disability compensation. Claimant has received sixty-eight (68) weeks of temporary total disability at the rate of sixty-one and 54/100 dollars($61.54) per week for a total of four thousand one hundred eighty-four and 72/100 dollars($4184.72). Claimant appears to have been incapacitated for this period. Under §85.34, Code of Iowa, this amount is to be credited against the combined permanent partial disability and healing period disability compensation due. No overpayment has occurred.

THEREFORE, Defendants are ordered to pay Claimant thirty-four and five-tenths(34.5) weeks of permanent partial disability compensation at the rate of fifty-nine dollars($59) per week. Defendants are ordered to pay Claimant twenty and seven-tenths(20.7) weeks of healing period compensation at the rate of sixty-one and 54/100 dollars($61.54) per week. Defendants are to pay or reimburse the claimant the unpaid portion of Dr. Richards' three hundred sixty-one dollar($361) bill. The claimant is to be reimbursed the sum of one hundred fifty-six dollars($156) for travel expenses. Credit is to be given the defendants for sixty-eight(68) weeks of temporary total disability compensation previously paid.

Costs of the proceeding are taxed to the defendants.

Signed and filed this 25 day of February, 1974.

ALAN R. GARDNER
Deputy Industrial Commissioner

No Appeal

Tony Lee Dideriksen, Claimant,

vs.

Jack's of Iowa, Inc., Employer,
and
The Western Casualty & Surety Co., Insurance Carrier, Defendants.

Review Decision

Mr. James M. Adams, Attorney at Law, 105 Jefferson Street, Burlington, Iowa 52601, For the Claimant

Mr. H. C. Walsh, Attorney at Law, 321 North Third, Burlington, Iowa 52601, For the Defendants.

This is a proceeding brought by the claimant, Tony Lee Dideriksen, and by the defendants, Jack's of Iowa, Inc., employer, and Western Casualty & Surety Co., insurance carrier, seeking Review under the provisions of Section 86.24 of the Iowa Workmen's Compensation Act, of an Arbitration decision, wherein Claimant was awarded medical benefits but denied disability benefits on account of injuries allegedly sustained on or about February 25, 1970. The case on Review was submitted on the transcript of the evidence at the Arbitration proceeding and the oral briefs and arguments of counsel. No additional evidence was presented for consideration on Review.

Claimant contends that since the Arbitration decision found that he received an injury arising out of and in the course of his employment and that adequate notice was given to the employer of such injury, that the Deputy Industrial Commissioner erred in not finding that Claimant had temporary disability for the period from February 16, 1971, when he was hospitalized for surgery until April 1, 1971, when he was released to return to work by his attending physician.

Defendants contend that the evidence was insufficient to establish any causal connection of Claimant's injury to his employment; that adequate and sufficient notice was not given of the alleged injury; and that Claimant failed to submit to examination by a physician, as directed by the employer.

Defendants' last contention requires little consideration. Section 85.39 provides that in the event an employee refuses to submit to examination that he shall be deprived of the right to any compensation for the period of such refusal. Even if the claimant had refused to submit to a medical examination, there is no claim being made for compensation for the period of such refusal. The only claim for compensation being made is for the period during and after Claimant submitted to medical examination and treatment. The employer never designated a certain doctor or specific time for examination, so Claimant cannot

be faulted for his choice of doctor although he is not to be commended for his timing. Claimant's testimony, however, indicates he was not particularly troubled by the hernia until shortly before submitting to treatment.

There is no question from the record that after Claimant took his service physical that both he and his employer knew that he had a hernia. Claimant reported the results of his service physical to Mr. Sinclair. Sinclair said he would have to find out from Mr. Joe Daniels what to do about it. Mr. Sinclair advised the claimant to go to a local doctor to verify the fact that he had a hernia. Mr. Sinclair apparently never contacted Mr. Daniels about the matter until after Claimant went to the hospital. Claimant continued to work and did not seek medical assistance for some time. Although this may not have been the wisest thing to do, it must be pointed out that the employer did not follow up on Claimant's request that he be advised if it was covered by insurance. Mr. Sinclair was aware that the only type of insurance that the employer had which could apply was workmen's compensation. He knew, therefore, that if there was coverage, it would have to be for a work connected injury. He knew also that the claimant was looking to his employer for coverage. It is, therefore, apparent that Mr. Sinclair was aware that the claimant was giving notice of an injury for which he was seeking workmen's compensation benefits. At least, Mr. Sinclair was put in a position where he should have either reported the alleged injury or investigated further to ascertain if it was work connected. The purpose of the notice provisions in the compensation act is to enable the employer to investigate facts pertaining to the injury. **Hobbs v. Sioux City,** 2 NW 2d 275.

Claimant testified that the first time he noticed anything at all in the area where the hernia occurred was when he felt a "pull" while stacking boxes at the warehouse of his employer. He testified that he had started stacking the boxes on the floor and worked his way up. When the stack got too high to reach from the floor, he used a stepladder. He was on the stepladder when he felt the "pull". At the time, he thought it was merely a pulled muscle and shrugged it off. Witnesses corroborated the fact that the claimant showed signs of pain or strain in the area of his right leg and groin, subsequent to the alleged incident in the warehouse.

The surgery which was performed on the claimant on February 16, 1971, was for the express purpose of repairing Claimant's hernia. Although there is no showing of any intervening cause, the claimant indicated that just prior to submitting himself to examination and surgery by Dr. Robert B. Allen, that the hernia that Claimant contends was precipitated by the incident in defendant employer's warehouse in February, 1970.

The claimant was not employed by the defendant employer at the time of his surgery. His employment was terminated shortly before, either by the employer or by mutual agreement of the parties. Claimant testified that he made the appointment with Dr. Allen prior to his termination. It does not appear that Claimant's alleged injury or doctor appointment was in any way connected with his employment termination. If the claimant had continued his employment with the defendant employer, there would be little question that if the hernia were one arising out of and in the course of his employment, that the period of temporary disability occasioned by the submission to surgery and recuperation would be compensable as temporary disability. The fact that the employment relationship was terminated just prior thereto for unrelated reasons should not alter this fact.

THEREFORE, the Arbitration Decision is hereby modified.

It is found and held as finding of fact:

That on February 25, 1970, the claimant sustained a personal injury arising out of and in the course of his employment with Jack's of Iowa, Inc.; that adequate notice of said injury was given to the employer within ninety days of the injury; that no permanent disability resulted from said injury; that said injury resulted in temporary disability from February 16, 1971, until April 1, 1971; and that the claimant incurred hospital and medical bills as a result of said injury in the amount of $618.40.

WHEREFORE, the defendants are ordered to pay to the claimant weekly compensation for six and two-sevenths weeks at the rate of $47.50 per week, accrued payments being payable in a lump sum. Defendants are further ordered to pay the following bills:

Memorial Hospital	$358.40
Dr. Robert B. Allen	$200.00
Drs. Eastman, Peterson & Caldron	$ 60.00

Defendants are ordered to pay the cost of the Arbitration proceeding and the shorthand reporter at said proceeding.

Signed and filed this 13 day of July, 1972.

ROBERT C. LANDESS
Industrial Commissioner

No Appeal

George Doty, Claimant,

vs.

Arron Feinberg, d/b/a Feinberg's, Employer, Defendant.

Review Decision

Mr. Thomas E. Tucker, Attorney at Law, 516 - 7th Street, Fort Madison, Iowa 52627, For the Claimant.

Mr. Austin J. Rashid, Attorney at Law, 619 - 7th Street, Fort Madison, Iowa 52627, For the Defendant.

This is a proceeding brought by the defendant, Arron Feinberg, d/b/a Feinberg's seeking a Review of an Arbitration Decision wherein the claimant, George Doty, was awarded benefits under the Workmen's Compensation Act for injuries he sustained on November 28, 1969. On May 18, 1972, the case came on for Review Hearing before the undersigned Industrial Commissioner at the Court House in Fort Madison, Iowa. The case was presented on a transcript of the evidence at the Arbitration proceeding and additional evidence presented on Review.

The Arbitration Decision holds that Claimant was an employee of the defendant and that he received an injury arising out of and in the course of his employment on November 28, 1969, resulting in temporary disability for eleven and two-sevenths (11 2/7) weeks and compensable medical expense of $1,863.25.

Defendant's Petition for Review contends that Claimant failed to prove that he was an employee; that the evidence does show that Claimant was an independent contractor; and that even if Claimant were an employee that his injury did not arise out of and in the course of his employment.

No new evidence was submitted on Review to indicate that Claimant was not "working" at his "job" at the time of his injury. There is sufficient showing that the claimant was engaged in his normal job activities on defendant's premises prior to the injury. If he was an employee of the defendant, he was engaged in an activity that would be expected of him at the time of his injury.

The primary issue in this matter is the legal status of the claimant with regard to the defendant. The burden of proof is upon the claimant to establish, by a preponderance of the evidence, that he was an employee of the defendant. **Nelson v. Cities Service Oil Co.**, 259 Iowa 1209, 146 N.W. 2d 289.

Code of Iowa, Section 85.61(2) states in part:

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

The Iowa Supreme Court has consistently held that the criteria used to determine the existence of an employer-employee relationship are: (1) the employer's right of selection or to employ at will; (2) responsibility for the payment of wages by the employer; (3) the right to discharge or terminate the relationship; (4) the right to control the work; and (5) is the party sought to be held as employer the responsible authority in charge of the work or for whose benefit the work is performed. **Hjerleid v. State,** 229 Iowa 818, 295 N.W. 139; **Sister M. Benedict v. St. Mary's Corp.,** 255 Iowa 847, 124 N.W. 2d 548; **Nelson v. Cities Service Oil Co.,** Supra.

Applying the facts of the instant case, we find that defendant had the right of selection of the claimant in the first instance. Claimant had done work for the defendant at a time prior to the period involved in the instant action. On both occasions, his work entailed cleaning scrap metals that were delivered to the defendant. He had terminated his relationship with the defendant previously, apparently over a disagreement as to whether his work product was going to be weighed on one occasion when he wanted it done or he was going to have to wait until the person in the employ of the defendant, who was to do the weighing, was free to do so. This was in late 1968 or early 1969. In August of 1969, Claimant went back to the defendant and asked to have his job back. He was taken on and told he would be paid on the basis of six cents per pound of cleaned metal, and that he was to be there everyday, to which he agreed. During the interim period when Claimant was not working for the defendant, one Tee Johnson performed in the same capacity as the claimant. This relationship was terminated by the defendant, as it was thought to be undesirable. The claimant is not now and has not since shortly after his injury, been working for the defendant. Defendant does not engage anyone in the capacity of cleaning scrap metals anymore, finding it economically convenient to send the metals to the smelters uncleaned. It is therefore, inescapable that the defendant possessed the right of selection and to employ at will.

The arrangement for compensating the claimant was to pay him six cents per pound for all acceptably cleaned metals. This was usually done on Fridays when the other employees were paid. Claimant would turn over to an employee of the defendant, the metals he had cleaning during the week. These would be inspected and weighed and

claimant would be paid at that time. Occasionally, on Claimant's request, he would have his work product weighed and get paid on days other than Fridays. In any event, however, it was for work that he had performed prior to that time. Wages means compensation paid to a hired person for his services. **In re Estate of Plumb,** 256 Iowa 938, 129 N.W. 2d 630; **Cuthbertson v. Harter Post No. 839,** 245 Iowa 922; 65 N.W. 2d 83; **Buckley v. Deegan,** 244 Iowa 503; 57 N.W. 2d 196. When the method of payment is for piece work to the extent that it indicates continuing service, such payment has been held to be an indication of employment. 1A Larson's Workmen's Compensation §44.33(b).

As regards the defendant's right to discharge or terminate the relationship, it seems evident that, as previously set out, the defendant not only had the right but in fact exercised this right. The evidence shows no distinction between the relationship between Tee Johnson and the defendant and that of Claimant and the defendant. In the case of Tee Johnson, it is clear that his relationship was definitely terminated by the defendant.

Perhaps the element of the relationship most favorable to the defendant is the element of control. There is much in the record which would tend to indicate that the claimant was "his own boss" or "didn't take orders from anyone." The law is clear, however, that it is the right to control and not the exercise of the right that is important. 1A Larson's Workmen's Compensation §44.10. Evidence indicating defendant's right to control the claimant in the performance of his duties are (1) the fact that when first hired, the claimant was taught by a representative of the defendant the manner in which to clean the metals. Claimant did not come to the defendant in the first instance as one holding himself out as experienced in that line of endeavor; (2) when Claimant was taken back on the job the last time he was told to be to work everyday; (3) defendant provided the area in which the job was to be performed; (4) defendant provided the bench, vise and gasoline used in the performance of the job; (5) the metals which the claimant cleaned were furnished by the defendant on a continuing basis; (6) the claimant had to work during a time when the job site was open or get an employee of the defendant to open the gate for him if he wanted to do his work, and (7) the fact the claimant performed other services for the defendant, as requested, on two or three occasions for which he was apparently paid.

Although no direct control was exercised over the details of Claimant's work, this would not seem necessary as Claimant was only paid for the work that he completed satisfactorily. After once showing him the manner in which the work is to be done, there is little that can be done other than rejecting the finished product.

As to the fifth proposition, there can be no doubt that the defendant was the party for whose benefit the work was being performed. Defendant was in the scrap business. He got a better price for cleaned metals than he did for unclean. Although Defendant contends that he didn't make any more money one way than the other, this is a business decision he had made—to have someone clean the metals before shipping to the smelters. It is a well known fact that not all business decisions are profitable, but in any event the cleaning of the metals was the decision that was made and it was an integral part of the defendant's business.

Claimant has established a prima facie case that he was an employee of the defendant. Defendant has the burden of going forward with the evidence and overcome or rebut the case made by Claimant. He must also establish, by a preponderance of the evidence, any pleaded affirmative defense. **Nelson v. Cities Service Oil Co.,** Supra. Defendant has alleged as an affirmative defense that Claimant was an independent contractor.

The criteria for determining the existence of an independent contractor relationship are also set out in the **Nelson** case. These are: (1) the existence of a contract for the performance by a person of a certain piece or kind of work at a fixed price; (2) the independent nature of his business or of a distinct calling; (3) his employment of assistants with the right to supervise their activities; (4) his obligation to furnish necessary tools, supplies, and materials; (5) his right to control the progress of the work, except as to final results; (6) the time for which the workman is employed; (7) the method of payment, whether by time or by job; (8) whether the work is part of the regular business of the employer.

Restatement, Agency 2d, section 220(2) lists ten matters of fact to be considered in determining whether a person is acting an as independent contractor. It is for the triers of fact to determine whether or not there is a sufficient group of favorable factors to establish the relation. Restatement, Agency 2d, section 220, comment c. **Daggett v. Nebraska-Eastern Exp. Inc.,** 252 Iowa 341, 107 N.W. 2d 102.

In this case, the facts show that the claimant was not in an independent type of business or of a distinct calling; that he employed no assistants; that although he used his own hand tools and wheelbarrow, there is no showing he was obligated to do so or that the furnishing of such tools was a condition of his getting the job; that he was controlled to the degree of being required

to be there everyday or report his absence; that his employment was of a continuous nature; that although he was paid by the pound, it was on a quantity type basis and for continuing service; and that the work was a part of the regular business of the employer.

The evidence adduced in the Review proceeding was directed toward showing the intention of the parties (primarily the employer) as to the relationship they were establishing. The employer did not withhold income tax or social security from Claimant's pay; report Claimant on his quarterly payroll report to the Employment Security Commission; nor pay premiums to his workmen's compensation insurance carrier, based upon claimant's wages.

Earlier Iowa Supreme Court decisions have indicated that the intention of the parties as to the relationship they are creating is an element to be considered. **Hassebrock v. Weaver Construction Co.**, 246 Iowa 622, 67 N.W. 2d 549; **Usgaard v. Silver Crest Golf Club**, 259 Iowa 453, 127 N.W. 2d 636.

As indicated in the **Nelson** case, this can be somewhat misleading standing alone. The **Nelson** case further indicates that this subjective standard may, where appropriate, be used by the trier of fact to shed light upon the true status of the parties. It would not appear that resort to the subjective standard of intention of the parties is necessary in this case, as the evidence concerning the objective standards preponderate in favor of the conclusion that Claimant was the employee of the defendant.

THEREFORE, the Arbitration decision is hereby affirmed.

It is held as finding of fact:

That George Doty was the employee of the defendant Arron Feinberg, d/b/a Feinberg's on November 28, 1969, and that on said date he received an injury arising out of and in the course of his employment, resulting in temporary disability of eleven and two-sevenths (11 2/7) weeks. It is further found that Claimant sustained medical expense as a result of said injury in the amount of $1,863.25 and that he is entitled to temporary disability benefits in the amount of $40.00 per week.

WHEREFORE, the defendant is ordered to pay the medical expense as set out in the Arbitration Decision in the total amount of $1,863.25. Defendant is further ordered to pay eleven and two-sevenths (11 2/7) weeks of temporary disability benefits at the rate of $40.00 per week, accrued amounts to be paid in a lump sum, together with statutory interest. Costs of this action and the Arbitration proceeding are to be paid by the defendant.

Signed and filed this 9 day of August, 1972.

ROBERT C. LANDESS
Industrial Commissioner

No Appeal

Raymond England, Claimant,

vs.

Western Materials, Inc., aka Western Engineering Company, Inc., Employer,
and

Maryland Casualty Company, Insurance Carrier, Defendants.

Review-Reopening Decision

Mr. Keith More, Attorney at Law, P.O. Box 470, Harlan, Iowa 51537, For the Claimant.

Mr. James E. Thorn, Attorney at Law, P.O. Box 398, Council Bluffs, Iowa 51501, For the Defendants.

This is a proceeding in Review-Reopening brought by the defendants, Western Materials, Inc., aka Western Engineering Company, Inc., employer, and Maryland Casualty Company, the insurance carrier, against the claimant, Raymond England, to deny additional benefits under the Iowa Workmen's Compensation Act by reason of an industrial injury that occurred on October 16, 1971. This matter came on for hearing before the undersigned Deputy Industrial Commissioner on March 18, 1974, at the courthouse in and for Shelby County at Harlan, Iowa. At the conclusion of the hearing counsel were given leave to file evidentiary medical depositions, and the last of these having been filed on July 11, 1974, the record was closed at that time.

An examination of the Industrial Commissioner's file reveals that an appropriate Employers First Report of Injury was filed on June 5, 1972. The file further reveals that a Memorandum of Agreement, Form 4, was filed and approved June 5, 1972, calling for a temporary disability payment in the amount of $64 per week. A Form 5 is also contained in the file disclosing a period of temporary disability of 26 4/7 weeks as having been paid, with the last date of compensation payment having been November 7, 1972.

There is sufficient evidence in the record to support the following statement of facts, to wit:

The claimant, age 34 and married, had been a member of the United State Armed Forces from May of 1956 until January of 1960. The claimant is suffering from diabetes. This condition manifested itself in the claimant at some time after his discharge from the Armed Forces. Claimant also suffers from severe peripheral neuropathy, resulting in a lack of feeling in both legs below the knees. The claimant fails to notice excessive heat, cold or foreign objects in his shoes. Claimant accepted a position with Defendant Employer as truckdriver for the construction season of 1971. On October 16, 1971, the claimant sustained chemical burns on both feet caused by the lime used in road construction. He was seen and treated by R. E. Donlin, M.D., of Harlan, Iowa, until November 19, 1971.

He was unable to perform any active gainful employment until March 9, 1972.

The claimant was admitted to the Department of Internal Medicine, University of Iowa Hospitals, on January 19, 1972. A diagnosis of diabetes mellitus with acute ketoacidosis was made. His admission to the University of Iowa Hospitals was coincidental in that the claimant suffered a diabetic seizure while transporting his son to Iowa City for medical care that day. During a general physical examination preparatory to Claimant's admission, he was noted to have a draining callus on the right foot and a small fluctuant red abscess on the sole of the left foot. The neurologic examination revealed diminished deep tendon reflexes on both lower legs with decreased sensation on both lower extremities distal to the knees.

The record is silent as to the nature and extent of the type of medical care the claimant was receiving between November 19, 1971, and January 19, 1972, but on January 30, 1972, the callus on the right foot had not healed. The callus was still draining in April of 1972 when the claimant was seen by the University Hospitals again.

The claimant was unable to perform gainful employment between April 2, 1972, and April 20, 1972.

During the April visit of 1972 at the University of Iowa Hospitals, a cast was applied to the right leg. In May of 1972 a prosthetic shoe was prescribed. In June the requested shoe was found as unfit upon delivery, and on August 16, 1972, a pair of prosthetic shoes and liners were finally delivered.

From September 13, 1972, to November 5, 1972, the claimant was unfit to work. Claimant was under treatment at the University of Iowa Hospitals again, another plaster cast having been applied. A scab on the bottom of the right foot was still present on November 1, 1972.

On July 13, 1973, the claimant's foot became irritated, developed a discharge and odor, and began to itch. The prosthetic shoes and liners had worn out and were not replaced by the defendants. The ulcerated area that had been present since the initial examination in 1971 by Dr. Donlin now suggested a mycotic infection. Four days later a collar button abscess had formed which resulted in the claimant's hospitalization on July 19, 1973, for appropriate treatment. This treatment was successful. However, the claimant's blood sugar was difficult to control even while the claimant was a patient in the hospital. The ulcer became infected again in August of 1973, and the claimant's blood sugar was in imbalance during August and September of 1973. By September 28, 1973, the condition of the ulcer had become progressively worse, and finally on October 18, 1973, an amputation of the right leg below the knee was performed.

Claimant has not been gainfully employed since October 18, 1973.

Defendants urge in their Application for Review-Reopening that there is no causal relationship between the injury of October 16, 1971, and the amputation in October of 1973. Defendants further contend that the amputation that did take place occurred only because the claimant neglected to take medication, stop drinking, stop smoking, and exercise care in matters of personal hygiene.

Therein lies the issue to be resolved, which is twofold, the first question being whether or not there is a causal relationship between the injury of October, 1971, and the amputation of October, 1973, and secondly, if that question be answered in the affirmative, whether or not the claimant's failure to abide by medical instructions was the cause for the degree of physical deterioration that resulted in the ultimate loss of the leg.

Daniel Borgen, M.D., of Iowa City, Iowa, a specialist in orthopedic surgery whose evidentiary medical deposition is a part of this record, testified as follows:

> "Q. Did you have or make any findings or arrive at any opinion, doctor, as to whether or not this patient, Raymond England, was following his diet, taking his insulin and conducting his personal habits in a manner conducive with control of his diabetic condition?
>
> A. I think that his diet and his insulin dose was proper, based upon the fact that he had not had any episodes of either that sounded like he was taking too much or not enough insulin. However, the — in my opinion he was

not following the instructions very well with regarding the care of his foot.

Q. In what respect was he not following his instructions, doctor?

A. Well, based upon the fact that prior to — well, based upon several instances; in January he was requested to come to our clinic when he was discharged from the hospital. He did not come until April. And when I saw him in April I requested he come into the hospital which he did not do. We put casts on his feet, on his leg, foot and leg, and twice, and he broke these casts. When he returned on the 17th I had ordered special shoes for him, they were not ready, and so I felt that it was necessary to put another cast on his foot, but he refused to have another cast on his foot. So — And on that basis I would say he did not follow instructions very well with the care of his feet.

Q. Did you have any conference at that time with the patient concerning problems which might result from failure to have the cast applied at that time?

A. Yes. I told him that the risk that he was running was to develop another infection in healing ulcer."

Robert M. Cochran, M.D., of Omaha, Nebraska, a general surgeon, testified during his evidentiary medical deposition as follows:

"Q. Doctor, had he followed your advice and changed his ways and in July of 73, in your opinion, would that amputation have occurred in October of 73?

A. Oh, boy. Is it going to rain tomorrow? I can't tell. I would like to say 'no', but I can — I mean, I am not that egotistical. I have never had a burn or a — or a non-diabetic — no, don't say that — I have never had a —a burn I have had to amputate and I have had burns that people have stepped in a vat of molten copper and I had one that poured stuff inside his shoe and I had — from the smelter's down here, but I have never had to amputate a burn or because of non-healing or as an infection that we couldn't control. So, therefore, the diabetes has to enter into it. I have amputated diabetic gangrene but usually in a young man, at the age that Ray presents, if we get utmost cooperation with the patient, you can pretty much look that patient in the eye and say that you can get him through the episodes without amputation. What would have happened, I am not a — smart enough to project, say, a set of circumstances come in that would differ, or alter the circumstances, what would have happened, I cannot answer that. The only thing I can do is to say that my expectation was that we could get him through without amputation but when we — it looked like there was — we were fighting a losing cause as far as utmost cooperation and Ray is a nice man, a nice boy, but he is not a very cooperative patient."

The unsettled family problems which resulted from the dissolution of his twelve-year marriage, giving him the custody of his three minor children during this period of treatment, would have taxed the resolve of any reasonable man, but to be required to drive 570 miles and attempt to meet medical appointment deadlines could and did place an undue burden on the claimant. The claimant was married for the second time in May of 1972, and this marriage was annuled in June of 1973. The claimant was married for the third time in August of 1973.

The claimant testified that the reason he refused the offered cast mentioned in Dr. Borgen's testimony was the fact that since he had just remarried and his wife did not possess a driver's license, it was impossible for him to make arrangements to return his wife to Council Bluffs from Iowa City without a motor vehicle. His wife had accompanied him to the University of Iowa Hospitals.

The record supports the fact that the claimant was essentially left to his own devices in making arrangements for treatment. He came under the care of the University of Iowa Hospitals quite accidentally. The claimant testifies that he was not in Iowa City seeking medical care but in fact was in the act of transporting his son there for medical treatment when he sustained a diabetic seizure and found himself under the care of the doctors at the University of Iowa Hospitals.

The claimant testifies he was reimbursed for only two trips between Council Bluffs and Iowa City, whereas he made at least seven such trips. No showing has been made that payment was made by the defendants for the necessary meal expense incurred by the claimant as a result of his enforced travel of 288 miles to seek reasonable medical care.

The claimant has the burden of proving by a preponderance of the evidence that some employment incident or activity brought about the health impairment on which he bases his claim. **Lindahl v. L. O. Boggs Co.**, 236 Iowa 296, 18 N.W. 2d 607; **Bodish v. Fischer, Inc.**, 257 Iowa 516, 133 N.W. 2d 867. A possibility is insufficient; a probability is necessary. **Burt v. John Deere Waterloo Tractor Works,** 247 Iowa 691, 73 N.W. 2d 732. The incident or activity need not be the sole proximate cause if the injury is directly traceable to it. **Langford v. Kellar Excavating & Grading,**

Inc., 191 N.W. 2d 667 (Iowa). If a claimant is suffering from a preexisting condition which is aggravated by an industrial injury, the resultant injury is compensable. **Littell v. Lagomarcino Grupe Co.,** 235 Iowa 523, 17 N.W. 2d 120; **Sondag v. Ferris Hardware,** Iowa Supreme Court (August 28, 1974).

All of the medical evidence agrees that, but for the diabetes and the peripheral neuropathy, the industrial injury would have healed normally. The medical profession further agrees unanimously that because of the diabetes and the difficulty in controlling it, the healing process of the burns suffered at the time of the industrial accident in October of 1971 became difficult. The ulcer that was formed by reason of the industrial injury eventually became gangrenous and required amputation. There is a causal relationship between the industrial incident of October, 1971, and the amputation of October, 1973. The evidence and the record can and does support such a finding.

With respect to the second proposition requiring determination, the defendants assert the defense which seems to be predicated in Equity. They allege in their Application for Review-Re-opening that the failure of the claimant to follow instructions was the cause of his amputation.

A reading of Chapters 85 and 85A, Code of Iowa, casts no light on the problem, as none of the affirmative defenses as set forth in Section 85.16 include the failure of the claimant to abide by medical admonitions and thereby increasing the disability by reason of such refusal.

The case of **Daugherty v. Scandia Coal Co.,** 206 Iowa 120, 219 N.W. 65, appears to be the only occasion that the Iowa Supreme Court has had a similar factual situation brought to its attention. The **Daugherty** case involves the industrial loss of an eye due to the alleged neglect by the claimant to report to a specialist promptly. A careful reading of the opinion indicates that the delay was due to problems of distance and adverse weather conditions, and the Court said:

> "On the question as to whether or not the act of the appellee in failing to go to a specialist promptly was the cause of the loss of the eye, it is, to say the least, a fact question."

Defendants ask that compensation for the permanent partial disability sustained as a result of the amputation of the right leg be denied because of the claimant's neglect in maintaining proper diet, insulin injections, and matters of personal hygiene. We disagree with that contention and, based upon the record, reject their argument for the following reasons:

1. The affirmative defenses alluded to in Section 85.16 require a willful intent.

2. This record does not support a charge of willful neglect by the claimant of his physical condition. Based upon the evidence and the record, it is our conclusion that the claimant chose to disregard some of the advice given him because of a lack of pain caused by the peripheral neuropathy and the resultant disbelief of the doctor's admonitions. During the crucial period of 1972 the claimant was required to be hospitalized a substantial distance from his residence and family.

3. To have allowed this kind of treatment for a diabetic patient who had peripheral neuropathy was poor practice. Clearly, this man required a closer degree of medical supervision than he obtained from the University of Iowa Hospitals. This record does not contain any explanation as to why a resident of Council Bluffs who was suffering from peripheral neuropathy and diabetes and had such a burn with the resultant complications should be required to journey all the way to Iowa City to receive appropriate reasonable medical care.

As a matter of judicial notice, we find that the same and equal care exists for the treatment of such conditions in the Omaha-Council Bluffs area. The defendants failed to provide a program of medical treatment with that end in view. The failure on the part of the claimant to request medical care more conveniently located does not relieve the defendants from providing such care.

THEREFORE, after taking all of the credible evidence contained in this record into account, the following findings of fact are made:

1. That the claimant sustained an industrial injury on October 16, 1971.

2. That the claimant was suffering from diabetes and peripheral neuropathy prior to the date of the industrial injury.

3. That the chemical burns sustained on October 16, 1971, became infected to an extent so as to render further medical treatment of the infection impossible.

4. That the diabetic condition contributed to the medical profession's inability to normally treat the infection.

5. That as a result of the gangrenous condition the removal of the right leg below the knee was performed in order to save the life of the claimant.

6. That there is a medical causal connection between the industrial injury of October 16, 1971, and the surgical removal of the right leg on October 18, 1973.

7. That the stump of the claimant's right leg will shrink with the passage of time, requiring adjustments to the prosthetic device or its replacement.

WHEREFORE, it is ordered the defendants pay the claimant one hundred seventy-five (175) weeks

permanent partial disability at the rate of fifty-nine dollars ($59) per week. It is further ordered that the defendants pay a healing period of one hundred five (105) weeks at the rate of sixty-four dollars ($64) per week, less appropriate credits for amounts previously paid.

Defendants are further ordered to pay four hundred fifty-six dollars ($456) for eight (8) round trips from Council Bluffs to Iowa City made by the claimant, less appropriate credits for amounts previously paid.

Defendants are further ordered to provide adjustment for and replacement of the prosthetic device as the need arises.

Defendants are further ordered to pay the costs of these proceedings and the costs of the shorthand reporter at the hearing.

Signed and filed this 27 day of September, 1974, at the office of the Iowa Industrial Commissioner at Des Moines.

HELMUT MUELLER
Deputy Industrial Commissioner

No Appeal

Barbara Ellen Frank, Claimant

vs.

Liberty Tavern, Employer

Iowa Mutual Insurance Company, Insurance Carrier, Defendants.

Review Decision

Mr. John W. Ackerman, Attorney at Law, 1127 North Second St., Clinton, Iowa 52732, For the Claimant.

Mr. Matt K. Wolfe, Attorney at Law, 609 Tenth Street, DeWitt, Iowa 52742, For the Defendants.

This is a proceeding brought by the defendant, pursuant to Section 86.24 of the Iowa Workmen's Compensation Act, for Review of an Arbitration Decision wherein the claimant was held to have received an injury arising out of and in the course of her employment on February 25, 1972. The matter was submitted on the transcript of the Arbitration proceeding and the oral arguments of counsel.

The facts are not substantially in dispute. The claimant was employed as a barmaid at the Liberty Tavern on February 25, 1972, and was the only person on duty that evening. The customers in the tavern that evening consisted mainly of individuals celebrating the birthday of one of the other customers. At approximately 8:30 P.M., the claimant was challenged by a customer to knock on the ceiling in unison with the words of a then popular song which was playing on the jukebox. In accepting this challenge, the claimant climbed onto the bar and accomplished the task. While descending from the bar by way of a bar stool, she slipped from a rung of the bar stool and fell, breaking her leg at the ankle. The claimant had not been instructed to either perform or refrain from such activities by her employer. The claimant asserted that she had seen similar type activities in the tavern before. The employer had known the claimant to use the bar stool as a ladder before, as he had observed her using it while cleaning, turning on the air conditioner, and checking the numbers on the cash register.

The testimony at the Arbitration proceeding characterized the establishment as a friendly neighborhood tavern, which was patronized mainly by a regular clientele, mostly people working or living in close proximity to the establishment. The claimant was described as a good barmaid and a friendly and outgoing person who attempted to make the customers feel at home while in the tavern.

As a result of the injury, the claimant was hospitalized until March 6, 1972, and she was not released to work until August 14, 1972. No permanent disability compensation is sought by the claimant. The defendant has agreed to pay future medical treatment, if the injury is found to be compensable.

The issue present in this matter is whether or not the actions of the claimant were sufficient to constitute "horseplay", and thus negative her injury as one arising out of and in the course of her employment. Three Iowa cases have been found dealing with horseplay. They are as follows: **Whittmer v. Dexter Manufacturing Co.,** 204 Iowa 180, 214 N.W. 700; **Baker v. Roberts & Beier,** 209 Iowa 290; **Ford v. Barcus,** 155 N.W. 2d 507. None of these cases involved activity which would have been in any way beneficial to the employer. In the present matter, the claimant worked in a friendly neighborhood tavern. Part of the success of the tavern depends upon the customers enjoying themselves enough to return at another time. The actions of the claimant were such as to maintain good relations between the tavern and its patrons. They were for the enjoyment and pleasure of the customers. It is argued that even if the actions of the claimant in climbing upon the bar to knock on the ceiling were "horseplay", that the act of horseplay was concluded and the claimant had

returned to her employment and was doing an act contemplated in her employment in using the bar stool as a ladder. This is not necessary to determine, as in the factual situation here present, it is held that the actions of the claimant on February 25, 1972 were not such as to constitute horseplay and did not remove the claimant from the course of her employment.

WHEREFORE, the Arbitration Decision is hereby affirmed. It is found and held as a finding of fact that the claimant sustained an injury arising out of and in the course of her employment on February 25, 1972, resulting in twenty-four and two-sevenths (24 2/7) weeks of temporary total disability, compensable at the rate of sixty-one dollars and fifty-four cents ($61.54) per week. It is further found that claimant incurred the following medical expenses:

Jane Lamb Memorial Hospital	$898.75
Dr. Thomas R. Flores	298.09
Margret S. Emmons, M.D.	65.00
Osco Drug	3.82
Bluff Pharmacy	7.16
Dr. George Aurand	13.50
Transportation (15 visits)	13.50
Brown's Shoe Fit Company	23.69

THEREFORE, Defendants are ordered to pay Claimant twenty-four and two-sevenths(24 2/7) weeks of temporary total disability at the rate of sixty-one dollars and fifty-four cents($61.54) per week. Accrued payments are to be paid in a lump sum. Defendants are further ordered to reimburse the claimant the foregoing medical expenses. The defendants are ordered to pay the cost of the shorthand reporter at the Arbitration proceeding.

Signed and filed this 7 day of August, 1973.

ROBERT C. LANDESS
Industrial Commissioner

No Appeal

Clarence H. Halbach, Claimant,

vs.

Iowa State Highway Commission, Employer, and

State of Iowa, Insurance Carrier, Defendants.

Review-Reopening Decision

Mr. J. I. Hossack, Attorney at Law, 524 Grand Avenue, Spencer, Iowa 51301, For the Claimant.

Mr. Thomas D. McGrane, Asst. Attorney General, State Capitol, Des Moines, Iowa 50319, For the Defendants.

This is a proceeding brought by the claimant, Clarence H. Halbach, against the Iowa State Highway Commission and the State of Iowa, to recover benefits under the Workmen's Compensation Act on account of an injury sustained on January 25, 1968. The case came on for hearing before the undersigned at the courthouse in Spencer, Iowa, on October 24, 1972, at 1:30 p.m. The record was left open for the submission of further medical and other testimony. The record was completed on December 19, 1973.

The issues to be determined are whether or not the claimant sustained compensable disability and medical expenses as a result of an injury which arose out of and in the course of his employment on January 25, 1968, and the effect on the employer under §85.22, Code of Iowa, of a ten thousand dollars($10,000) settlement between the claimant and the driver of the automobile who struck the claimant.

It should be noted that there is a significant variance in Claimant's statements concerning the severity and nature of the injury. Discrepancy is also indicated between Claimant's statements and observations of the doctors. In his stipulated statement filed in the Industrial Commissioner's Office on December 19, 1973, the blow to the claimant was described as "terrifically hard." The blow was to the claimant's left hip and thigh region or back. He was thrown thirty(30) feet. He was "knocked sprawling" on his left side with his "left arm and elbow and left knee and leg striking the payment(sic) in a sliding fashion." He states he was "stunned and shocked for a while." The claimant indicates the car which struck him was traveling sixty miles per hour(60 mph). Later in the statement the claimant refers to the impact as a "glancing blow." It should also be noted that many of Claimant's statements contain hearsay concerning doctors' opinions. Such statements are disregarded.

The history given to Dr. Frank D. Edington, M.D., by the claimant on the date of the injury was that Claimant was "stooping over" and was struck a "very glancing blow" from a car going fifty to sixty miles per hour(50-60 mph). The blow struck the claimant in the "seat area" and knocked him a "period of feet." X-rays revealed no traumatic bone injury. Arthritic changes were noted. A bruised spot was noted at the point of impact on the lumbosacral area. No other contusions were noted at the time of the injury. At the time of the injury Dr. Edington felt the injury was not serious as the immediate effects were minimal.

The history given to Dr. Horst G. Blume, M.D. a neurosurgeon, in March of 1973, was that Claimant was knocked for at least forty(40) feet by the impact of a car going sixty miles per hour(60 mph). The Claimant stated he was bruised all over his body. The claimant landed face down. The blow was "very strong." Dr. Blume also assumes Claimant was in the air and landed following the impact. He feels the injury could have occurred no matter how far the claimant was thrown. He states "the impact after being thrown through the air is very very important to the patient's symptoms."

The history given to Dr. F. Eberle Thornton, M.D., an orthopedic specialist, indicates Claimant was standing when struck by an auto going seventy miles per hour(70 mph). He indicates to Dr. Thornton that his left leg and arm were skinned. Claimant mentioned having poliomyelitis to Dr. Thornton. Polio was denied in the history given to the University Hospital in Iowa City, Iowa.

It is interesting to note that the most recent statement of the claimant, his stipulated statement, describes in great detail the events of the accident. This statement was prepared over five years after the accident. Previous statements are not so detailed. This statement and others are in conflict with Dr. Edington's observations on the date of the injury. The most valid and accurate version of the accident is found to be that noted by Dr. Edington on the day of the accident. Accordingly, the severity of the original accident is much less than described to doctors in later years. The decreased severity and omission of the presence of poliomyelitis as a factor in Claimant's right arm problems lessens greatly the weight of Dr. Blume's testimony. This tendency to exaggerate also creates a frame of reference for viewing Claimant's present complaints.

Claimant's physical problems are many. He is apparently making claim for an aggravation of a preexisting arthritic condition. All testifying doctors agree that the underlying arthritis is not related to the accident.

Claimant makes claim for a hernia. At best, doctors state that the hernia was possibly related to the injury. However, this deputy commissioner finds that in viewing all the doctors' testimony and the time which passed from the date of the accident to the date of the appearance of the hernia, insufficient relationship between the hernia and the accident is shown.

Claimant makes claim for a kidney problem. No doctor will relate the problem to the injury of January 25, 1968. Claimant's complaints of frequency of urination are apparently due to the medication prescribed for swelling in his legs.

Claimant makes claims for swelling in his legs. According to the medical evidence, the swelling is due to causes unrelated to the injury of January 25, 1968. Other difficulties such as hearing loss are definitely unrelated to the injury of January 25, 1968.

Claimant had surgery on the ulnar nerve of the left arm. No doctor specifically or with sufficient medical certainty relates this difficulty to the injury of January 25, 1968. In fact, Dr. Thornton relates the ulnar nerve problem to a congenital "cervical" or extra rib. A history was given to Dr. Thornton of prior problems with Claimant's arms. The Iowa City records do not indicate a cause of the ulnar nerve problem. Dr. Blume makes no specific note with any certainty as to the cause of the ulnar nerve problem. The ulnar nerve problem is found to be unrelated to the injury of January 25, 1968.

The only problem of the claimant sufficiently related to the accident of January 25, 1968, is the aggravation of the preexisting arthritis. All testifying doctors agree that the arthritic condition was aggravated by the impact of the injury. All agree that no boney injuries occurred at the time of the accident. The form the aggravation has taken is an area of some dispute.

Dr. Thornton notes the claimant had substantial complaints and symptoms in the right arm prior to the accident. He does not relate this problem to the injury. He feels Claimant is substantially disabled due to the arthritis alone. He feels that the claimant registered no complaints prior to the accident as he had nothing "to hang his hat on" as a cause of aches and pains. Dr. Thornton feels Claimant has twenty-five to thirty percent (25-30%) disability of his back due to the injury. Dr. Thornton feels that changes in the spinal degenerative arthritis were indicated on x-rays taken in late 1972 compared to x-rays taken in early 1968. He states that the injury produced some degenerative arthritic changes in the spine. He feels Claimant's back is seventy-five percent (75%) disabled due to a combination of previous arthritic problems and the injury aggravation. Claimant's arm or upper extremity problems are unrelated to the injury. The fact that Claimant was a laborer and not "flagman" as the history indicated, does not change his opinion significantly as to degree of disability.

It should be noted that the parties have stipulated that Dr. William Krigsten, M.D., an orthopedic specialist, would testify substantially the same as Dr. Thornton. However, in his reports of April 20, 1968, and September 7, 1968, Dr. Krigsten indicates the claimant's disability is not a result of the January 25, 1968, incident. He does feel some temporary disability is due to aggravation of the underlying condition.

A report of Dr. William A. Baird, M.D., an orthopedic specialist, indicates the osteoarthritic

changes result in a fiften percent(15%) permanent partial disability.

Dr. Edington, a general practitioner, agrees that the claimant has degenerative arthritis of the spine. That condition was aggravated by the injury of January 25, 1968. The only basis for Dr. Edington's opinion that no disability existed prior to January 25, 1968, is the lack of subjective complaint by the claimant. As the claimant now complains of symptoms, Dr. Edington appears to relate all symptoms to the injury. Dr. Edington does not give a percentage of disability. He states the claimant could not do heavy work for long hours and in inclement weather. Dr. Edington apparently includes any cervical complaint as a disability resulting from the injury of January 25, 1968. However, the left arm problem is probably not related to this injury as no sign of injury was present in this area on January 25, 1968.

Dr. Horst G. Blume notes that x-rays taken March 5, 1973, show practically the same findings as x-rays taken October 23, 1968. He feels Claimant's low back pain is somewhat due to irritation of structures in the lumbar spine. He feels the preexisting arthritic condition of Claimant's back was aggravated. He feels that due to Claimant's back condition he can do supervisory work but not labor. He feels the injury of January 25, 1968, has caused injury to the low cervical nerve roots which result in arm weakness and atrophy. In particular, Claimant has no strength in his right hand. It should be noted that Dr. Blume bases his causal relationship upon the severity of the impact no matter how far Claimant was knocked at the time of the injury. Dr. Blume's history indicates Claimant was thrown through the air. Dr. Blume received no history of previous poliomyelitis. He was told nothing by the claimant of what apparently is a long history of significant right hand problems. He feels Claimant has a permanent disability to the body as a whole of seventy-five percent (75%). Surgery may be a possibility. At present surgery is not recommended.

In examining and comparing the opinions, medical testimony and evidence, it is significant to note that the doctors treating the claimant in the early months following the accident tend to minimize the effects of the aggravation. Even Dr. Edington, the original treating physician, did not feel the injury caused severe effects until a later time. Dr. Thornton's analysis that the arthritis caused problems which Claimant lived with prior to the injury is accepted as being the most realistic medical opinion. Dr. Edington's opinion thus gives way to that of Dr. Thornton. Dr. Thornton's percentage of disability due to the aggravation seems to apply to Claimant's whole back. However, he found difficulties due to aggravation primarily in the lumbar area. The injury has apparently set in motion some further degeneration. The arthritis, however, is a degenerative process in itself. It is thus the finding of this deputy commissioner that some degeneration was caused by the trauma of January 25, 1968. Some is caused by the natural degeneration of the arthritis. No finding in this opinion is to change Claimant's burden of proof as to any further degeneration which may occur.

Dr. Blume's opinion conflicts with Dr. Thornton's opinion concerning the claimant's cervical and bilateral arm weakness problems. As Dr. Blume's opinion is based upon an incomplete history concerning previous arm problems and poliomyelitis, his opinion in the context of arm weakness carries no weight. Dr. Thornton's analysis of the cause of arm weakness is accepted. The "claw" right hand as opposed to other arm problems is found to be the result of poliomyelitis or a cervical rib. The opinion of Dr. Thornton is shared by the University Hospitals in Iowa City in that polio is the cause of the "claw" hand. In any event, the "claw" hand is unrelated to the injury of January 25, 1968. The left arm ulnar nerve difficulty has been previously discussed. Dr. Thornton's opinion that the claimant found something on which to "hang his hat" for all possible problems following the injury is given great weight.

The evidence of Claimant's work history obtained from the claimant and fellow workers is that of a laboring man. No question exists that because of multiple factors the claimant cannot and should not perform heavy labor. If a doctor had been aware of Claimant's arthritic condition prior to the January 25, 1968 injury, heavy labor would not be recommended. As previously discussed, only a portion of Claimant's disability is caused by the aggravation occurring January 25, 1968. This deputy commissioner finds Claimant's permanent partial industrial disability as a result of the January 25, 1968 incident to be thirty-five percent (35%). Claimant is thus entitled to one hundred seventy-five(175) weeks of permanent partial disability compensation.

Little question exists that Claimant was incapacitated from performing gainful employment for at least sixty percent(60%) of one hundred seventy-five(175) weeks, or one hundred five(105) weeks. Dr. Blume does state in 1973, that Claimant could perform a supervisory type of work. It should be noted that credit is to be given to the defendant employer and State of Iowa for the thirty-three and two-sevenths(33 2/7) weeks of sick-leave apparently paid to the claimant prior to the commencement of benefit payments through the Industrial Commissioner's Office.

According to documents required to be filed with the Industrial Commissioner's Office concerning settlement agreements under §85.22, Code of Iowa, the claimant received ten thousand dollars($10,000) in a nonworkmen's compensation recovery from the driver of the automobile which struck the claimant. The attorney fee taken from the ten thousand dollars($10,000) was three thousand dollars($3,000). The employer has paid the claimant in disability benefits the total of six thousand four hundred twelve and 50/100 dollars($6,412.50). Medical benefits totaling one thousand four hundred twenty-two and 30/100 dollars($1,422.30) have been paid. The total of these figures is seven thousand eight hundred thirty-four and 80/100 dollars($7,834.80). Pursuant to §85.22, Code of Iowa, the seven thousand dollars($7,000) recovered from the auto driver was to have been paid to the employer as reimbursement for the compensation paid. As this was not done, the employer is entitled to a credit of this sum against further benefits which may be due.

Paragraph 6 of the stipulation filed December 19, 1973, indicates expenses of the claimant "associated with treatment suffered in the course of his employment." However, the doctors testifying and findings previously made require disallowance of some of those expenses found to be unrelated to the injury of January 25, 1968. The stipulation language is such it appears the employer is not objecting to payment of related expenses as being unauthorized by the employer.

Notice is taken of the files of the Industrial Commissioner's Office concerning bills paid by the defendant State of Iowa. The records of the Industrial Commissioner's Office indicate the following disbursements for medical expenses:

Clarence H. Halbach	$ 24.01
Clarence H. Halbach	7.50
Clarence H. Halbach	14.23
Clarence H. Halbach	96.86
Clarence H. Halbach	38.22
Clarence H. Halbach	87.70
Clarence H. Halbach	109.50
Clarence H. Halbach	98.71
Clarence H. Halbach	22.86
Nelson Drug	22.80
McFarland Clinic	20.00
Dr. Krigsten	22.66
Dr. Krigsten	25.00
Spencer Municipal Hospital	143.00
Dr. F. E. Thornton	90.00
The Jobst Institute, Inc.	20.00
The Jobst Institute, Inc.	20.00
Dr. Edington	346.00
University Hospitals	213.25
TOTAL	$1422.30

The claimant was admitted to University Hospitals in Iowa City in October of 1968, April of 1969, and September of 1969. It is difficult to determine the charges related to the January 25, 1968 injury from the evidential record. If no stipulation as to compensability had been entered, Claimant would not have established his burden of relating the charges to the January 25, 1968 injury with sufficient certainty. In view of the stipulation, the only charges disallowed are those obviously unrelated. Please note no work related surgery was performed. The charges not allowed are:

EKG	$ 17.75
Operating Room	17.00
EKG	19.50
Operating Room	210.00
Anesthesiologist	47.75
Barber	1.75
Operating Room	278.00
TOTAL	$591.75

The total bill from University Hospitals is three thousand five hundred five and 76/100 dollars ($3,505.76). The portion of the bill found related to the January 25, 1968 injury because of the stipulation is two thousand nine hundred fourteen and 01/100 dollars ($2,914.01). Of this figure the sum of two hundred thirteen and 25/100 dollars ($213.25) has been paid by the State of Iowa. The balance due from the employer is two thousand seven hundred and 76/100 dollars ($2,700.76).

The thirty-seven and 50/100 dollars ($37.50) charge claimed by the employee as paid to the University Hospitals has been paid to the claimant by the employer.

Of the one hundred sixty dollars ($160) listed in the stipulation for The Jobst Institute, Inc., the amounts paid directly to The Jobst Institute, Inc., or reimbursed to the claimant are one hundred dollars ($100). The balance due from the State of Iowa is sixty dollars ($60).

Of the six hundred forty-four and 48/100 dollars ($644.48) listed in the stipulation for Nelson Drug, the sum of four hundred four and 69/100 dollars ($404.69) has been paid by or reimbursed to the employee. The balance due from the State of Iowa is two hundred thirty-nine and 79/100 dollars ($239.79).

Of the sixty-two and 66/100 dollars ($62.66) in the stipulation charged by Dr. Krigsten, the sum of forty-seven and 66/100 dollars ($47.66) was paid by the employer. The balance due is fifteen dollars ($15).

The McFarland Clinic bill was paid in its entirety by the employer.

The amount to be paid to the University Hospitals for medical services is seven hundred fifteen dollars ($715).

The bill from "Christenson" of forty-five dollars ($45.00) was for the hernia operation previously found to be unrelated to the injury of January 25, 1968. This figure is apparently included in the four hundred forty-seven and 55/100 dollars ($447.55) figure in the footnote to the stipulation. The remaining four hundred two and 55/100 dollars ($402.55) portion of the five hundred forty-five and 55/100 dollars ($545.55) Spencer Municipal Hospital bill was also incurred for treatment of the unrelated hernia. The balance of the Spencer Municipal Hospital bill of one hundred forty-three dollars ($143) was paid by the employer. No amounts are due from the State of Iowa for these bills.

Dr. Edington received three hundred forty-six dollars ($346) from the defendant employer. The balance of one hundred eighty-nine dollars ($189) is due from the State of Iowa in accordance with the stipulation.

Special note is made that certain amounts included in the bills from University Hospitals and Dr. Edington would, in view of the testimony, be unrelated to the injury of January 25, 1968. The claimant would not have sustained his burden of proof of sufficiently relating these bills to the injury of January 25, 1968. However, the stipulation entered into by the parties has allowed the claimant to meet that burden of proof except for those items previously noted as being obviously unrelated to the January 25, 1968 injury.

Claim is made for travel, meal and lodging expense. No statutory provision exists for allowance of meals and lodging except through a broad interpretation of "reasonable cost of transportation" under §85.39, Code of Iowa. Costs of transportation are allowed under the referenced section in a broad interpretation of §85.27, Code of Iowa. Of the travel expenses for trips listed in the stipulation, the claimant was sent by the employer for examination or evaluation purposes apparently to the McFarland Clinic in Ames, Iowa, and to Dr. Thornton in Des Moines, Iowa. While a recital states that the employer sent the claimant to Sioux City and Iowa City, Iowa, the doctor's testimony is in conflict. Dr. Edington indicates he referred the claimant to Dr. Krigsten in Sioux City and was instrumental in the claimant's attendance at Iowa City. The only meals allowed will be five dollars ($5) for the August, 1968 trip to Sioux City and the five dollars($5) for the March 5, 1971 trip to Des Moines, Iowa. Claimant is to be reimbursed the sum of ten dollars ($10) for meal expense.

Travel expenses will be allowed for the above trips and for trips for medical treatment to Sioux City and Iowa City, Iowa. No provision exists in the Workmen's Compensation Law for allowing expenses for discussions with the employer. The official mileage from Spencer to Sioux City, Iowa, is ninety-five(95) miles. The mileage from Spencer to Iowa City, Iowa, is two hundred seventy(270) miles. According to the document attached to the stipulation, Claimant sought treatment in Sioux City on one occasion and Iowa City on three occasions. The total mileage is one thousand eight hundred ten (1,810) miles. The compensable rate is ten cents (10c) per mile. Claimant is to be reimbursed the sum of one hundred eighty-one dollars ($181) for travel expense.

In summary, the ultimate findings of this deputy commissioner are that as a result of the injury of January 25, 1968, the claimant sustained a permanent partial industrial disability of the body as a whole of thirty-five percent (35%) as a result of the aggravation of Claimant's preexisting arthritis. The claimant is entitled to one hundred five (105) weeks of healing period disability compensation. The following expenses are to be paid or reimbursed to the claimant by the employer:

Iowa University Hospitals	$ 2700.76
The Jobst Institute, Inc.	60.00
Nelson Drugs	239.79
Dr. Krigsten	15.00
Iowa University Hospitals	715.00
Dr. Edington	189.00
Meal expense	10.00
Travel expense	181.00

Claimant is thus entitled to:	
med. expenses previously unpaid	$ 3,921.46
ppd benefits (175 weeks at $47.50/ week	8,312.50
hp benefits (105 weeks at $40.00/week)	4,200.00
	$16,433.96

Of this amount, the defendant employer is to receive credit for the seven thousand dollars ($7,000) of the third-party settlement, six thousand four hundred twelve and 50/100 dollars ($6,412.50) permanent disability benefits previously paid and the thirty-three and two-sevenths (33 2/7) weeks of temporary total disability paid as sick leave. Credit is to be given only for the dollar equivalent of thirty-three and two-sevenths (33 2/7) weeks at forty dollars per week, or one thousand three hundred thirty-one and 42/100 dollars($1,331.42). The total credit to the employer is fourteen thousand seven hundred forty-three and 92/100($14,743.92). Claimant is thus entitled to the sum of one thousand six

hundred ninety and 04/100 dollars($1,690.04) in accrued benefits under the Iowa Workmen's Compensation Law.

THEREFORE, Defendants are ordered to pay the claimant one hundred seventy-five (175) weeks at the rate of forty-seven and 50/100 dollars ($47.50) per week. Defendants are further ordered to pay or reimburse the claimant the above indicated medical, travel and meal expenses totaling three thousand nine hundred twenty-one and 46/100 dollars ($3,921.46). Defendants are further ordered to pay Claimant one hundred five (105) weeks of healing period disability compensation at the rate of forty dollars ($40) per week. Credit is to be given to the defendants for the above indicated sums. The total amount to be paid the claimant is one thousand six hundred ninety and 04/100 dollars ($1,690.04).

Costs of this action are taxed to the defendants.
Signed and filed this 22 day of February, 1974.

ALAN R. GARDNER
Deputy Industrial Commissioner

Appealed to District Court. Decision Pending

Lyle Helle, Deceased,
Joan Helle, Surviving Spouse, Claimant,

vs.

Globe Life & Accident Insurance Company, Employer,
and

Chubb & Son, Inc., Insurance Carrier, Defendants.

Review Decision

Mr. Ralph McCartney, Attorney at Law, 701 Blunt Parkway, Charles City, Iowa 50616, For the Claimant.

Mr. Jack Rogers, Attorney at Law, 940 Des Moines Building, Des Moines, Iowa 50309, For the Defendants.

This is a proceeding brought by the claimant, Joan Helle, against the alleged employer of her deceased husband, Globe Life & Accident Insurance Company, and its insurance carrier, Chubb and Son, Inc., for Review, pursuant to the provisions of Section 86.24 of the Iowa Workmen's Compensation Act, of an Arbitration Decision wherein she was denied benefits for the death of her husband, Lyle Helle. The case was presented on a transcript of the evidence at the Arbitration proceedings and the written briefs and oral arguments of counsel.

Claimant is the surviving spouse of Lyle Helle, who on August 17, 1970 drowned in a swimming pool located at the Redwood Motel in Marshalltown, Iowa.

There are two basic issues presented by the facts in this case. The first is whether or not the decedent was an employee of the defendant employer, hereinafter called "Globe". The second is whether or not, if he was an employee, the injury resulting in death arose out of and in the course of his employment. The arbitrator held that the decedent was an employee, but that his injury resulting in death did not arise out of and in the course of his employment.

Decedent commenced working for Globe on May 11, 1968, and worked continuously and exclusively for Globe until the time of his death. He signed a "Career Agents Contract" with Globe dated June 3, 1968. The contract stated, in part, that the relationship between the decedent and Globe was "that of an Independent Contractor" and that it was not to "be construed to create the relationship of employer and employee." At the time of his death, decedent was a unit manager with agents under his supervision. His immediate supervisor at the time of his death was the branch manager, Douglas McGuiness. The duties of McGuiness consisted of recruiting new agents and assisting the unit managers.

During the period of time the decedent worked for Globe, the number of agents and unit managers they had in Iowa was few. The men worked generally in "crews" moving from place to place throughout the state. McGuiness would receive from Globe lists of policyholders and leads to aid in the solicitation and selling of insurance. McGuiness would then consult with the unit managers and an area would be selected in which the crew would locate for a period of time to conduct their business. At the time in question, McGuiness had selected the Redwood Motel in Marshalltown as the crew headquarters and had arranged for the installation of a private telephone line for the purpose of telephone prospecting.

McGuiness also placed an ad in the Marshalltown newspaper for the purpose of obtaining applications for employment. The prospective applicants were screened by a recruiter who was not a member of the crew. He would then refer the acceptable ones to McGuiness for further interview. McGuiness would conduct the interviews jointly with a unit manager. The unit manager participating in the interview was usually the one to whom McGuiness expected the applicant would be assigned in the event he were hired. Unit Managers also participated in the interviews to learn how to recruit and to express their opinions concerning the applicant.

On the evening of August 17, 1970, all members of the crew dined at the same restaurant. McGuiness and one of the other unit managers left the restaurant first to return to the motel to interview one of two applicants that were expected to be seen that night. Upon returning to the motel, decedent was requested by McGuiness to remain at the motel to participate in the second interview. Decedent apparently requested and received permission to go swimming in the motel pool during the interim. Decedent later died as a result of drowning in the pool.

The Supreme Court has, on numerous occasions, reiterated the criteria used to establish an employer-employee relationship. They are, the employer's right of selection or to employ at will; responsibility for the payment of wages by the employer; the right to discharge or terminate the relationship; the right to control the work; and is the party sought to be held as employer the responsible authority in charge of the work or for whose benefit the work is performed.

The Arbitration Decision quite adequately discusses the facts and law, with regard to the relationship of the parties. The holding that the decedent was an employee of Globe at the time of his death was not seriously challenged in the Review proceeding. Nothing further would be gained by reiterating the findings of fact and conclusions of law, with which I concur, from the Arbitration Decision. The findings of fact and conclusions of law with regard to the relationship of the parties are adopted by this commissioner. It is therefore held that an employer-employee relationship existed for the reasons as set forth in the Arbitration Decision.

The second question presented in this matter turns upon the interpretation placed upon the status of the employee at the time of his injury resulting in death, as to whether or not it arose out of and in the course of his employment. Counsel for both parties have presented excellent briefs supporting their positions. The facts are not in dispute. It is only the application of the law thereto that is in dispute.

Defendants contend that the decedent was engaged in a personal recreational activity and that there was no causal connection between the activity and the employment and no benefit to the employer from the activity. Claimant contends that the decedent was on call and therefore in the course of his employment and that the activity engaged in at the time of his injury was sufficiently related so as to warrant a finding that his injury arose out of his employment.

Claimant does not dispute the finding of fact of the deputy, but insists that his conclusion that there was no causal connection between the activity and the employment nor benefit to the employer arising out of the activity is unduly legalistic, technical and contrary to the broad and liberal interpretation which is required to be placed upon the provisions of the Act.

Claimant makes much of the argument that the decedent was "on the employer's premises" and "on call" and implies that as a result, the injury that he received was one "arising out of and in the course of his employment."

"***It is well settled that the words 'arising out of' and the words 'in the course of' are used conjunctively, and so both conditions must exist to bring the case within the statute.*** **Crowe v. DeSoto Consolidated School District,** 246 Iowa 402, 405; 68 N.W. 2d 63.

"To be compensable an employee's injury must occur 'in the course of employment' and also 'arise out of it.' Code section 85.3(1). The burden rests on claimant to establish these factors. (citation omitted)

"We have frequently said 'in the course of' the employment refers to time, place and circumstances of the injury. 'Arising out of' relates to the cause and origin of the injury. An injury occurs in the course of employment when it is within the period of employment at a place where the employee reasonably may be performing his duties, and while he is fulfilling those duties or engaged in doing something incidental thereto." (citations omitted) **McClure v. Union, etal., Counties,** 188 N.W. 2d 283, 287.

There is some question that the decedent was "in the course of his employment". **1 Larson, The Law of Workmen's Compensation** §22 states the rule as follows:

> "Recreational or social activities are within the course of employment when
>
> (1) They occur on the premises during a lunch or recreation period as a regular incident of the employment; or
>
> (2) The employer, by expressly or impliedly requiring participation, or by making the activity part of the services of an employee, brings the activity within the orbit of the employment; or
>
> (3) The employer derives substantial direct benefit from the activity beyond the intangible value of improvement in employee health and morale that is common to all kinds of recreation and social life."

Without deciding whether or not the employer's "premises" extends beyond the rooms occupied by the decedent and his fellow workers to the entire motel, or at least the swimming pool, the decedent was "on call" at the time of his injury and had been directed to remain close to the

premises, if not actually on the premises. Giving the decedent the benefit of the general principle, stated in **1 Larson** §25, that employees whose work entails travel are continuously within the course of their employment except for a distinct personal departure does not automatically render the case compensable.

The question still remains as to whether or not the decedent's injury "arose out of the employment". That the workmen's compensation act should be liberally construed in favor of the claimant, we do not dispute. We must, however, on questions of law, follow the precedents established by the courts. Although the claimant cites several cases in support of his cause from Iowa and other jurisdictions, it appears that all save one are distinguishable from the case sub judice. In **Sica v. Retail Credit Company, etal.,** 227 A. 2d 33, the employee was injured at the annual company picnic. The court held that the picnic was an express term of the contract of employment; that the employer encouraged and authorized the planning committee, paid all expenses and that it was a benefit to the employer. In **Cabin Crafts, Inc. v. Arlene B. Pelfrey,** 168 S.E. 2d 660, the decedent was attending a convention representing his employer and engaged in the planned activities of the convention; he was where his employer urged and expected him to be and the activity was in the interest of his employer and reasonably necessary or incident to the regular work. In **Rausch v. Workmen's Compensation Appeals Board,** 79 Calif. Reporter 148, a camp counselor was riding horseback on her time off. Horseback riding was part of her regular employment and available to her on her time off at a discounted cost. It was implied that the activities were contemplated by her employment. In **Linderman v. Cownie Furs,** 234 Iowa 708, 13 N.W. 2d 667, the decedent drowned while on a fishing trip at the employer's cabin, which he won as a result of a sales contest. All expenses were paid by the employer and it was admitted to be a benefit to the employer. The court held that the decedent was in the performance of an act incident to his employment and recognized as of value by the employer in connection with sales of its merchandise and service when he went on the fishing trip. This decision, incidentally, was criticized in **30 Iowa Law Review 591.** In 1971, on very similar facts, another jurisdiction held opposite to the **Linderman** case. **Burton v. American Natl. Ins. Co.,** 10 N.C. App. 499, 179 S.E. 2d 7. In **Fintzel v. Stoddard Tractor Co.,** 219 Iowa 1263, 260 N.W. 725, the employee was hunting with a prospective customer at the customer's request. The question in that case was not one of "arising out of the employment", as the court stated that both parties seemed to assume that the injury arose out of the employment, if he was in the course of his employment. Although the court held that his activities were in the furtherance of his employer's business, this case, by the court's own admission, cannot be authority for the issue of "arising out of the employment". In **Bowen v. Saratoga Springs Comm'r.,** 267 App. Div. 928, 46 N.Y.S. 2d 822, a locker boy at the club who drowned was allowed the use of the pool on off time when it was not crowded. It was obviously contemplated by his employment. The only case which cannot be distinguished is **David Wexler and Company v. The Industrial Commission, etal.,** 288 N.E. 2d 420, in which a traveling salesman who was on the road was killed while apparently returning from playing golf on a holiday. It was held not to be unreasonable. The court implies, however, that they are aware that the decision is somewhat contrary to other decisions of theirs which they did not reverse. In this case, the decedent was engaged in swimming, which was not required by his employment, nor sponsored by his employer. It was of no benefit to his employer. At the time of his death, he was at the deep end of the pool, which was somewhat risky because of his lack of ability to swim. He put himself in this position on his own volition and not at the direction of anyone else. He had been in the pool before and was presumably aware of its characteristics.

In **Lamb v. Standard Oil Co.,** 250 Iowa 911, 96 N.W. 2d 330, the court stated at page 917:

> "***However, if the employee by some 'unusual and rash act' causes the injury or it results from risks produced by the personal activities, such injury does not arise out of the employment.' " See also **Crees v. Sheldahl Telephone Co.,** 258 Iowa 292, 300.

I believe it can be conceded that an employee who receives an injury while engaged in an employer sponsored recreational or social activity would be more entitled to compensation than one who was not. In an annotation at 47 ALR 3d 566 concerning injuries suffered in connection with activities or events over which the employer exercised some degree of supervision, control or participation, it is stated at page 571:

> "Whether an employee injured while attending or traveling to or from an employer-sponsored social affair was compelled, either directly or indirectly to attend the affair, whether the employer derived some benefit from his sponsorship of the function, the extent to which the employer sponsored, controlled, or participated in the activity, and whether the social affair was a benefit or consideration of the employment to which the

> employee was entitled, have been recognized as to the primary elements to be considered in determining the compensability of the injury."

If these are the primary elements to be considered in an employer sponsored activity, it should follow that at least these elements and probably more should be considered in an unsponsored activity.

There is no evidence to support a finding that the activity in which decedent was engaged was under any compulsion from his employer; that the employer derived any benefit other than the nebulous prospect that the employee's morale would be improved; that the employer sponsored, controlled or participated in the activity; or that the activity was a benefit or consideration of the employment to which the employee was entitled.

In **Linderman,** supra, (a case in which compensation was granted), the court states at page 714: "A good statement of the test to be applied is contained in a case where compensation was denied." See **Smith v. Seamless Rubber Co.,** 111 Conn. 365, 368, 150 A. 110, 111, 69 ALR 856, where the court states:

> " 'Where an employer merely permits an employee to perform a particular act without direction or compulsion of any kind, the purpose and nature of the act becomes of great, often controlling significance in determining whether an injury suffered while performing it is compensable. If the act is one for the benefit of the employer or for the mutual benefit of both an injury arising out of it will usually be compensable; on the other hand, if the act being performed is for the exclusive benefit of the employee so that it is a personal privilege or is one which the employer permits the employee to undertake for the benefit of some other person or for some cause apart from his own interests, an injury arising out of it will not be compensable.' "

Other cases which have denied compensation for drowning in a motel swimming pool are, **The Matter of Wilson v. United Auto Workers International Union,** 441 S.W. 2d 475, and **Perry v. American Bakeries Co.,** 136 S.E. 2d 643. See also **Hardware Mutual Casualty Co. v. McDonald,** Texas Court of Civil Appeals, San Antonio District, No. 15, 239, November 21, 1973.

There is insufficient evidence to support a finding that Decedent's injury resulting in his death arose out of and in the course of his employment.

THEREFORE, the Arbitration Decision is hereby affirmed.

WHEREFORE, recovery must be and is hereby denied to the Claimant. The parties are ordered to pay the costs of producing their own evidence, except the defendants are ordered to pay the costs of the shorthand reporter at the Arbitration proceeding and the transcript on appeal.

Signed and filed this 29 day of January, 1974.

ROBERT C. LANDESS
Industrial Commissioner

Appealed to District Court. Decision Pending

Ronald Hoover, Claimant,

vs.

Johnson Machine Works, Employer,
and

Employers Insurance of Wausau, Insurance Carrier, Defendants.

Review Decision

Mr. John A. Jarvis, Attorney at Law, 301 N. 22nd Street, Chariton, Iowa 50049, For the Claimant.

Mr. Marvin E. Duckworth, Attorney at Law, 510 Central Nat'l Bank Bldg., Des Moines, Iowa 50309, For the Defendants.

This is a proceeding brought by the claimant, Ronald Hoover, seeking a Review of an Order entered November 20, 1972, wherein he was required to submit to an examination requested by the defendant employer, Johnson Machine Works, and its insurance carrier, Employers Insurance of Wausau, pursuant to the provisions of Section 85.39, Code of Iowa. The claimant produced additional evidence at the Review proceeding and upon this and the arguments of counsel, the matter was submitted on December 27, 1972.

Claimant contends that the request of the defendants to have the claimant examined by Dr. F. Eberle Thornton is unreasonable as to time and place.

The evidence supports the following finding of fact:

Claimant sustained an injury on March 19, 1970, for which he was paid temporary compensation through May 3, 1970. Claimant was treated immediately thereafter by Richard G. Bower, D.O. Dr. Bower reported to the defendants under date of April 1, 1970. This report did not indicate any permanent impairment. Defendants had the

claimant examined by Dr. Thornton on April 27 and June 23, 1970. The reports of these examinations indicated, respectively, "It is a little early to estimate his final disability but I feel that it is going to be minimal" and "I feel that he will have little, if any, permanent disability with time. For his own good, he should be working".

Dr. Bower treated the claimant on several occasions from March 19 through April 22, 1970. The defendants paid the bill for his services during this period. Defendant carrier requested reports from Dr. Bower on March 26, April 21 and May 7, 1970. The only report they received other than his bill was the report dated April 1, 1970. The claimant was allowed to see Dr. L. C. Hermann. Defendant carrier requested a report from Dr. Hermann on June 9, 1970. No report nor bill for services was received from Dr. Hermann by the defendants. With no further activity indicated, the defendant carrier closed their file in December of 1970.

On August 12, 1972, Claimant filed for Review-Reopening of his claim for his injury of March 19, 1970, alleging permanent disability. In response to Interrogatories and by allegation of Claimant's counsel, the claimant is continuing to be examined and treated for conditions related to his injury. No evidence by way of testimony or reports of any findings causally connecting Claimant's condition to the injury in question or establishing a permanent disability has been offered to this commissioner. No medical reports establishing Claimant's present condition have been offered to the defendants. There has been no showing that the claimant is less able to make the same trip from Russell to Des Moines that he made on two occasions in 1970.

Defendants have offered to pay the travel expenses and other statutory obligations necessary to conduct the requested examination. Dr. Thornton has examined the claimant previously and his evaluation would be of great assistance to the eventual trier of fact in the event this matter goes to a hearing on the merits.

Claimant's counsel requested that the hearing be continued to afford him the opportunity to obtain more witnesses. In support of his motion, he entered into evidence a subpoena directed to Dr. Thornton which could not be served in Polk County, because of Dr. Thornton's absence. The motion was overruled, as there was no showing that Dr. Thornton or any of the other witnesses the claimant intended to call could lend any assistance in the determination of the issue at hand, to wit, the reasonableness of defendants' request for an examination of the claimant by Dr. Thornton in Des Moines, Iowa.

THEREFORE, the Order of November 20, 1972, is hereby affirmed. The claimant is ordered to appear in Des Moines, Iowa, for examination by Dr. F. Eberle Thornton, M.D., upon ten (10) days written notice served upon his attorney by registered mail.

Signed and filed this 29 day of December, 1972.

ROBERT C. LANDESS
Industrial Commissioner

Appealed to District Court; Affirmed

Fern Jeffrey, Claimant,

vs.

Northwest Baptist Home Society, Employer,
and

Commercial Union Companies, Insurance Carrier,
Defendants.

Review Decision

Mr. Alfred A. Beardmore, Attorney at Law, 608 Clark Street, Charles City, Iowa 50616, For the Claimant.

Mr. Harry W. Haskins, Attorney at Law, 803 Fleming Building, Des Moines, Iowa 50309, For the Defendants.

This is a proceeding brought by the claimant, Fern Jeffrey, against her employer, Northwest Baptist Home Society, and its insurance carrier, Commercial Union Companies, pursuant to the provisions of Section 86.24 of the Iowa Workmen's Compensation Act for Review of an Arbitration Decision wherein the claimant was awarded medical benefits for an injury received June 6, 1972, but denied weekly compensation benefits for temporary or permanent partial disability.

Notice of assigment for Review hearing was given on January 17, 1974, setting the hearing for February 14, 1974. On February 12, 1974, a Notice of Additional Evidence by the claimant was received in the office of the Industrial Commissioner and by counsel for the defendants. Defendants objected to the timeliness and content of the Notice. Defendants' objections were sustained. The case was then presented on the transcript of the evidence taken at the Arbitration hearing and the arguments of counsel.

Claimant contends that the record supports a finding of disability benefits due the claimant as a result of her injury. Defendants ask that the Arbitration Decision be affirmed.

The claimant testified that she was a fifty year old widow with no dependent children. She was employed as a nurse's aide in the infirmary section of the nursing home operated by the defendant employer. On June 6, 1972, Claimant worked the shift from 6:45 A.M. to 2:45 P.M. Around 2:30 P.M., while assisting a patient from an easy chair to the bathroom, Claimant testified she hurt her left arm. Claimant stated that the patient was sitting in the chair with a bedside table in front of her. Claimant took ahold of the patient with her left arm and pushed the bedside table away with her other arm. As she was raising the patient, about halfway up the patient didn't think she could make it any further so Claimant took a firmer hold and pushed her toward the bed, so that if she did fall it would be on the bed rather than the floor. Claimant managed to get the patient to the bed. Another aide came in and helped the claimant assist the patient to the bathroom. Claimant stated that during this proceeding she had noticed that her left arm hurt, but that she didn't pay much attention to it as she wanted to get the patient to the bathroom before she had an accident.

Claimant testified that she told Lois McCabe, her superior, and Mr. Hale, the administrator, what had happened.

Claimant testified that the next two days were regular days off, but that she returned to work on June 9 and 10. June 10 was her last day of work, as she had previous to the June 6 incident given notice of termination effective that date.

Claimant testified that she had previously elected to terminate her employment because she was still being bothered by an injury to her right arm and shoulder which had occurred in her home in December, 1971. Since she felt that her work was aggravating the injury to her right arm, Claimant had decided to find different work. Claimant had been treated by a chiropractor, Dr. Robert Breitbach, approximately 22 times between December, 1971 and June 6, 1972, for her right arm and shoulder injury.

The record reveals that Claimant went off duty immediately after sustaining the injury to her left arm on June 6, 1972. After her normal days off on June 7 and 8, she worked the two remaining days of her employment. On June 13, Claimant began receiving chiropractic treatments for the work injury from Dr. Breitbach.

Dr. Breitbach's diagnosis, on June 13, 1972, was that Claimant had "suffered a moderate sprain of the left rotator cuff with accompanying capsulitis which progressed to an adhesive capsulitis known as a frozen shoulder." Claimant was then unable to raise her arm above the 90-degree level, nor was she able to reach behind her back at all. During the next sixteen months, Claimant received approximately 54 treatments from Dr. Breitbach. The doctor testified that Claimant's condition was improved. She can raise her left arm "to about 145-degrees and she can reach not quite as far as she should up her back so that it is progressing to be at a normal level at some time in the future."

Claimant has not worked since June 10, 1972, when she terminated her employment. Although she desired to return to office work at that time, she had no immediate employment plans. Claimant's prior work history included work in Montgomery Ward's order office, two bookkeeping positions, inventory, and as a "one-girl" office for a construction company. Her most recent employment prior to working for defendant employer was with the New Hampton Economist Tribune. Although she was hired as a bookkeeper, she testified that she did ads, subscriptions, special orders, and payroll as well as bookkeeping. In March, 1973, under the auspices of Vocational Rehabilitation, Claimant began a stenography course at Hamilton Business College, Mason City. She testified that she was receiving A's and B's in the courses, and that the mobility in her left arm is now "excellent compared to what it was." She stated that her left arm bothered her only when she used a manual typewriter.

It is the claimant's burden to prove that she sustained an injury arising out of and in the course of her employment by a preponderance of the evidence. It is also Claimant's burden to show a causal connection between her injury and disability. **Musselman v. Central Telephone Co.,** 261 Iowa 352, 154 N.W. 2d 128. Questions of causal connection are essentially within the domain of expert testimony. **Bradshaw v. Iowa Methodist Hospital,** 251 Iowa 375, 101 N.W. 2d 167. An award cannot be predicated on conjecture, speculation, or mere surmise. **Sparks v. Consolidated Indiana Coal Co.,** 195 Iowa 344, 190 N.W. 593.

Under the provisions of Section 85.34(2)(a), Code of Iowa, Claimant's disability is to the body as a whole and must be evaluated industrially and not merely functionally. **Dailey v. Pooley Lumber Company,** 233 Iowa 758, 10 N.W. 2d 569. In determining industrial disability, consideration may be given to the injured employee's age, education, qualifications, experience, and her inability because of the injury to engage in employment for which she is fitted. **Olson v. Goodyear Service Stores,** 255 Iowa 1112, 125 N.W. 2d 251. It is the reduction of earning capacity, not merely functional disability, which must be determined. **Barton v. Nevada Poultry Co.,** 253 Iowa 285, 110 N.W. 2d 660.

Claimant's uncontradicted testimony established that her injury arose out of and in the course of her employment. However, it was determined in the Arbitration hearing that the injury did not result in either a period of temporary disability or a permanent partial disability. The Deputy Commissioner found Claimant's evidence in respect to temporary disability to be conjectural and speculative. She had previously given her employer two weeks notice of termination due to her prior injury. She testified that she had no immediate employment plans at that time. Despite the June 6 injury at work, Claimant completed her remaining two days of employment as scheduled. No evidence was presented which alleged that Claimant even attempted to find employment.

Claimant seeks reimbursement for approximately 54 chiropractic treatments from Dr. Breitbach, alleging that they were all due to her June 6 work-related injury. During the six months prior to that injury, Claimant had averaged almost one treatment per week with Dr. Breitbach for her December, 1971 injury to her right arm and shoulder, and she had decided to terminate her employment because of this injury. Yet Dr. Breitbach testified that after June 6, he no longer treated Claimant's right arm and shoulder. He stated that although Claimant's left arm and shoulder had been treated on each of the 54 occasions, "there had been other things come along with it."; i.e., other areas had also been treated. For example, on September 7, 1973, Claimant's ribs were also treated. Dr. Breitbach testified that injury to the associated muscles was related to the work injury. Such an assertion would not appear reasonable. Dr. Breitbach's records fail to show any rib complaints between June 6, 1972 and September 7, 1973, a period of fifteen months.

Claimant did not delineate the extent to which each shoulder injury contributed to the period of alleged disability. Dr. Breitbach testified that Claimant was progressing "toward a normal level at some time in the future." Claimant testified as to her capabilities as a secretary and as a student at the business college. The testimony of both Dr. Breitbach and the claimant failed to show a reduction of earning capacity to establish permanent partial disability resulting from the injury of June 6, 1972, as required by **Barton v. Nevada Poultry,** supra.

Claimant urges that temporary benefits be granted for the period of March to December, 1973, while Claimant was enrolled in the vocational rehabilitation course at the business college. For Claimant to receive temporary disability benefits, incapacity must be proved. The allegation that the claimant was authorized schooling by Vocational Rehabilitation, which commenced nine months after the injury, is not sufficient by itself to carry Claimant's burden of proof.

Testimony presented would indicate that the claimant did, in fact, suffer a disability from the work injury on June 6, 1972, and had not fully recovered the complete functional use of her left arm and shoulder. However, the record was insufficient to substantiate a claim for disability. The claimant did not offer a physician's evaluation or any documentation of temporary or permanent disability. In light of the surrounding circumstances of Claimant's previous injury and her prior decision to terminate her employment, the testimony of her chiropractor that he was treating her was simply too conjectural and speculative to warrant a determination and award of disability. The record is devoid of evidence pertaining to whether the claimant attempted to find employment. Neither was there any claim for the eight visits to medical doctors, which were mentioned during the hearing, nor for any drugs mentioned in answers to interrogatories.

Dr. Breitbach testified that his chiropractic fees since the work injury totaled $330.00. His business records, which were admitted into evidence, indicate a fee total of $315.00. From the testimony in the record and the notations on Dr. Breitbach's records, it is impossible to determine the true extent of the portion of chiropractic treatments which were attributable to the work injury. Various references on the records to "neck"; 5/25/73 "adj-fell down"; and 9/7/73 "ribs, neck, L arm" make an exact determination impossible. The Deputy Commissioner's determination that $220.00 should be attributed to the work injury appears to be reasonable.

WHEREFORE, the Arbitration Decision is hereby affirmed.

It is found and held as finding of fact:

That the claimant did sustain an injury to her left shoulder arising out of and in the course of her employment with defendant employer on June 6, 1972.

That sufficient notice, pursuant to Section 85.23, Code of Iowa, was given to the employer.

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

That $220.00 of Dr. Breitbach's bill of $330.00 is attributed to the injury of June 6, 1972.

THEREFORE,the employer and insurance carrier are ordered to pay the bill of Dr. Breitbach in the sum of $220.00. It is further ordered that defendants pay the costs of Arbitration and Review proceedings, including the costs of the shorthand reporter at both proceedings.

Signed and filed this 29th day of March, 1974.

ROBERT C. LANDESS
Industrial Commissioner

No Appeal

Gary W. Kay, Claimant,

vs.

Des Moines Register & Tribune, Employer,
and

Employers Mutual Casualty Company, Insurance Carrier, Defendants.

Review - Reopening Decision

Mr. James A. Jackson, Attorney at Law, 427 Fleming Building, Des Moines, Iowa 50309, For Claimant.

Mr. E. J. Giovannetti, Attorney at Law, 510 Central Nat'l Bank Bldg., Des Moines, Iowa 50309, For Defendants.

This is a proceeding in Review-Reopening brought by the claimant, Gary W. Kay, against his employer, Des Moines Register & Tribune, and their insurance carrier, Employers Mutual Casualty Company, to recover benefits under the Iowa Workmen's Compensation Act on account of an injury on November 9, 1970. The case came on for hearing before the undersigned Deputy Industrial Commissioner at the Industrial Commissioner's Office in Des Moines, Iowa, on June 11, 1974. The record was closed on July 26, 1974.

A Memorandum of Agreement was filed and approved on December 2, 1970. Claimant was paid temporary disability for twelve and six-sevenths (12 6/7) weeks at the rate of sixty-one dollars ($61) per week. The permanent partial disability rate is fifty-six dollars ($56) per week.

The issue to be determined is the extent of any additional compensable disability sustained by Claimant as a result of the injury of November 9, 1970.

Claimant began work for Defendant Employer in 1969. His job classification was general maintenance. On November 9, 1970, Claimant fell a distance of approximately forty (40) feet from a ladder at Defendant Employer's plant.

Claimant was initially treated for his injuries at Iowa Methodist Hospital. The reports from Iowa Methodist Hospital indicated that Claimant, as a result of the accident, received a laceration above his right eye and an injury to his left leg. J. W. Walker, M.D., interpreted x-rays taken of Claimant as follows:

> "11/9/70, skull: No evidence of fracture in the bones of the skull.
>
> Left leg: No evidence of fracture in the left tibia or fibula.
>
> Left ankle: Negative."

Treatment at Iowa Methodist consisted of three sutures. As a result of the accident, Claimant was off work approximately two and one-half (2½) weeks.

On February 14, 1972, Claimant was seen by James L. Stecher, M.D., for complaints of left leg and low back pain. Dr. Stecher referred Claimant to Joe F. Fellows, M.D., an orthopedic surgeon.

Dr. Fellows examined Claimant on February 22, 1972, for his complaints of left leg and low back pain. Dr. Fellows' examination was as follows:

> "The exam was an orthopedic examination confined to the back and left leg primarily. The examination of the back revealed the general curvature of the back to be straight, his range of motion of the back was essentially normal, although, bending to either side was slightly restricted. He was noted to have some subjective tenderness in the left sacroiliac joint. Neurological exam of the lower extremities was normal. There was no atrophy noted in either lower leg. Tests for sciatic nerve tenderness were essentially negative. In addition, the leg lengths were equal. On examining his left ankle he had some tenderness along the lateral antro joint line. This extended over to the region of the medial malleolus. Ankle motions were normal and the foot distal to the ankle appeared normal. I also examined the remainder of his left leg which was essentially normal."

X-rays taken by Dr. Fellows were interpreted by him as follows:

> "X-rays were taken of the lumbosacral spine, which is the lower back, essentially, and x-rays were also taken of the left ankle and heel. X-rays of the lumbosacral spine were essentially normal. The disk spaces appeared normal and there was no dislocations. I noted the sacroiliac joints were normal as were the hip joints. At the time of the reviewing these films at that date, I felt there was a questionable condition called spondylolysis at the L2-L3 level, but that was not definite. X-rays of the left ankle showed evidence of some spurs or osteophytes forming across the anterior tibia, which is the lower leg bone just above the ankle joint."

Dr. Fellows diagnosed Claimant's back pain to be of a "mechanical nature." He defined the term as follows:

"When I use the term 'mechanical back pain,' I'm referring to pain that originates in the lower back from a muscle or ligament weakness in the back. Usually it's used to differentiate between a neurogenic back pain, which is nerve depression or tension, as opposed from that coming from the bone, from the muscle or the ligament in the supporting structures of the back."

In respect to Claimant's left leg complaints, Dr. Fellows noted evidence of trauma or injury to his anterior left ankle.

Claimant was next seen by Dr. Fellows on February 29, 1972. As a result of his examination, Dr. Fellows noted irritation around the anterior left ankle and persistent back symptoms of a mechanical etiology.

On May 19, 1972, Claimant was admitted to Iowa Methodist Hospital. Dr. Fellows surgically removed the osteophytes that had formed on Claimant's anterior left ankle. Claimant was released from the hospital on May 22, 1972. Sutures were removed by Dr. Fellows on May 30, 1972. Dr. Fellows examined Claimant's ankle on June 2, 7, and 14, 1972. On June 14, 1972, Claimant reported to Dr. Fellows that his back pain had improved. Claimant was next seen by Dr. Fellows on June 28, 1972. Dr. Fellows prescribed medication to reduce the inflammation in Claimant's foot. No complaint of back pain was recorded by Dr. Fellows.

On October 6, 1972, Dr. Fellows examined Claimant for complaints of pain in his left heel and lower back. His findings were as follows:

"I indicated his back had fairly good motion, there was no muscle spasm noted. He had tenderness in the left sacro-iliac region. I examined the lower back, leg incision and the anterior ankle which had healed well with a good range of motion in the ankle without pain or tenderness. Reflexes were normal in the legs and had some mild tenderness over the under surface of the left heel."

Dr. Fellows diagnosed Claimant's back complaints as ". . . recurrent back pain and I did not feel this was radicular or neurological in nature implying this was mechanical."

Claimant was next seen by Dr. Fellows on two occasions during August of 1973. On August 30, 1973, Dr. Fellows noted complaints of pain in the region of the Achilles tendon and in the medial aspect of his left ankle. No complaints were noted by Dr. Fellows concerning Claimant's back.

Dr. Fellows' next and last examination of Claimant was on January 2, 1974. Dr. Fellows recorded complaints of pain in the left heel and foot which ". . . seemed to radiate up the back of his left leg into the left thigh and extend all the way into his left buttock and lower lumbosacral region." His findings were as follows:

"The exam was again primarily the back and left lower extremity. The back appeared straight without a list of a curvature. He had minimal if any muscle spasm present in the lower lumbar spine. He had tenderness in the left paravertebral muscles in the lower lumbar spine and tenderness in the left sacro-iliac joint. The range of the motion was decreased, flexed 25 degrees, extended 25 degrees. Side bending appeared normal, however, to the right and left. Test again for sciatic irritation were negative and measuring the calf and thigh circumference for any atrophy was negative. Leg lengths were equal. He had good muscle strength in all of the involved—or all the major muscle groups of the left lower extremity and I could detect no sensory changes or reflex changes in the left lower leg."

X-rays of the lumbosacral spine were essentially normal.

Dr. Fellows estimated Claimant's permanent partial impairment to his left lower extremity to be four percent (4%) as a result of the incident of November 9, 1970.

Concerning the causal connection between Claimant's back complaints and the incident of November 9, 1970, Dr. Fellows testified:

"Q Doctor, over the period of time that you have treated him, have you formed an opinion within a reasonable degree of medical certainty as to whether or not that condition is a result of the fall that he described to you as occurring on November 9, 1970?

A I think the weakness that he has in the back could have begun after the strain or injury he sustained, but I don't — I do not feel there has been an objective injury which is on going or persistent since that fall.

Q So as I understand it, the findings that you make now concerning Mr. Kay's back are not residual products of the fall of November, 1970?

A Not directly."

He further testified that Claimant has suffered no permanent partial impairment to his low back.

On cross-examination, Dr. Fellows stated:

"Q Doctor, based upon your education and experience in the field, an injury such as Mr. Kay sustained in his fall of 1970 regarding the injury to his left lower extremity, isn't it probable, Doctor, that this type

of injury can cause difficulty to the lower back as Mr. Kay has described to you?

A This is possible.

Q Is it probable, Doctor?

A I can't say it's probable."

He further stated on recross-examination:

"This is my supposition that he probably had a muscle strain at the time of the original injury in the lower back. I don't feel he has a muscle strain, you know, as of right now or as of any of my examinations."

The claimant has the burden of proving by a preponderance of the evidence that the injury of November 9, 1970, was the cause of his disability on which he bases his claim. **Lindahl v. L. O. Boggs,** 236 Iowa 296, 18 N.W. 2d 607. A possibility is insufficient; a probability is necessary. **Burt v. John Deere Waterloo Tractor Works,** 247 Iowa 691, 73 N.W. 2d 732. The extent of compensation payments to which a claimant may be entitled is determined by the loss (disability) resulting from the injury and not by the producing cause (injury). **Barton v. Nevada Poultry Co.,** 235 Iowa 285, 110 N.W. 2d 660.

The question of causal connection is essentially within the domain of expert testimony. **Bradshaw v. Iowa Methodist Hospital,** 251 Iowa 375, 101 N.W. 2d 167. However, expert medical evidence must be considered with all other evidence introduced bearing on the causal connection between the injury and disability. **Burt v. John Deere Waterloo Tractor Works,** supra. Such medical evidence merely relates to the question of the whole burden of proof of the claimant.

Considering the evidence offered in light of the foregoing principles, Claimant failed to sustain his burden of proof by a preponderance of the evidence that his disability is to the body as a whole. Although Dr. Fellows testified that Claimant probably had a muscle strain in the lower back at the time of the original injury, he did not believe Claimant had a muscle strain as of his last examination or at the time of his prior examinations. He further testified that Claimant suffered no permanent partial impairment to his back as a result of the incident of November 9, 1970. The reports of Iowa Methodist Hospital on November 9, 1970, noted no complaints, diagnosis, or history of back injury on that date. Additionally, the record in this case did not contain any medical evidence indicating treatment of Claimant's back during the period from November 9, 1970, to February 14, 1972.

Claimant sustained his burden of proof in respect to the disability to his left lower extremity. Dr. Fellows testified that Claimant as a result of the accident of November 9, 1970, suffered a permanent partial disability of four percent (4%). Since the injury was to a scheduled member, the ability to earn wages was not a factor in determining the disability to the leg.

The parties stipulated that forty dollars ($40) for a pair of shoes for Claimant was fair and reasonable. However, there was no medical testimony that the shoes were necessary for the treatment of his injury of November 9, 1970.

WHEREFORE, it is found that Claimant on November 9, 1970, sustained an injury which arose out of and in the course of his employment and resulted in a four percent (4%) permanent partial disability to his left leg which is compensable at the rate of fifty-six dollars ($56) per week. It is further found that Claimant was incapacitated from working for at least nine and six-tenths (9.6) weeks, entitling him to maximum healing period compensation at the rate of sixty-one dollars ($61) per week.

Costs of the court reporters for the deposition of Dr. Fellows and for this hearing are taxed to Defendants.

Credit is to be given to Defendants for compensation already paid by them.

Interest on the award pursuant to §85.30, Code of Iowa, is to accrue from the date of this decision.

Signed and filed this 19 day of August, 1974.

DENNIS L. HANSSEN
Deputy Industrial Commissioner

No Appeal

Julius Kelch, Claimant,

vs.

Smitty's Super Valu, Employer,
and

Continental Insurance Company, Insurance Carrier, Defendants.

Review - Reopening Decision

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

Mr. Joseph J. Straub, Attorney at Law, 9 East State Street, Algona, Iowa 50511, For the Defendants.

This is a proceeding in Review-Reopening brought by the claimant, Julius Kelch, against his

employer, Smitty's Super Valu, and Continental Insurance Company, its insurance carrier, to recover benefits under the Iowa Workmen's Compensation Act for an injury that occurred on July 30, 1970. This matter came on for hearing before the undersigned Deputy Industrial Commissioner on March 29, 1973, sitting as sole arbitrator, in the courthouse of Emmet County at Estherville, Iowa. At the conclusion of the hearing, counsel were given leave to provide the evidentiary depositions of Drs. Carroll O. Adams, M.D., and Albert D. Blenderman, M.D., and to file briefs. The last brief was filed on July 9, 1973.

There is sufficient evidence in the record to support the following statement of facts, to wit:

The claimant, age 57, began his employment for Defendant Employer in 1969 as a meat cutter. His principal duties were to reduce quarters of beef into retail cuts. On July 30, 1970, while lifting a quarter of beef from the floor, the claimant experienced an immediate onset of pain in the lumbar area. After receiving treatment from a local physician, the claimant was sent in August of 1970 to Dr. Albert Blenderman, M.D., of Sioux City for further treatment. After a period of conservative treatment, surgery was performed on March 1, 1971, with disc removal at L/3-L/4 and a fusion. Subsequent to the surgery Dr. Blenderman released the claimant on August 27, 1971, with a rating of six percent (6%) functional disability. Dr. Blenderman expressed his expert medical opinion, based upon his last examination of April 12, 1973, that the claimant had sustained a ten percent (10%) functional disability of the body as a whole. Dr. Blenderman indicated that there is continuing difficulty at the L-3 interspace; that further surgical intervention at this time would not result in any appreciable decrease in symptoms; that the claimant is continuing to have difficulty; and that any form of continual manual labor is out of the question for the claimant.

Dr. Carroll Adams, M.D., a Fellow of the American College of Orthopedic Surgeons, examined the claimant on January 11, 1972, and counselled the claimant during an eleven-month period, seeing him for the last time in December of 1972. Dr. Adams expressed his expert medical opinion that the claimant suffers from a severe degenerative arthritis in the proximity of the third, fourth and fifth lumbar discs; that this condition was aggravated by the trauma of July 30, 1970; and that the claimant experiences a forty percent (40%) functional disability of the body as a whole.

The issue to be decided in this case is whether or not the claimant has sustained the burden of proof in establishing a "change of condition" and thereby allowing this department to review and reopen his case as provided for in Section 86.34:

> "**Review of award or settlement.** Any award for payments or agreement for settlement made under this chapter where the amount has not been commuted, may be reviewed by the industrial commissioner or a deputy commissioner at the request of the employer or of the employee at any time within three years from the date of the last payment of compensation made under such award or agreement, and if on such review the commissioner finds the condition of the employee warrants such action, he may end, diminish, or increase the compensation so awarded or agreed upon. Any party aggrieved by any decision or order of the industrial commissioner or a deputy commissioner on a review of award or settlement as provided in this section, may appeal to the district court of the county in which the injury occurred and in the same manner as is provided in section 86.26."

Defendants contend that in the filing of a Form 5 they now have that type of "agreement" contemplated under Section 86.34. An agreement connotes a bilateral act. This is basic contract law.

It is general practice within the insurance industry that upon receiving a rating from the attending physician as to the amount of permanent partial disability, the required payments are made. Upon completion of such payments, a Form 5 is filed with this department for the purpose of reporting the total amount paid and the method used in arriving at the amount paid. In this case we have an example of that general practice. By unilateral action the insurance carrier, after paying 14 3/7 weeks temporary disability and 38 weeks permanent partial disability, filed a Form 5. Nothing in this record indicates that an agreement was entered into with the claimant regarding the percentage of temporary total disability. In fact, the claimant did not sign the Form 5, and the act of the carrier in filing the Form 5 cannot be considered as an agreement but rather as the carrier's attempt to conform to this department's Rules of Practice 1.1(4) which reads as follows:

> "**Form No. 5 Employer's Receipt.** This report is to be signed by the employee when compensation is terminated or interrupted, and is to be filed with the industrial commissioner by the employer or insurance carrier, as the closing supplement to Form No. 4."

As noted in **The Iowa Law of Workmen's Compensation,** Center for Labor and Management, University of Iowa, Monograph Series No. 8 (1967) at page 121:

> "If an employer or its insurance carrier has filed a Memorandum of Agreement, paid

weekly compensation but terminated payments without any agreement on the part of the claimant...it can be seen that a determination of the extent of disability has never been obtained. This may be had in a review-reopening proceeding without the technical showing of a change of condition, as there is no point from which a change of condition can be established."

The record is that Dr. Blenderman performed the surgery, and at the time of Claimant's discharge in August of 1971 he was given a six percent (6%) functional disability. Things did not go well, and Claimant again saw Dr. Blenderman, who at the time of his most recent examination in April of 1973 indicated that additional problems were present at L-3 and felt that the claimant had a fifteen percent (15%) functional disability of the spine which equals ten percent (10%) functional disability of the body as a whole.

Defendants contend that no award in excess of the original rating of August 27, 1971, can be made since the claimant has failed to show any legal reason for increasing his disability beyond the original finding.

It is well settled that a change in the condition of the employee warrants the bringing of an action in review-reopening. **Beaver v. Collins,** 242 Iowa 1192, 49 N.W. 2d 877; **Sheker v. Quealey,** 232 Iowa 429, 4 N.W. 2d 250.

Change in condition includes a change in the percentage of disability involving permanent partial disability. **Bousfield v. Sisters of Mercy,** 249 Iowa 64, 86 N.W. 2d 109.

As in the **Bousfield** case, Dr. Blenderman's opinion that the disability considering her history was in excess of the amount originally determined after the first operation justifies the review-reopening.

It follows then that the defendants' proposition that the claimant has not shown a "change of condition" is without merit.

None of Dr. Blenderman's testimony indicates the presence of the arthritic condition testified to by Dr. C. O. Adams, M.D. Dr. Adams is of the opinion that this preexisiting arthritis was aggravated by the episode of 1970. If there is a conflict in the medical evidence, the conflict appears to be centered around the existence of this arthritic condition and its applicability to the extent of the permanent partial disability of the body as a whole as experienced by the claimant. **Gosek v. Garmer-Stiles,** 158 N.W. 2d 731, at page 735 reads:

> "We now hold, cause for allowance of additional compensation exists on proper showing that facts relative to an employment connected injury existed but were unknown and could not have been discovered by the exercise of reasonable diligence, sometimes referred to as a substantive omission due to mistake, at time of any prior settlement or award."

THEREFORE, after taking all of the credible evidence contained in this record into account, it is held as a finding of fact that the claimant did sustain an industrial injury and that said injury arose out of and in the course of his employment for his employer.

It is further found and held as a finding of fact that by reason of this industrial injury the claimant has sustained an industrial disability of forty percent (40%) of the body as a whole. It is further found and held as a finding of fact that the claimant has sustained a temporary total disability in excess of the statutory healing award, not having been gainfully employed for any appreciable period of time since the date of the accident.

WHEREFORE, it is ordered that the defendants pay the claimant two hundred (200) weeks permanent partial disability at fifty-nine dollars ($59) per week, and further the defendants pay one hundred twenty (120) weeks healing period at the rate of sixty-one dollars ($61) per week, less credit for those amounts previously paid.

The defendants are further directed and ordered to pay the following medical expenses:

Dr. A. D. Blenderman, M.D.	$ 40.00
Estherville Medical Center	17.00
Dr. Carroll O. Adams, M.D.	76.00
Radiology Associates of Mason City	20.00
Rexall Drug	154.55
Dr. Roy L. Sharp, D.C.	128.00

It is further ordered that the defendants pay statutory mileage of ten cents (10¢) per mile for ten (10) round trips between Claimant's place of residence and Sioux City, Iowa. It is further ordered that the defendants pay the claimant ten cents (10¢) per mile for ten (10) round trips between the point of Claimant's residence and Mason City, Iowa.

It is further ordered the defendants pay the cost of transcription of the evidentiary medical depositions of Dr. Carroll O. Adams, as well as the cost of the attendance of the court reporter at the hearing.

Signed and filed this 13 day of August, 1973, at the office of the Iowa Industrial Commissioner.

HELMUT MUELLER
Deputy Industrial Commissioner

No Appeal

Jake E. Koenen, Claimant,

vs.

Woodford-Wheeler Lumber Co., Employer,
and

Iowa National Mutual Ins. Co., Insurance Carrier,
Defendants.

Review Decision

Mr. Donald Goranson, Attorney at Law, 304 Main Avenue, Clear Lake, Iowa 50428, For the Claimant.

Mr. E. J. Giovannetti, Attorney at Law, 510 Central Nat'l. Bank Bldg., Des Moines, Iowa 50309, For the Defendants.

This is a proceeding brought by the Defendants, pursuant to the provisions of Section 86.24 of the Iowa Workmen's Compensation Act, for Review of an Arbitration Decision wherein the claimant was held to have received injuries arising out of and in the course of his employment on September 24, 1970. Claimant was awarded certain medical benefits. No temporary disability benefits were awarded as Claimant's regular salary was continued throughout. The issue of permanent disability was held open in both the Arbitration and Review proceedings. The matter was submitted on Review upon the transcript of the Arbitration proceedings and the written briefs and oral arguments of counsel.

The following facts are not in dispute:

Claimant was the manager of defendant employer's Meservey, Iowa lumberyard. In addition to managerial duties, Claimant sometimes called on and helped persons who would have need of the services of the lumberyard, thereby promoting his employer's business. Claimant was paid a monthly salary. The defendant employer had agreed to furnish materials and plans for a house being built for Mr. and Mrs. Elmer Dorenkamp at a site near Meservey.

On September 24, 1970, Claimant accompanied his wife and Mr. and Mrs. Merlin Ruiters on a trip to Mason City, Iowa. Mr. Ruiters was on the trip to attend a meeting in nearby Emery, Iowa. Mrs. Ruiters and Claimant's wife were going shopping in Mason City. On the way to Mason City, a stop was made in Clear Lake at the home of Ken Mortensen, where claimant was to pick up some plans Mortensen was preparing for the Dorenkamps. The plans were not ready, so Claimant returned to the car and accompanied his wife and the Ruiterses to Emery, where they discharged Mr. Ruiter. Claimant then drove the car to Mason City. Claimant waited in the car, except for a few moments prior to departure, while the wives shopped. Claimant drove the return trip to Emery. Mr. Ruiters then resumed driving. They again stopped at the Mortensen residence in Clear Lake where the claimant, after a few minutes wait, secured the Dorenkamp plans. The two couples then resumed their journey back to Meservy with Mr. Ruiters driving. A few miles south of Clear Lake, the vehicle in which Claimant was riding was involved in an accident from which the Claimant received injuries.

The route that the car followed in going to and coming from Mason City was Highways 107 and 106. From this route, there was a slight deviation into Clear Lake to the Mortensen home. This deviation is approximately 13½-14½ blocks one way from the intersection of Highways 107 and 106.

Defendants contend that the claimant would have gone on the trip to Mason City, regardless of whether or not they stopped at Mortensen's house; that his reason for going was purely social and that any business purpose for the trip was incidental and an afterthought.

Claimant contends that his purpose for the trip was to pick up the plans.

The evidence concerning the claimant's intended purpose for making the trip supports the following statement of facts:

At some point in time during the day of September 24, Mrs. Dorenkamp called the claimant to request that she receive the plans for the Dorenkamp house. Sometime during the afternoon of the same day, Claimant's wife called to inform him that she had been invited to accompany the Ruiterses. During the afternoon of the same day, Claimant called Mortensen to inquire as to the availability of the plans. Mortensen indicated that the plans were not then ready, but that he would try to have them ready that evening. Sometime after Claimant was advised by his wife that she was invited to go with the Ruiterses to Mason City, the claimant decided to accompany them. Around 6:00 P.M., Mrs. Koenen called the Ruiterses to inform them she would be going and that the claimant was going also. Mrs. Koenen then knew that Claimant wished to stop at Mortensen's in Clear Lake to pick up the plans. The Ruiterses did not know, however, until Claimant got into the car.

In the instant action, the trip taken by the claimant was dual purpose, in that the claimant did more than just go to his destination, perform his business mission and return.

As stated in 1 Larson, **The Law of Workmen's Compensation,** §18.12:

> "The basic dual purpose rule, accepted by the great majority of jurisdictions, may be summarized as follows: when a trip serves both business and personal purposes, it is a personal trip if the trip would have been made in spite of the failure or absence of the business purpose and would have been dropped in the event or failure of the private purpose, though the business errand remained undone; it is a business trip if a trip of this kind would have been made in spite of the failure or absence of the private purpose, because the service to be performed for the employer would have caused the journey to be made by someone even if it had not coincided with the employee's personal journey."

There is no doubt that the trip itself would have been made without the claimant's presence. The question, however, is whether or not the claimant would have gone along if he could not have fulfilled his business purpose.

The only direct evidence in the record upon this question of the claimant's intent is that of himself, wherein he stated:

> "Well, they were going ahead of time. I wasn't planning on going to Mason until I found out about these plans and I either had to go get the plans myself or when I found out that my wife was going with Ruiters, I just asked him when we left if it would be all right if we'd stop and pick up the plans, rather than take two cars, and he said it would be fine because he had a meeting and we would do this at the same time. I rode with them."

It is difficult to say that the claimant had any purpose for the trip other than the business purpose. As he performed no personal errands for himself on the trip, it can only be said that his non-business purpose would have been to drive the car from Emery to Mason City and back. He was not, however, asked to go along for this purpose. The fact that claimant chose to accompany his wife and friends on a previously arranged trip rather than go alone in his own car does not change his intent for taking the trip.

In 1 Larson, **The Law of Workmen's Compensation,** §18.13, the author explains the opinion of Judge Cardoza in the leading case of **Marks v. Gray,** 251 N.W. 90, 167 N.E. 181 (1929)

> "***He said it was sufficient if the business motive was a concurrent cause of the trip. He then defined 'concurrent cause' by saying that it meant a cause which would have occasioned the making of the trip even if the private mission had been canceled. One detail must be stressed to make this rule complete: it is not necessary, under this formula, that, on failure of the personal motive, the business trip would have been taken **by this particular employee at this particular time.***"

The defendants went to great lengths in an attempt to show that there was no critical need for the trip to be made at this particular time because of the stage at which the construction of the Dorenkamp house was and that the plans could have been obtained in due course without the special trip. It is unrefuted, however, that Mrs. Dorenkamp had asked that she have the plans the following morning and that the claimant felt that some action would have to be taken by him to accomplish this end.

Although the contention is made that the idea to pick up the plans was formulated after the claimant had already decided to go on the trip for personal reasons, the testimony and reasonable inferences therefrom indicate that the claimant considered the fact that the plans had to be obtained in some manner by the next morning as his primary objective. After hearing that a trip was being made in the direction he had to go, this was determined to be a reasonable, and possibly preferable, means of accomplishing this objective. It seems by far the greater inference that the purpose the claimant went on the trip at all was to secure the plans.

Defendants contend that Claimant's injury did not arise out of his employment. As the deputy stated in the Arbitration decision, once an employee is established as being in the course of his employment, an auto accident or other street accident appears to "arise out of" his employment. **Golay v. Keister Lumber Company,** 175 N.W. 2d 385; **Crees v. Sheldahl Telephone Company,** 258 Iowa 292, 139 N.W. 2d 730; **Pribyl v. Standard Electric Company,** 246 Iowa 333, 67 N.W. 2d 438; **Kyle v. Greene High School,** 208 Iowa 1037, 226 N.W. 71.

There is no reason to concern ourselves with the question of whether or not there was a deviation involved which would make the claimant on a personal venture at the time of his injury, rather than on his business route. The claimant's route to obtain the plans was from his home in Merservey to the Mortensen home in Clear Lake. The accident occurred on this pathway. If the accident had occurred between Clear Lake and Mason City there could be cause for concern, but such is not the case. The fact that the claimant stopped at the Mortensen house both before and after going to Mason City strengthens the position that the pathway from Meservey to Clear Lake and back was a business route as to the claimant.

The defendants stipulated that the following bills incurred since the arbitration proceeding were fair and reasonable and were incurred as a result of the injury to the claimant:

Cerro Gordo Medical Society Blood Bank	$ 50.00
Corner Drug - Wheelchair	133.32
Dr. G. Earl Jurgenson	16.50
Radiology Associates	30.00
Rochester Orthopedic Appliance	202.50
Surgical Associates	600.00
St. Joseph Mercy Hospital	177.85

WHEREFORE, the Arbitration Decision is hereby affirmed.

It is found and held as findings of fact: That Claimant sustained an injury arising out of and in the course of his employment with the defendant employer on September 24, 1970, resulting in medical expenses as itemized in the Arbitration Decision and above; and that any obligation for temporary disability payments has been met by the defendant employer's continuation of regular salary payments to the claimant. No finding as to permanent disability was contemplated or is made in this Decision.

THEREFORE, Defendants are ordered to pay the medical expenses itemized above and in the Arbitration Decision. Costs of this proceeding and the Arbitration proceeding are taxed to the defendants.

Signed and filed this 5 day of February, 1973.

ROBERT C. LANDESS
Industrial Commissioner

No Appeal

Robert W. Lehman, Claimant,

vs.

Home Carpet Company,
and

Arthur H. Neumann & Bros., Inc., Employers,
and

Maryland Casualty Company,
and

Bituminous Casualty Company, Respective Insurance Carriers, Defendants.

Review - Reopening Decision

Mr. Timothy J. Walker, Attorney at Law, 1400 Central Nat'l Bank Bldg., Des Moines, Iowa 50309, For the Claimant.

Mr. W. C. Hoffmann, Attorney at Law, 1324 Des Moines Building, Des Moines, Iowa 50309, For the Defendants Home Carpet Co. and Maryland Casualty Company.

Mr. John A. McClintock, Attorney at Law, 803 Fleming Building, Des Moines, Iowa 50309, For the Defendants Arthur H. Neumann & Bros., Inc., and Bituminous Casualty Company.

This is a proceeding in Review-Reopening brought by the claimant, Robert W. Lehman, against his employer, Home Carpet Company, and its insurance carrier, Maryland Casualty Company, and his employer, Arthur H. Neumann & Bros., Inc., and its insurance carrier, Bituminous Casualty Company, to recover benefits under the Iowa Workmen's Compensation Act on account of injuries sustained on January 5, 1970, September 2, 1970, and March 2, 1971. The case came on for hearing before the undersigned at the Iowa Industrial Commissioner's Office in Des Moines, Iowa on Monday, December 20, 1971, at 1:30 P.M. The record was held open for medical depositions. The filing of the depositions was indicated as finished on May 1, 1972.

The issue to be determined is whether or not Claimant sustained compensable disability and medical expenses from the three (3) injuries.

On January 5, 1970, a superumbilical hernia resulted from Claimant lifting a rug pad for the defendant, Home Carpet Co. Dr. Norman Rose, D. O. did a surgical repair of the hernia. Dr. Rose indicated no postoperative problems and that Claimant had a repaired superumbilical hernia. Dr. Rose concedes that hernia repairs can break down.

On September 2, 1970, a superumbilical hernia presented itself while Claimant was unloading a truck of lumber for the defendant, Arthur Neumann & Bros., Inc. The hernia was in the same area as that of January, 1970. Dr. Homer E. Wichern, M.D., did the surgical repair of the hernia.

Dr. Wichern's testimony indicated he felt that Claimant had a "recurrent" umbilical hernia. He felt that the recurrent hernia is "resultant to" the original hernia in January, 1970. He immediately, thereafter, used the phrase "precipitating" cause when referring to the lifting incident of September 2, 1970.

Dr. Wichern explained that the hernia sac in Claimant's abdomen was of unknown origin and of some duration. The sac was in the previous surgical scar. The incident of September 2, 1970, caused abdominal fat or omentum to be caught in

the sac. The resultant "strangulation" of the fat caused the pain and necessitated the surgery by Dr. Wichern sooner than had the incident not occurred.

Dr. Wichern was satisfied the hernia was repaired by his surgery. Claimant was released to return to work and in fact did return to work. The hernia repair was still intact in January, 1971. Dr. Wichern does say that anyone with a hernia repair has a chance of a recurrence of the hernia.

Special note should be made of Dr. Wichern's testimony concerning causation of the September 2, 1970 incident. He states the incident of September 2, 1970, was a precipitating cause of the pain and necessitated the operation he performed. He also states the difficulties in September, 1970, were due to or resulting from the January, 1970, hernia and surgery. His testimony can be interpreted in two (2) ways. Dr. Wichern may be saying that both events are the proximate cause of the problems of September, 1970. Alternatively, he may be saying that the incident of lifting on September 2, 1970, was the intervening cause which brought about the disability. The injury of January, 1970, was healed. However, the problems of January, 1970, caused a weakness and potential for injury.

The latter view is chosen. Dr. Wichern's reference to a recurrence of the primary problem or that the September 2, 1970 incident was a direct result of the January, 1970, hernia and surgery is interpreted to mean that certain difficulties and weaknesses followed the January, 1970, incident. This is a factor in determining permanency when Claimant's condition stabilizes as well as temporary disability unrelated to a specific lifting incident. However, the intervening events of September 2, 1970, were the proximate cause of the disability and operation.

On March 2, 1971, while at work, Claimant again was presented with a superumbilical hernia. Dr. Bryce E. Wilson, D.O., performed the surgical repair of this hernia. The hernia of March 2, 1971, was in the same location as the previous surgery.

Dr. Wilson describes Claimant's subsequent hernias as breakdowns of previous and original herniations apparently due to lifting heavy objects. It does not appear that the history of the incident at work on March 2, 1971, due to lifting was given to Dr. Wilson. Dr. Wilson does indicate that strain may not be the only reason for breakdown of hernia repair. Failure to heal properly is one reason.

Dr. Wilson indicates the hernia found by him was in the scar of the previous surgeries. Dr. Wilson does not indicate that the hernia had healed. He states that in June, 1971, Claimant had a recurrence of the hernia repaired by him. This was subsequently repaired. The breakdown of the previous hernia was again found in September, 1971. The claimant was then referred to University Hospitals at Iowa City, Iowa.

Dr. C. E. Hartford testified concerning the surgical procedures performed at University Hospitals at Iowa City, Iowa. Three (3) hernias were found. Repairs by a screen insertion were made in November, 1971. Dr. Hartford indicated one of the three (3) hernias had been related to a surgery performed on Claimant when he was an infant. The other two (2) were apparently in the area of the scars from previous surgery. He only indicates one hernia was related to the previous repairs.

Dr. Hartford indicates wounds can take up to two (2) years to reach a maximum point of strength. Scars and wounds are never as strong as normal tissue. Dr. Hartford indicates the normal healing of a hernia repair is six (6) weeks. The history of recurrent hernias prevents Dr. Hartford from stating with certainty when the repair would heal in this case. He wants to follow the claimant for a period of six (6) months from April 14, 1972. Dr. Hartford indicates an occupation not involving lifting is recommended. Dr. Hartford does feel the hernias are repaired.

Each of the three (3) incidents caused some temporary incapacity from working and necessitated surgery. Each incident caused some potential weakness for recurrence in that the scar tissue is not as strong as the original tissue. It is devitalized to a degree. However, Dr. Hartford and Dr. Wilson feel the permanent status of the weakness following the most recent surgery has not yet been reached. Dr. Hartford indicates he will not be able to indicate a permanent condition until around October 16, 1972, a period six (6) months from April 14, 1972.

Dr. Hartford and Dr. Wilson were the only doctors examining Claimant after the Iowa City surgery. Dr. Wilson indicates Claimant's difficulties up to the time of the Iowa City surgery are due to the original herniation and repair breakdown and subsequent aggravation. Dr. Hartford indicates at least one of the hernias he repaired is unrelated to the work related injury. The others were in the same area as the other injuries.

Dr. Rose and the claimant both indicated that the claimant was off work due to the January 5, 1970, incident for approximately six (6) weeks. Claimant was off work due to the September 2, 1970, incident from September 3, 1970, to October 26, 1970, a period of seven and five-sevenths (7 5/7) weeks.

Claimant did not return to work after the March 2, 1971, incident. The doctors have indicated that six (6) weeks is a normal healing period for any given hernia. Claimant's difficulties, however, are

compounded by recurrent hernias. In June, 1971, and September, 1971, hernias were found again. Surgery was performed following each. The doctor's testimony would indicate the difficulties Claimant has are related to the several injuries. The testimony places more emphasis on the original injury as a source of difficulties which did not immediately follow a specific episode. Other than the susceptibility for recurrence the period of difficulties began in June, 1971. The doctors placed this emphasis on the original injury as a cause even though the hernias were considered repaired by the operating doctors.

Dr. Wilson and Dr. Hartford indicate Claimant can do sedentary work or work requiring no lifting. Dr. Hartford examined Claimant on April 14, 1972, and gave this opinion as of that date.

Claimant's Exhibit 1 in the sum of $350.00 is the unpaid balance of the bill of the Wilden Clinic for treatment. The bill does not indicate which portion is for treatment for the March 2, 1971, hernia and which is for subsequent treatment.

Claimant's Exhibit 2 in the sum of $242.00 is the bill of Dr. John E. Cisna, D.O. While more proof of connection is preferred, the testimony of the claimant and the other osteopaths bring Dr. Cisna's bill into a relationship with the hernias. Following the six (6) weeks healing time set forth by various doctors, the portion of the bill through April 27, 1971, would be related to the March, 1971, hernia. That total is $101.00. The remainder of the bill is related to later difficulties.

Claimant's Exhibit 3 in the sum of $549.70 is the Des Moines General Hospital bill for the hernia repair and treatment in July, 1971. Again, more evidence relating the bills to the injury is preferred. Dr. Wilson's testimony as to the dates of the hernia repair when compared to the dates on the bill is sufficient to connect the bills to the injury.

Claimant's Exhibit 4 is the bill from University Hospitals in Iowa City, Iowa. More evidence is preferred to relate the bills to the injury. Dr. Hartford gave no testimony concerning the Iowa City Hospital bills. However, the dates of the bills and the dates of the hospitalization for hernia repair coincide. Dr. Hartford is on the University Hospital staff. The total of the bill after all amendments is $1,092.40. Little testimony is given on which to divide the bill according to the work related hernias and that not related. Dr. Hartford indicates one of the three (3) hernias is work related. Therefore, one-third (1/3) of the Iowa City bill is then properly to be considered.

Claimant's Exhibit 5 in the sum of $352.00 plus the $25.00 addendum for Dr. Hartford's April, 1972, examination could have been testified to by Dr. Hartford. However, the relationship of the entire bill corresponds to dates and procedures performed by Dr. Hartford at the University Hospitals. Again, only one-third (1/3) of the cost will be allowed.

The Memorandum of Agreement on file indicates that the rate for temporary disability for Claimant's injury of January 5, 1970, is $52.00 per week. The Memorandums of Agreement on file indicate the temporary rate for Claimant's September 2, 1970, injury and March 2, 1970, injury is $61.00 per week.

WHEREFORE, it is found that Claimant suffered six (6) weeks of temporary disability compensable at the rate of $52.00 per week solely because of the January 5, 1970, injury while employed by the defendant, Home Carpet Co.

It is further found that Claimant suffered seven and five-sevenths (7 5/7) weeks of temporary disability compensable at the rate of $61.00 per week solely because of the September 2, 1970 injury while employed by the defendant, Arthur Neumann & Bros., Inc.

It is further found that Claimant suffered six (6) weeks of temporary total disability compensable at the rate of $61.00 per week solely because of the March 2, 1971, injury while employed by the defendant, Arthur Neumann & Bros., Inc.

It is further found that Claimant sustained thirty-six and five-sevenths (36 5/7) weeks of temporary total disability jointly due to all injuries. This period is determined from the time following six (6) weeks after the March 2, 1971, injury to November 16, 1971, the date of the Iowa City surgery. Sixty percent (60%) of this period is to be paid by the defendant, Home Carpet Co. at $52.00 per week. Forty percent (40%) is to be paid by the defendant Arthur Neumann & Bros., Inc. at $61.00 per week. The sixty percent (60%) and forty percent (40%) figures were determined based upon the doctors' emphasis that the January 5, 1970, injury was the principal source of the weakness for recurrence.

It is further found that Claimant was temporarily totally incapacited from November 16, 1971, to April 14, 1972, partially due to the joint injuries. This is a period of twenty-one and three-sevenths (21 3/7) weeks. One-third (1/3) of this period was jointly caused by the injuries. Defendant Home Carpet Co. is to pay sixty percent (60%) of this figure at $52.00 per week. Defendant Arthur Neumann & Bros., Inc., is to pay forty percent (40%) of this figure at $61.00 per week.

While testimony indicates the first two (2) hernias may have healed, Dr. Wilson and Dr. Hartford's testimony indicates Claimant's condition has not reached a measurable state of stability to enable a finding of permanency. The frequent recurrence indicates the lack of stability for the period from January, 1970, through the present.

It is further found that Claimant's Exhibit 1 in the sum of $350.00 is related to the injuries in issue. Insufficient evidence is given to apportion the amounts between the two (2) defendant employers. The defendant employer, Arthur Neumann & Bros., Inc. is to pay for the portion related to the March 2, 1971 injury. The remainder is to be paid by both defendant employers. The defendant, Home Carpet Co. is to pay sixty percent (60%), the defendant, Arthur Neumann & Bros., Inc. is to pay forty percent (40%).

It is further found that Claimant's Exhibit 2 is related to the injuries in issue. $101.00 is to be paid by the defendant, Arthur Neumann & Bros., Inc. The remainder of the $242.00 bill is to be paid jointly by the defendant employers. Defendant Home Carpet Co. is to pay sixty percent (60%). Defendant Arthur Neumann & Bros., Inc. is to pay forty percent (40%).

It is further found that Claimant's Exhibit 3 in the sum of $549.70 is related to the injuries in issue. Sixty percent (60%) is to be paid by the defendant, Home Carpet Co. Forty percent (40%) is to be paid by the defendant, Arthur Neumann & Bros., Inc.

It is further found that one-third (1/3) of Claimant's Exhibit 4, the University Hospital bills from Iowa City, Iowa, in the sum of $1,092.40 is related to the injuries in issue. Sixty percent (60%) is to be paid by the defendant, Home Carpet Co. Forty percent (40%) is to be paid by the defendant, Arthur Neumann & Bros., Inc.

It is further found that one-third (1/3) of Claimant's Exhibit 5 in the sum of $377.00 is related to the injuries in issue. Sixty percent (60%) is to be paid by the defendant, Home Carpet Co. Forty percent (40%) is to be paid by the defendant, Arthur Neumann & Bros., Inc.

THEREFORE, Defendant Home Carpet Co. is ordered to pay Claimant twenty-six and two-sevenths (26 2/7) weeks of temporary disability compensable at the rate of $52.00 per week. The defendant, Arthur Neumann & Bros., Inc. is ordered to pay Claimant thirty-four and one-seventh (34 1/7) weeks of temporary total disability compensable at the rate of $61.00 per week.

The defendant, Home Carpet Co. is to pay sixty percent (60%) and the defendant, Arthur Neumann & Bros., Inc. is to pay forty percent (40%) of the following bills:

That portion of Claimant's Exhibit 1 unrelated to the March 2, 1971, injury.

$141.00 of Claimant's Exhibit 2.
$549.70 of Claimant's Exhibit 3.
$364.13 of Claimant's Exhibit 4.
$125.66 of Claimant's Exhibit 5.

Defendants are to share equally the cost of the proceeding.

Signed and filed this 11 day of October, 1972.

ALAN R. GARDNER
Deputy Industrial Commissioner

No Appeal

Robert W. Lehman, Claimant

vs.

Home Carpet Company,
and

Arthur H. Neumann & Bros., Inc., Employers,
and

Maryland Casualty Company,
and

Bituminous Casualty Company, Respective Insurance Carriers, Defendants.

Amended Review-Reopening Decision

Mr. Timothy J. Walker, Attorney at Law, 1400 Central Nat'l Bank Bldg., Des Moines, Iowa 50309, For the Claimant.

Mr. W. C. Hoffmann, Attorney at Law, 1324 Des Moines Building, Des Moines, Iowa 50309, For the Defendants Home Carpet Co. and Maryland Casualty Company.

Mr. John A. McClintock, Attorney at Law, 803 Fleming Building, Des Moines, Iowa 50309, For the defendants Arthur H. Neumann & Bros., Inc. and Bituminous Casualty Company.

Now on this 31st day of October, 1972, a mathematical error having been committed, the undersigned amends the Review-Reopening Decision in the matter of Robert W. Lehman - vs - Home Carpet Co. and Neumann & Bros., Inc. as follows:

The first paragraph of the order on page ten (10) of the above mentioned Review-Reopening Decision should now read:

THEREFORE, Defendant Home Carpet Co. is ordered to pay Claimant thirty-two and eleven thirty-fifths (32 11/35) weeks of temporary disability compensable at the rate of $52.00 per week. The defendant Arthur Neumann & Bros., Inc. is ordered to pay Claimant thirty-one and nine thirty-fifths (31 9/35) weeks of temporary total disability compensable at the rate of $61.00 per week. Credit is to be given defendants for

disability compensation previously paid.

The remainder of the order shall remain as in the original decision.

Signed and filed this 31st day of October, 1972.

ALAN R. GARDNER
Deputy Industrial Commissioner

Richard Herbert Lewis, deceased,
Gladys Joan Lewis, spouse,
et al, Claimants

vs.

Standard Oil Div. of American Oil Company,
Employer, Self-Insured Defendant.

Order of Apportionment

Mr. Claude H. Freeman, Attorney at Law, 900 Hubbell Building, Des Moines, Iowa 50309, For William John, Belva C., and Tamara J. Lewis.

Mr. E. J. Giovannetti, Attorney at Law, 510 Central Nat'l Bank Bldg., Des Moines, Iowa 50309, For Gladys Joan and Matthew Lewis, Cynthia, Candice, Patrice, and Michael Dillon.

Mr. W. C. Hoffmann, Attorney at Law, 1324 Des Moines Building, Des Moines, Iowa 50309, For the Defendant.

Mr. Richard Lewis, 3008 North Avalon, Peoria, Illinois 61604, "Certified Mail", Not Appearing.

This is a proceeding initiated by the Standard Oil Co., self-insured, in the nature of a request under §85.43, Code of Iowa, for the Iowa Industrial Commissioner to make an equitable apportionment of the death benefits due the dependents of Richard H. Lewis, deceased. The matter came on for hearing on September 5, 1973, at 9:30 a.m., in the offices of the Iowa Industrial Commissioner in Des Moines, Iowa.

Proceedings have been delayed in Iowa pending the resolution of a claim initiated in Illinois. The claimants were unsuccessful in Illinois. The defendant has admitted for purposes of this proceeding that Richard H. Lewis met his death as a result of an industrial accident occurring on August 28, 1969, in Grundy County, Iowa, which arose out of and in the course of his employment with the defendant, Standard Oil Company. The decedent's salary was such as to entitle his dependents to the maximum weekly benefit for death resulting from the accident occurring August 28, 1969. Testimony at the hearing established that a funeral expense in excess of five hundred dollars ($500) was incurred and paid by the widow, Gladys Lewis.

The sole issue presented in this proceeding is the proportion of the three hundred (300) weeks of death benefits payable at the rate of forty-seven dollars and fifty cents ($47.50) per week, totalling fourteen thousand two hundred fifty dollars ($14,250) which is to be paid to each qualified dependent under the Iowa Workmen's Compensation Law.

The decedent was first married to Delores Lewis on June 9, 1951. Four children resulted from that marriage. The children are Richard W. Lewis, born November 23, 1952, Belva C. Lewis, born November 3, 1953, William John Lewis, born January 12, 1955, and Tamara J. Lewis, born July 9, 1956. Delores Lewis was divorced from the decedent on February 10, 1959.

The decedent was then married to Gladys Lewis, the widow, on December 22, 1963. One child living at the time of the decedent's death resulted from that marriage. The child was Matthew Lyons Lewis, born August 22, 1965.

Prior to being married to the decedent the widow, Gladys Lewis, was married to Donald Dillon. Four children resulted from this earlier marriage between Donald Dillon and Gladys Lewis. The children are Michael John Dillon, born June 11, 1959; Cynthia Lynn Dillon, born July 11, 1955; Candice Jo Dillon, born August 2, 1956; Patrice Ann Dillon, born June 11, 1959. Michael John and Patrice Ann Dillon are twins. It has been established that the latter four children are step-children as contemplated in §85.42, paragraph 2, Code of Iowa.

The widow, natural children under sixteen (16) years of age and step-children under sixteen (16) years of age on August 28, 1969, are presumed to have been wholly dependent on the decedent pursuant to §85.42, Code of Iowa. The only child not included as a presumed dependent is Richard W. Lewis. He was sixteen (16) years old on the date of the accident causing death.

Richard W. Lewis was served with the Industrial Commissioner's Notice of Filing by certified mail sent to his mother and natural guardian, Delores Lewis. An Illinois law firm entered its Appearance on his behalf in the Iowa proceeding. That firm subsequently withdrew as counsel. Richard W. Lewis received a Notice of Assignment of Hearing. Through conversations with his wife and written communications, it appears Richard W. Lewis was informed of his status under the Iowa Workmen's Compensation Law. He did not appear at the hearing to attempt to sustain any burden of proof of actual dependency or other factors which might entitle him to a share of the benefits. Testimony at the hearing indicated no infirmity

existed in Richard W. Lewis on August 28, 1969, and that he was not wholly or partially dependent on Richard H. Lewis on August 28, 1969. Accordingly he is not entitled to participate in the death benefits.

The remaining dependents appeared by their attorneys. The attorneys, after consultation with their respective clients, agreed and requested that the fourteen thousand two hundred fifty dollars ($14,250) in death benefits be apportioned as follows:

1. Seventy percent (70%) of the death benefits should be paid to Gladys Lewis, Cynthia Lynn Dillon, Candice Jo Dillon, Patrice Ann Dillon, Michael John Dillon, and Matthew Lyons Lewis. Of this seventy percent (70%) one-half should be paid to Gladys Lewis, one-half should be paid to the four step-children and one natural child in equal shares.

2. Thirty percent (30%) of the death benefits should be paid to Belva C. Lewis, William John Lewis, and Tamara J. Lewis in equal shares.

This distribution meets with the approval of the undersigned as being fair to all parties concerned.

Five children are under the age of eighteen (18) years on the date of the filing of this decision. Tamara J. Lewis is seventeen (17) years of age; Matthew Lyons Lewis is eight years of age; Candice Jo Dillon is seventeen (17) years of age; Patrice Ann and Michael John Dillon are fourteen (14) years of age. Accordingly the provisions of §85.49, Iowa Code, must apply.

WHEREFORE, it is found that Richard H. Lewis died as a result of an industrial accident on August 28, 1969, which arose out of and in the course of his employment with the defendant Standard Oil Company. It is further found that the decedent's salary was such as to entitle the dependents to the maximum weekly death benefit of forty-seven dollars and fifty cents ($47.50) for three hundred (300) weeks.

It is further found that Richard W. Lewis is not entitled to a share of the death benefits.

It is further found that Gladys Lewis is the widow of Richard H. Lewis.

It is further found that the following children are presumed wholly dependent on Richard H. Lewis pursuant to the provisions of §85.42, paragraph 2, Code of Iowa, as of August 28, 1969:

Belva C. Lewis
William John Lewis
Tamara J. Lewis
Matthew Lyons Lewis
Cynthia Lynn Dillon
Candice Jo Dillon
Patrice Ann Dillon
Michael John Dillon

It is further found that the apportionment of the death benefits among the various dependents as follows is fair and equitable:

Seventy percent (70%) of the death benefits shall be paid to Gladys Lewis, Matthew Lyons Lewis, Cynthia Lynn Dillon, Candice Jo Dillon, Patrice Ann Dillon, and Michael John Dillon.

One-half of the seventy percent (70%) shall be paid to the widow. One-half of the seventy percent (70%) shall be paid to the five named children in equal shares.

Thirty percent (30%) of the death benefits shall be paid to Belva C. Lewis, William John Lewis, and Tamara J. Lewis in equal shares.

THEREFORE, Defendants are ordered to pay the dependents of Richard H. Lewis three hundred (300) weeks of death benefits at forty-seven dollars and fifty cents ($47.50) per week in the above indicated proportions to the above indicated dependents. Accrued amounts are to be paid in a lump sum.

Defendants are ordered to reimburse Gladys Lewis the five hundred dollars ($500) paid by her for funeral expense.

Benefits due the minor children, Tamara Lewis, Matthew Lyons Lewis, Candice Jo Dillon, Patrice Ann Dillon, and Michael John Dillon are to be paid to the clerk of the District Court of Grundy County, Iowa, as trustee pursuant to §85.49, Code of Iowa, or as a judge of the District Court for Grundy County, Iowa, shall direct.

Costs of this proceeding are taxed to the defendants.

Signed and filed this 27th day of September, 1973.

ALAN R. GARDNER
Deputy Industrial Commissioner

No Appeal

Mildred Mahaffey, Claimant,

vs.

Cardinal Cleaners, Employer,
and

Liberty Mutual Insurance Co., Insurance Carrier,
Defendants.

Review Decision

Mr. Joseph B. Joyce, Attorney at Law, 400 Central Nat'l. Bank Bldg., Des Moines, Iowa 50309, For the Claimant.

Mr. W. C. Hoffmann, Attorney at Law, 1040 Des Moines Building, Des Moines, Iowa 50309, For the Defendants.

This is a proceeding brought by Claimant, now deceased, and Kenneth B. Anderson, sole surviving son, beneficiary and representative of Claimant, under Claimant's Petition for Review and Renewed Petition for Review, pursuant to Section 86.24 of the Iowa Workmen's Compensation Act, Defendant's Motion to Dismiss and Claimant's Resistance thereto. Claimant's Petitions and Defendants' subsequent Motion to Dismiss raise issues concerning the entire course of the proceedings below. This proceeding for Review will therefore necessarily consider all matters and proceedings brought before the Industrial Commissioner in connection with this action.

Claimant had been receiving workmen's compensation benefits from the defendants at the rate of $59.00 per week, for a permanent partial disability of 70% of the left hand, which resulted from a compensable injury sustained by the claimant on June 27, 1972. The proceedings relevant to this case were initiated when the claimant, Mildred Mahaffey, filed a Petition for Commutation on June 8, 1973. On July 10, 1973, a Deputy Commissioner issued a letter to both parties expressing his opinion that he was unable to approve the commutation, as it did not appear that the commutation would be in her best interests, as required by Section 85.45 of the Iowa Workmen's Compensation Act.

On July 11, 1973, the claimant filed a request for an immediate hearing and, on July 20, 1973, the claimant also filed a Petition for Review of the Deputy Commissioner's opinion that the commutation should not be granted. The Industrial Commissioner, in a letter to the claimant's attorney dated July 23, 1973, determined that the claimant's Petition for Review was premature, in that the deputy's inability to approve the commutation as set out in his letter of July 10 was not a final finding that was reviewable. The Commissioner also indicated that the purpose of the upcoming hearing was to take evidence and to make a ruling regarding Claimant's Petition for Commutation.

On August 7, 1973, the hearing requested by the claimant was held. The sole witness called by the claimant was Kenneth B. Anderson, the only son of the claimant. Claimant was hospitalized at the time of the hearing. The only other evidence submitted by the claimant was a statement, by Dr. J. W. Hatchitt, D.O., as to the present condition and life expectancy of the claimant. It was stipulated that this report bears no direct reference to any alleged injuries sustained in connection with the Iowa Workmen's Compensation Act. The record of the hearing indicates that at the close of the hearing, the Deputy Commissioner expressed his interest in obtaining additional material to clarify matters testified to by Anderson, especially in regard to alleged bills paid by him for his mother and the extent of the Claimant's medicare insurance coverage. No evidence other than Anderson's testimony was ever submitted with regard to these matters. Both parties submitted written arguments by September 11, 1973.

Before a decision was reached on the merits, the claimant, Mildred Mahaffey, died on September 5, 1973. On October 4, 1973, a hearing was held on the Defendants' Motion for Summary Judgment. The defendants asserted that since the claimant died of causes not connected in any way with her previous compensable injury, the defendants' liability terminated pursuant to Section 85.31(5).

The claimant, at the October 4, 1973 hearing, contends that the Deputy Commissioner's letter of July 10, 1973, which denied commutation, was a reviewable decision and by the timely filing of the Petition for Review on July 20, subsequent to that letter and prior to the August 7 hearing on the merits, entitled the claimant to a Review and a decision on the merits regarding Petitioner's Petiton for Commutation since the claimant was alive at the time the initial Petition for Review was filed on July 20. The claimant also complains that, as of the date of the hearing on Defendants' Motion for Summary Judgment, no decision on the merits of claimant's Petition for Commutation had resulted from the August 7 hearing. Both parties agree that the evidence at this point is identical with the evidence submitted at the August 7 hearing, with the addition of evidence of Claimant's death.

The Deputy Commissioner issued a formal ruling on October 18, 1973, which upheld the Defendants' Motion for Summary Judgment and dismissed the case, as required by Section 85.31(5), Code of Iowa.

On October 26, 1973, the claimant filed his Petition for Review and Renewed Petition for Review (referring to the Petition for Review filed July 20, 1973). On December 31, 1973, Defendants filed their Motion to Dismiss. On February 12, 1974, the hearing before the Industrial Commissioner was held to consider the Defendants' Motion to Dismiss. Both parties took positions similar to the ones taken at the October 4, 1973 hearing. The defendants contend that all the issues presented by the claimant are moot for the following reasons: (1) Regardless of the proceedings before the August 7, 1973 hearing, a formal evidentiary hearing was held and thereby

satisfied the requirements of due process. (2) The claimant failed to produce sufficient evidence showing that the commutation was in her best interests, as required by Section 85.45, Code of Iowa. (3) Section 85.31(5) expressly terminates the liability of the defendants for workmen's compensation benefits upon the death of the claimant for causes not relating to compensable injuries. (4) The claimant's right to compensation was thereby terminated upon her death. (5) All pleadings filed subsequent to Claimant's death were not filed by a person who either has a right to file or who is entitled to benefits. (6) No dependents were left by the decedent.

The claimant contends that the commutation was in the best interests of the claimant; that the Deputy Commissioner's July 20 letter refusing commutation was a reviewable decision; and that since the Petition for Review was timely filed after this letter, but before the claimant's death, the claimant and her representative are entitled to a Review Decision on the merits of their Petition. It is contended on behalf of the claimant that, in spite of the formal evidentiary hearing on August 7, no decision on the merits has been reached regarding commutation. The claimant also contends that any proceeding after the filing of their Petition for Review on July 20 is irrelevant and relies most heavily upon her alleged right for Review of the Deputy Commissioner's letter of July 10, 1973, which did not grant commutation.

There are two main issues presented, a determination of either being dispositive of the entire case. In the interests of justice, however, both issues will be separately and completely considered.

The first issue presented is whether the claimant, Mildred Mahaffey, would be entitled to commutation in light of the evidence presented at the hearing on August 7, 1973.

Section 85.45, Code of Iowa, states insofar as relevant, as follows:

> "Future payments of compensation may be commuted to a present worth lump sum on the following conditions****
>
> "2. When it shall be shown to the satisfaction of the industrial commissioner that such commutation will be for the best interest of the person or persons entitled to compensation****"

The evidence shows that the claimant, Mildred Mahaffey, was receiving benefits for a permanent partial disability, was not employed, was hospitalized, that she had no outstanding debts, left no dependents, and that she was the only person entitled to compensation under the Iowa Workmen's Compensation Law.

It was contended on behalf of Claimant that due to her physical condition and impending death from carcinoma of the lung, such commutation would be in her best interests; that since she was hospitalized and in need of continuous medical services, the commutation would perhaps assist her in meeting her medical expenses; that the commutation would enable her to fulfill her moral obligation to her son by leaving the remaining balance of the commutation to him, as an estate, as partial repayment for his past financial assistance and other services.

The claimant also relies on **Diamond v. Parsons Co.**, 129 N.W. 2d 608, 616(Iowa 1964) which held that "...in determining the best interests of the person or persons entitled to compensation by the statute, Claimant's condition and life expectancy may properly be considered along with other matter...." In the claimant's Brief in Support of Petition for Commutation, at page 5, the claimant summarized her position with the following language:

> "The Petitioner, Mildred Mahaffey, is only requesting that she be given the chance to obtain her award so that she can take care of her moral obligation and perhaps her financial obligations by receiving the award in a lump sum amount before she dies. Because of the fact that her estate would not be entitled to this compensation, nor can a cause of action arise because the workmen's compensation statute prohibits it.(sic)"

At this point, it must be noted that the Iowa Workmen's Compensation Law is not designed to enable a person to fulfill moral obligations. The general theory behind workmen's compensation laws is to provide income replacement during periods of unemployment for work-related injuries. Commutation was not provided for the purpose of circumventing the statutory limitations imposed upon the entitlement of the workmen's compensation benefits to a deceased's estate. The requirements of commutation are explicitly set out by statute, and a person receiving benefits is entitled to commutation only upon a showing that such commutation will be in the best interests of the person or persons entitled to compensation. Claimant's son is not such a person. The claimant has produced no evidence, at any time, showing a need for a lump sum payment as opposed to periodic payments. The record of the August 7, 1973 evidentiary hearing establishes, if anything, that the commutation would only be in the best interests of Claimant's adult son. Anderson, who was the only witness called, testified that he had in the past provided various services to his mother, and paid various bills, including medical expenses. He also testified that his mother felt a moral obligation to leave an estate to repay him for these services.

The claimant, however, offered no evidence as to the amount and number of these bills that Anderson allegedly paid.

More significant, however, is Anderson's testimony as to the financial status of his mother, the claimant. She was in poor physical condition and required hospitalization and medical attention, yet the claimant's medicare insurance policy covered most, if not all, of these bills. The Deputy Commissioner requested further information regarding these matters, yet the claimant did not provide it. In addition, the claimant was receiving Social Security benefits of $151.80 a month, and workmen's compensation benefits in excess of $236.00 a month. Not only does the evidence indicate that the claimant's current income exceeded her current expenses, but that it also exceeded her wages from her previous employment of approximately $332.80 a month. In addition, Mr. Anderson testified that the claimant's income would be apportioned between a joint checking account, from which he paid most of the claimant's bills, and a savings account in his name only. The witness estimated that this latter account solely in his name contained approximately $5,000.00, deposited from all the benefits received by the claimant. The witness also testified that his mother had transferred her house to him, partly if not entirely in consideration for the services Mr. Anderson had rendered to her in the past.

Other than above described, the claimant offered no evidence that would indicate that the commutation would be of benefit to the only person entitled to compensation, Mildred Mahaffey. The record shows no evidence that the commutation was needed to help the claimant meet her current financial obligations, which were adequately covered by her medical insurance, Social Security benefits, and workmen's compensation benefits. The $5,000.00 reserve attributable to the claimant's surplus benefit payments would appear adequate to cover any unanticipated contingency. The purpose of leaving an estate to compensate her son does not fall within the purposes of commutation or the Iowa Workmen's Compensation Law. In fact, that very law prohibits such a purpose by denying the estate of Claimant any right to receive such residue of unpaid benefits.

As mentioned previously, the claimant relies upon **Diamond v. Parsons Co.,** supra, as authority for the proposition that the claimant's condition and life expectancy may properly be considered along with other matter. A review of the fact situation of that case will show that although those factors are relevant, they do not in themselves establish that a commutation will be in the best interests of the person entitled to benefits. In **Diamond,** the claimant needed money to pay doctor bills and attorney fees. In addition, he was planning on buying an equity in apartment houses, and moving in one of those apartments from his rented apartment. In the present case, no such purposes are shown. In contrast, the record shows that the claimant not only received an income from benefits in excess of her expenses, had extensive medical insurance, but had no outstanding debts and an accumulated surplus of approximately $5,000.00.

No evidence has been submitted that a commutation would be in the best interests of the claimant, or that there is any need for commutation in view of the financial status of the claimant. The fact that the claimant may not live long enough to receive the entire amount of benefits previously awarded for permanent partial disability, if they are paid on a periodic basis as opposed to a commuted lump sum basis of future payments, is not such "best interests" as are contemplated by the Workmen's Compensation Act.

The second major issue presented in this proceeding can be stated as follows: In light of the claimant's death before a decision on the merits of the case was reached, does Section 85.31(5), Code of Iowa, require that the defendants' Motion to Dismiss be granted when the deceased leaves no dependents or any other person entitled to compensation by statute?

Section 85.31(5) states, as follows:

> "Where an employee is entitled to compensation under this chapter for an injury received, and death ensues from any cause not resulting from the injury for which he was entitled to compensation, payments of the unpaid balance for such injury shall cease and all liability therefore shall terminate."

The record shows that the claimant died from causes unrelated with any compensable injury. Section 85.31(5) terminates the liability of the employer and insurance company for any benefits that had not already accrued. Upon the death of the claimant, the issues presented by her Petition for Commutation became moot.

The claimant's contention that the Deputy Commissioner's letter of July 10, 1973, which refused commutation, is a reviewable decision and therefore any proceedings subsequent thereto are irrelevant, raise issues concerning whether the claimant was afforded procedural due process. The Deputy Commissioner's letter was to the effect that he was unable to approve the commutation. This was more in the form of an informal advisory opinion than a decision or finding. The Industrial Commissioner, in a letter to the claimant dated July 23, 1973, indicated that

a Review at that time would be premature in light of the upcoming evidentiary hearing scheduled for August 7, 1973, and the Deputy Commissioner's opinion was not a final finding on the merits of the claimant's Petition.

At the August 7 hearing, the claimant was provided with the opportunity to present her case by both the oral and written arguments of her counsel. The claimant had ample opportunity to supply evidence supporting her case and to present witnesses. The Deputy Commissioner even urged any party so desiring to submit further evidence before a decision was reached. The claimant chose not to introduce any further evidence, and has never contended that she had further evidence, or was not given a full and fair opportunity to present her case. Neither the fact that no decision was rendered on the merits of the claimant's Petition before her death, nor the fact that her death terminated her cause of action altered the fact that the claimant was given a full and fair evidentiary hearing. Any decision reached by the deputy, based upon the evidence presented at the August 7 hearing prior to Claimant's death, would have been reviewable at the request of either party. Claimant died on September 5, 1973. In all likelihood, a Review hearing would not have taken place prior to that date. As a Review proceeding is de novo, evidence of Claimant's death would have been admissible at such hearing and the same result afforded by the deputy's ruling on the Motion for Summary Judgment would be indicated.

It is found and held as a finding of fact:

That the claimant did not show that a commutation would be in the best interests of a person entitled to benefits under the Iowa Workmen's Compensation Act. That the claimant, Mildred Mahaffey, died from causes unrelated to her compensable injury.

It is found and held as conclusions of law:

That the liability of the employer, Cardinal Cleaners, and insurance carrier, Liberty Mutual Insurance Company, for future unaccrued benefits was terminated by the death of the claimant. It is further held that no other persons are entitled to receive benefits which would have accrued after her death.

WHEREFORE, the Claimant's Petition for Commutation is denied. Defendants' Motion to Dismiss Claimant's Petition for Review and Renewed Petition for Review is hereby sustained.

THEREFORE, recovery must be and is hereby denied to the claimant. Defendants shall pay the fee of the shorthand reporter at the Arbitration hearing.

Signed and filed this 8 day of April, 1974.

ROBERT C. LANDESS
Industrial Commissioner

No Appeal

Mable McDowell, Surviving Spouse of Robert G. McDowell, Claimant,

vs.

The Town of Clarksville, Employer,
and

Hawkeye Security Insurance Company, Insurance Carrier, Defendants.

Review Decision

Mr. Don Hagemann, Attorney at Law, Waverly, Iowa 50677, For the Claimant.

Mr. Gene Shepard, Attorney at Law, Allison, Iowa 50602, For the Claimant.

Mr. Craig Mosier, Attorney at Law, First National Bldg., Waterloo, Iowa 50705, For the Defendants.

This is a proceeding brought by the defendants, The Town of Clarksville, a municipal corporation, employer, and Hawkeye Security Insurance Company, its insurance carrier, seeking a Review of an Arbitration Decision wherein the claimant, Mable McDowell, was awarded benefits under the Iowa Workmen's Compensation Act for an alleged injury sustained by Robert G. McDowell on June 26, 1969, resulting in his death on June 27, 1969.

Pursuant to the provisions of Section 86.24, the case came on for Review hearing before the undersigned Industrial Commissioner on October 6, 1972. The case was submitted on the transcript of the proceedings at the Arbitration hearing, plus additional evidence presented on behalf of the defendants and the briefs and arguments of counsel.

Robert G. McDowell, at the time of his alleged injury resulting in death, was serving as a volunteer fireman for the Town of Clarksville. The cause of death was subarachnoid hemorrhage, following the rupture of an anterior cerebral communicating aneurysm. Deceased, at the time of his death, was 45 years of age. His regular occupation was an over-the-road truck driver. On June 26, 1969, deceased had returned from a trip to the State of Michigan, arriving home around

4:00 or 4:30 P.M. After arriving home, he visited with the claimant for awhile. They then went downtown for groceries and visited with several people downtown. They returned home and decedent read the newspaper while the claimant prepared the evening meal. They had supper around 6:00, after which Claimant did the dishes and the decedent resumed reading the paper. Shortly thereafter, they decided to take a ride to see how bad the weather situation was. They drove around checking several potential flood sites, including a farm where their daughter kept her horse. While they were visiting with the person who took care of the daughter's horse, the fire siren blew, whereupon decedent got into the car and hurried to the fire station. At the fire station, the volunteer firemen were advised that they had been called in for flood duty, as a farm house was in jeopardy of inundation. Decedent's first duty was to load a 1953 or 1954 Chevrolet dumptruck with sand, by using a hydraulic end loader. Decedent then drove the truck to the farm that was in jeopardy. The truck was not equipped with power steering. Upon arrival at the farm site, the decedent was required to back the truck into position and experienced some difficulty in doing so. After getting the truck into position, decedent and another volunteer fireman commenced filling bags with sand. One would scoop sand while the other held the bag. The bags would be filled one-half to three-quarters full, and then hauled to the back of the truck where someone else would take them off and load them onto an awaiting jeep or boat. Decedent and the other volunteer fireman alternated scooping and holding the bag. Over a period of approximately 20 minutes, some 30-50 bags were filled. It then became apparent that more sand was going to be needed, so the decedent was delegated to radio the fire station to secure the same. Decedent went to the other truck which contained the radio, and asked for permission to use the radio. Decedent got into the truck and, using the radio, tried to contact the fire station. As he was talking on the radio, he started to mumble. One of the other firemen asked him what was the matter and decedent stated that he didn't feel very good. He was reported variously as appearing as if he was going to throw up, and that his face turned dark. He then slumped over the steering wheel, at which time two firemen removed him from the cab of the truck and commenced giving first aid. Decedent was then taken in a comatose state to the local hospital, where he remained overnight. He was then removed to Iowa City the following day, by ambulance, where he came under the care of Dr. R. A. Caulkins, M.D., a neurologist. Dr. Caulkins first evaluated the decedent around 10:00 A.M. on June 27, 1969. Decedent expired at 8:20 P.M.

The medical testimony in this case consists of four eminently qualified physicians. Each of them are Board Certified in their respective fields and have had prior experience in the field of subarachnoid hemorrhage and intracranial aneurysms. Each of the doctors testified on the basis of a hypothetical question. Although one of the doctors had observed the decedent while he was living, he was in a coma and the history he obtained was from decedent's daughter who was not present at the time decedent was stricken. Another of the doctors participated in the autopsy. All of the doctors has basically the same information from which to testify. As there is no variance between the diagnosis of the various doctors, we shall limit the review of the testimony to the issue of whether or not the activities in which the decedent was engaged while acting as a volunteer fireman on June 26, 1969 were causally related to the rupture of the aneurysm resulting in his death.

Dr. Caulkins testified variously with regard to causation, as follows:

"A. Well, I think that it is a reasonable opinion that the activity in which this patient was engaged at the time of the onset of his illness was related to the rupture of his aneurysm." (Deposition, p. 14)

"A. I believe most physicians believe them (the activity he was involved in at the time of the rupture) to be related." (Deposition, p. 15)

"A. In my opinion, I think it is reasonable to record it as possible, if not likely, that the aneurysm ruptured as a consequence of his increased activity and stress of the day.

"Q. Would you say that was probable? (objected to as leading)

"A. In my opinion it is probable (Deposition, p. 16)

"A. Well, in my opinion, I believe that most physicians given that information would probably conclude that the aneurysm ruptured as a consequence of his stressful activity of the day." (Deposition, p. 17)

"A. I believe that it is reasonable that most physicians would agree that stress, exercises, emotional stress, can contribute to the rupture of these aneurysms." (Deposition, p. 23)

"A. I would say that most people would agree that it is unknown with absolute certainty, but it is also common clinical surmise or conjecture as you said earlier that they are related or can be related." (Deposition, p. 25)

"A. ***I just mean to say that I believe most physicians believe that stress can be a cause of a rupture of an aneurysm at the time it ruptures that it can be a contributing

factor.

"Q. And so that also is your opinion?

"A. Well, yes, in my opinion, that stress and effort can contribute to an aneurysmal rupture. I just mean to say that isn't the only cause, but under some circumstances that's why it ruptured when it did and I think that's what happened in this case, but I imagine that I may be wrong." (Deposition, pp.35-36)

"A. ...I think that most neurologists would say that while there is question about what causes aneurysms to rupture and no one wants to speak with absolute certainty, I believe that most neurologists believe that many aneurysms rupture during violent activity." (Deposition, p. 36)

"Q. Doctor, then based on your observations your experience and the facts as I stated before, it is your opinion based on a reasonable medical certainty that this particular aneurysm ruptured as the result of the activities of that day?

"***Objected to as leading.

"A. Well, in my opinion, I think they are related." (Deposition, pp. 38-39)

Dr. William F. McCormick, M.D., a neuropathologist, testified:

"Q. ***Is there any relationship between trauma and the rupturing of an aneurysm?

"A. Not that I am certain of. Not that I am reasonably certain of.

"Q. Is there any relationship between stress and strain or violence and the rupture of an aneurysm?

"A. Not that I am reasonably certain of.

"Q. Any relationship between hypertension and the rupture of an aneurysm?

"A. ***There is no good relationship at all between the present existing blood pressure and whether or not the aneurysm will rupture." (Deposition, pp.12-13)

"A. I think that it is impossible to say with reasonable medical certainty that there is any causal relationship between rupture of the aneurysm and the hypothetical situation you advised." (Deposition, p. 17)

"A. I think there is no reasonable association between the exercise and the rupture of the aneurysm." (Deposition, p. 18)

"Q. ***Do you think it is possible, given enough stress and strain that the stress and strain would contribute to the rupture of an aneurysm?

"A. I would assume that it is possible.

***

"Q. What about probable, Doctor, answer to same question?

"A. I do not think it is probable." (Deposition, p. 40)

Dr. Norbert Enzer, M.D., a pathologist and clinical pathologist, testified:

"A. It is my opinion that the activities described in your question did not have anything to do with the rupture of the aneurysm." (Deposition, p. 28)

"Q. What did cause this aneurysm to rupture, Doctor?

"A. I think the progressive degeneration of the wall of the aneurysm.

"Q. Then are you connecting the fact that it occured immediately subsequent to physical stress and emotional stress as coincidence?

"A. Yes. Yes. ***" (Deposition, p. 50)

"Q. In other words, Doctor, you don't feel that his physical activities of that day or the emotional stress of the day caused the rupture of the aneurysm at all; is that correct?

"A. I've indicated that, I hope, to you in the cross-examination, and I certainly hope I indicated it in my direct response.

"Q. Or you don't know?

"A. No. I said—I didn't say I don't know. I said my opinion was it did not contribute." (Deposition, pp. 52-53)

Dr. F. Miles Skultety, M.D., a neurosurgeon testified at the Review proceeding in response to the hypothetical question, "I don't believe that there is connectionship." He testified further that there is no relationship between emotional stress, strenuous physical activity and the rupture of an aneurysm. He believed it to be a random event that can happen under any circumstances and didn't believe that there is any evidence to date to support the idea that stress or strain, physical or emotional, will precipitate the rupture. He testified further, "I believe that if he had been doing something else it would have ruptured anyway." He conceded that it was possible but not that it is probable.

The burden of proof is upon the claimant to establish her case by a preponderance of the evidence. **Almquist v. Shenandoah Nurseries, Inc.,** 218 Iowa 724, 254 N.W. 35. For Claimant to obtain compensation, it must be shown by a preponderance of the evidence that the death was caused by a "personal injury" arising out of and in the course of decedent's employment. **Lindahl v. Boggs,** 236 Iowa 296, 18 N.W. 2d 607.

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 body, but because of the traumatic or other

hurt or damage to the body of an employee. **Almquist v. Shenandoah Nurseries,** supra. A disease which under any rational work is likely to progress so as to finally become disabling does not become a "personal injury" merely because it reaches a point of disablement while work for an employer is being pursued. It is only when there is a direct causal connection between exertion of the employment and the injury that a compensation award can be made. The question is whether the diseased condition was the cause, or whether the employment was a proximate contributing cause. **Musselman v. Central Telephone Company,** 154 N.W. 2d 218.

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. The evidence must be based upon more than mere speculation, conjecture and surmise. **Burt v. John Deere Waterloo Tractor Works,** 247 Iowa 691, 73 N.W. 2d 732.

The testimony of Drs. McCormick, Enzer and Skultety are definitely contrary to Claimant's position that decedent's death was causally connected to the work which he was performing at the time of his alleged injury. Dr. Caulkins is the only doctor whose testimony is even favorable to Claimant's viewpoint. His opinion was stated variously as what he believed most physicians would believe which, although not objected to, at least hedges on hearsay and is certainly not supported by the testimony of the other three doctors; that it is a "a reasonable opinion", that it is "possible", that it "can contribute", that it is "common clinical surmise or conjecture". The strongest testimony of Dr. Caulkins in support of the claimant's position, was in response to leading questions when he stated that, in his opinion, it is "probable", and "I think they are related".

Under the evidence presented in this record, the claimant has failed to carry her burden of proof.

THEREFORE, the Arbitration Decision is hereby reversed.

It is found and held as finding of fact:

That the decedent did not sustain an injury on June 26, 1969, arising out of and in the course of his employment by the defendant employer, resulting in death.

WHEREFORE, recovery must be and is hereby denied to the claimant. The parties shall pay the costs of producing their own evidence, except the defendant shall pay the fees of the court reporter at the Arbitration and Review proceedings.

Signed and filed this 26 day of March, 1973.

ROBERT C. LANDESS
Industrial Commissioner

Appealed to District Court: Reversed

Patrick J. Morrissey, Claimant,

vs.

City of Waterloo, Employer,
and

Bituminous Casualty Company, Insurance Carrier, Defendants.

Review Decision

Mr. Robert D. Fulton, Attorney at Law, 616 Lafayette Street, Waterloo, Iowa 50705, For the Claimant.

Mr. John McClintock, Attorney at Law, 803 Fleming Building, Des Moines, Iowa 50309, For the Defendants.

This is a proceeding brought by the defendants, City of Waterloo, and their insurance carrier, Bituminous Casualty Co., pursuant to the provisions of Section 86.24 of the Iowa Workmen's Compensation Act, for Review of an Arbitration Decision wherein the claimant, Patrick J. Morrissey, was awarded workmen's compensation benefits as a result of injuries he received on or about April 5, 1971, resulting in 4% permanent partial disability to the back. It was further found that the claimant received an injury in November, 1970, but that he failed to give statutory notice to his employer and was thereby precluded from recovery for that injury. The case was presented for review on the transcript of the evidence presented at the Arbitration hearing, a medical report by Dr. Robert H. Kyle, M.D., and the written briefs and arguments of counsel.

The claimant testified that at the time of the Arbitration hearing, he was 23 years of age and single. He had completed high school and more than two years of college. Prior to being employed by defendant employer, hereinafter referred to as "City", he had worked at various jobs involving physical labor. He testified to having no physical difficulties prior to and at the time he was employed by the City in June of 1970. He was employed by the City on a crew of three involved in garbage collection. The crew consisted of a

driver and two helpers. Claimant was one of the helpers whose job it was to collect the garbage cans from houses, carry them to the truck and dump them into the back of the truck. Claimant testified that he worked without any difficulty until about the middle of November, when he noticed a pain in his buttocks and left leg, similar to a pulled muscle. The pain didn't bother him much and he continued to work until in April of 1971, when he fell from the garbage truck. During the interim between November and April, he sought the treatment of a chiropractor, Dr. Laneville, in January, for three treatments for the pain he was suffering in his back. During this interim the pain would come and go, but the periods of exacerbation would become extended. On or about April 5, 1971, at the first stop on the route after emptying a garbage can, the claimant attempted to jump onto the truck. His left leg "gave out". He tried unsuccessfully to hold on and fell from the truck. Prior to this incident, he testified that he had felt pain while lifting garbage cans and again when he attempted to jump onto the truck. He did not report the fall immediately, but later that day he reported it to the driver who then slowed down the truck and the claimant continued working the remainder of the day. The next day he had difficulty getting out of bed and did not go to work. Claimant sought the services of a Dr. Thornton, who took x-rays and advised the claimant that he could find nothing. He recommended that he see a specialist. Claimant testified that he did not return to work until the following week. He worked the entire day, but was having difficulty and was being assisted by the other helper. He did not go back to work after that because of pain in his back and because he was receiving treatment. He sought treatment from Dr. Kyle, a neurologist. Dr. Kyle had the claimant admitted to St. Francis Hospital, where a myelogram was conducted. He received no further treatment from Dr. Kyle. He was later sent to Dr. Bernard Diamond, M.D., by the defendants, who gave him physical therapy for a month. Dr. Diamond then released the claimant to return to work on June 28, 1971. When he returned to City, there was no work available for him. Claimant testified that he still had trouble with his back and he sought the services of Dr. John R. Walker, M.D., who gave him physical therapy for a month. He was no longer receiving therapy, but still in the care of Dr. Walker at the time of the Arbitration hearing.

On cross-examination, the claimant testified that he reported the incident of April 5, 1971, to the secretary and to Carl Fagerlind on the following day. He indicated that he had previously talked of his difficulty with the driver, Arlan Waterman. He further testified that in November, 1970, he had first had his onset of back pain and that the pain progressively got worse, but that after the April 5 incident he could hardly do anything. He described his activities since June, 1971, as having gone hunting once or twice a week during the hunting season, attempting to shovel snow on one occasion and swimming, which he considered therapy. He had not actually sought other employment and intended to return to college in February, working toward his degree.

The testimony of Claimant's mother confirmed his absence of symptoms before November, 1970, and his difficulties after that time which became more severe after April 5, 1971.

Arlan Waterman testified that he was the driver of the truck upon which the claimant worked. The claimant went to work on his truck when he first came with the City. Claimant had made complaints to him about back trouble several months after he started working. Waterman suggested that he see Dr. Laneville, or another chiropractor, and get fixed up. He would make complaints about his back hurting off and on, but continued working. Claimant did not report any definite injury to him until he reported having slipped and fallen. After that, they slowed down, but there had been other days when they had slowed down for the claimant. When he returned to work later, he was working slowly and "just couldn't do it".

Carl Fagerlind testified that he was the street commissioner for 21 years and had recently retired. He further testified that he had filled out an accident report on April 22, 1971, on the claimant, covering the incident of April 5, 1971. He believed that he had called the claimant into the office because he had heard that he had a bad leg. He had no other reports of injuries covering the claimant. He seemed to recall that he had observed the claimant limping one day after coming in from work and sent word to his foreman to have him come in to fill out an accident report.

Kenneth R. Petersen testified that he was foreman of the Sanitation Department and as such was in charge of crews of which the claimant was a member. He kept the attendance records on the claimant. These work sheets kept by him for the entire year of 1971 were presented as evidence. The sheets indicate that Claimant worked for the department on 87 of the 92 work days between January 2, 1971 and April 17, 1971; that he worked for the department each day between April 1, 1971, and April 17, 1971, except two Sundays; and that after April 17, 1971, the only day during 1971 which he worked for the department was April 21, 1971.

Petersen further testified that the normal procedure for reporting injuries in the Sanitation

Department was for a driver to report the occurrence of an injury to the foreman and the foreman to the department office.

Dr. Kyle's report indicated that he first saw the claimant on April 22, 1971, with the complaint of pain in his right sacroiliac region and buttock, spreading down the back of the right leg as far as the calf, together with some tingling into the toes, especially the great toe on the right, for about five months after he had developed pain while emptying garbage cans in November, 1970. He had had pain off and on since then. About April 12, Claimant had experienced this severe pain and had fallen off the garbage truck. He had been unable to work the week prior to the April 22, 1971 examination. X-rays revealed an S1 spina bifida. A myelogram was normal, as were spinal fluid studies.

Dr. Kyle instructed Claimant to use care in stooping and lifting and to limit lifting to 100 pounds. He was told that surgery might eventually be needed. Dr. Kyle's impression was that the claimant had a lumbar sprain and S1 spina bifida.

Dr. Diamond, a physician specializing in orthopedics, examined Claimant for treatment on May 28, 1971. He testified that during this examination, Claimant told him that ". . . in November of 1970 he lifted garbage cans and hurt his back, and one day he fell off a truck and the pain didn't let up." Dr. Diamond noted a mild congenital lumbar scoliosis and a one-half inch atrophy of Claimant's left thigh. He noted a narrow fifth lumbar vertebral interspace which "might indicate (Claimant had) injured the fifth disc." The narrowing could also have resulted from the congenital scoliosis. His diagnosis was that the claimant had a chronic back sprain of the low back and possibly a central disc lesion. This lesion could have led to the atrophy of Claimant's left thigh, although the atrophy could also have resulted from simply not using the left leg as much as the right leg. This atrophy, Dr. Diamond said, would take about six weeks to develop, in the absence of a severe cause such as a cutting of a nerve root. As treatment, Dr. Diamond prescribed a back support and some therapy. On June 11, 1971, he again saw Claimant and then indicated that Claimant could return to light work on June 28, 1971, and regular work on July 15, 1971.

Dr. Walker, an orthopedic surgeon, examined Claimant on October 6, 1971, and found a large space between L5-S1 in Claimant's posterior spine. He also "noticed a congenital anomaly which was a spina bifida occulta." He found Claimant to have a one-half inch left calf atrophy, and he diagnosed the lumbosacral joint space as being "a very indicative sign" of a disc herniation. He felt that the Claimant injured his back lifting garbage and that jumping on the truck was the "straw that broke the camel's back," when the disc finally herniated through. Dr. Walker felt that, disregarding Claimant's congenital anomaly, Claimant was 7% permanently partially disabled as he was on October 6, 1971, and would be 18% permanently partially disabled if he subsequently had a disc and bilateral fusion operation. For treatment, Dr. Walker prescribed a back support and belt, "Paul Williams" exercises, and heat and physical therapy.

Dr. Diamond again saw Claimant on February 28, 1972, for an examination. Dr. Diamond noted there was no atrophy in Claimant's thighs or calves on February 28, 1972. Dr. Diamond felt Claimant had probably had a disc syndrome, from which he had substantially recovered. He found the disc spaces of the lumbar spine to be normal and stated that the lack of leg atrophy indicated the absence of a disc herniation. Dr. Diamond felt Claimant might have some mild residuals of the disc syndrome for an indeterminate period, so he felt Claimant's body as a whole was 2% permanently partially disabled.

Claimant is a young man in his early twenties. His few years of work experience have been spent doing relatively heavy work. However, at the time of the Arbitration hearing, he had completed two years of college and planned to continue his education.

Section 85.23, Code of Iowa, states, in part, that "unless knowledge is obtained or notice given (by or to the employer or his representative concerning the occurrence of an otherwise compensable injury) within ninety days after the occurrence of the injury, no compensation shall be allowed."

Claimant contends that, in the Iowa Workman's Compensation Act, "injury" means "loss" or "result", rather than "cause", citing **Barton v. Nevada Poultry Co.**, 253 Iowa 285, 110 N.W. 2d 660.

Referring to the **Barton** case, supra, and Section 85.23, Claimant contends that because he sustained no loss until "from and after April 5, 1971", this date should be seen as the date which would mark the commencement of the ninety day period during which the City would have to be given notice or obtain knowledge of the injury. The **Barton** case, however, is not defining the word "injury" in conjuction with a notice statute. It defines the word "injury" as it is used in conjunction with disability determination and is referring to the ultimate extent of an injury, rather than the time at which it occurred.

Claimant testified that about the middle of November, 1970, he felt he had pulled a muscle in his gluteus maximus and that his back thereafter

hurt him when he was "lifting stuff and bending over". Also, Dr. Walker stated that Claimant had told him that he noticed a pain in his left buttock during November of 1970, when he was lifting heavy garbage cans and that "this became worse and worse."

Thus, Claimant apparently received an "injury" in November of 1970, from which his "loss" was minimal and not shown to be permanent. No notice of this "injury" was given to the City, but as of that time no claim for disability benefits was in existence although compensation for medical benefits could possibly have been claimed. As no notice was given, no claim for medical benefits can now be made. No such claim is being made.

Although no specific notice was given of an injury in November of 1970, it should be noted that the driver (Waterman) was aware of Claimant's complaints about back pain and had recommended treatment. Although no specific incident had been related to him, Waterman apparently considered the complaints to be job related as evidenced by his reason for recommending to the claimant that he seek treatment which was, "(b)ecause I have picked up garbage and I have had back trouble." This, however, is not such notice as is contemplated in the Workmen's Compensation Act.

The City contends that any injury the claimant sustained in April of 1971 was not a new injury, but is directly traceable to his injury in November of 1970.

The injury Claiment received in November did not appear to result in any compensable disability. The uncontradicted testimony is that an incident occurred in April, when the claimant fell from the truck which caused the claimant increased symptoms. This incident, together with the medical testimony, particularly of Dr. Walker, and the reasonable inferences therefrom indicate that the April injury, although in the same area as the prior complaints, was of sufficient significance as to constitute an independent injury resulting in disability.

If the claimant had a pre-existing condition or disability aggravated, accelerated, worsened or "lighted up" by an injury which arose out of and in the course of his employment, resulting in a disability found to exist, he is accordingly entitled to compensation. **Nicks v. Davenport Produce Co.,** 254 Iowa 130, 115 N.W. 2d 812, **Musselman v. Central Telephone Co.,** 261 Iowa 352, 154 N.W. 2d 128.

The incident in April was of greater impact than a natural progression from the November injury, and as such was an independent injury with a direct causal connection to the exertion of the employment.

WHEREFORE, the Arbitration Decision is hereby affirmed.

It is found and held as a finding of fact:

That Claimant sustained an injury arising out of and in the course of his employment with the defendant employer in November, 1970, and that adequate notice under Sections 85.23 and 85.24, Code of Iowa, was not given.

It is further found that Claimant sustained an injury arising out of and in the course of his employment with the defendant employer on April 5, 1971, resulting in a four percent (4%) permanent partial industrial disability to the body as a whole, compensable at the rate of $56.00 per week. It is further found that adequate notice pursuant to Sections 85.23 and 85.24, Code of Iowa, was given. It is further found that Claimant was temporarily incapacitated from working from April 21, 1971, through June 28, 1971, a period of nine and five-sevenths (9 5/7) weeks. The healing period compensation rate is $61.00 per week.

It is further found that the medical bill of Dr. Walker in the sum of $234.00 was reasonable and related to treatment for the April 5, 1971 injury.

THEREFORE, Defendants are ordered to pay the claimant twenty (20) weeks of permanent partial industrial disability compensation at the rate of $56.00 per week. Defendants are further ordered to pay Claimant nine and five-sevenths (9 5/7) weeks of healing period compensation at the rate of $61.00 per week. Defendants are further ordered to pay the bill of Dr. John R. Walker in the amount of $234.00. Defendants are to pay the costs of the action.

Signed and filed this 18th day of April, 1974.

ROBERT C. LANDESS
Industrial Commissioner

No Appeal

Russell H. Mowen, Deceased,
Doris H. Mowen, Surv. Spouse, Claimant,

vs.

Iowa Realty Company, Inc., Employer,
and

Continental Western Ins. Co., Insurance Carrier,
Defendants.

Review Decision

Mr. L. R. Voigts, Attorney at Law, 10th Flr., Hubbell Bldg., Des Moines, Iowa 50309, For Claimant.

Mr. E. J. Giovannetti, Attorney at Law, 510 Central Nat'l. Bank Bldg., Des Moines, Iowa 50309, For Defendants.

This is a proceeding brought by the defendants, pursuant to the provisions of Section 86.24 of the Iowa Workmen's Compensation Act, for Review of an Arbitration Decision wherein the claimant, Doris H. Mowen, surviving spouse of Russell H. Mowen, deceased, was awarded death benefits as a result of a fatal injury incurred by Russell H. Mowen, on July 6, 1972. The matter was submitted on Review upon the transcript of the Arbitration proceedings and the written briefs and oral arguments of counsel.

The following facts are not in dispute:

Russell H. Mowen, deceased, was employed by Iowa Realty Co., Inc., as a building superintendent. His job has been described as that of a general handyman or repairman. As remuneration for his services, Mowen was paid four hundred dollars ($400.00) per month and was also provided an apartment at the Ambassador West, 7607 Dennis Drive, in which he and his wife, the claimant in this action, lived. A workshop was also provided for the decedent, which was located on the same premises as the apartment.

The nature of Mowen's employment was that he was responsible for the general repairs at a large number of apartment complexes in various locations in and around Des Moines, owned or controlled by the defendant employer. This responsibility required the decedent at times to travel to the various complexes throughout the area to work, while at other times he was able to complete his work in the shop provided for him at the Ambassador West. The defendant neither provided the means of transportation for Mowen, nor reimbursed him for the expenses he incurred as a result of his travel. The car used by the decedent, the costs of its operation and the tools which he used were all provided by him at his own expense.

The claimant testified in regard to the daily work routine of the decedent. She stated that he had no regularly scheduled working hours, but that he would usually begin between 7:00 A.M. and 9:00 A.M. and continue working until around 7:00 P.M. She also said that he would at times be called to repair something in the middle of the night. The claimant testified that when the decedent would go to one of the complexes to work that he would take most of his tools along to insure that he had the proper ones to do the work required and that when he returned to the shop to work that he would then unload all of his tools.

On the day of his demise, July 6, 1972, Mowen had gone to the Embassy Apartments on East Euclid to install a light fixture. After leaving the Embassy, he was involved in a fatal traffic accident at the 1900 block of East Euclid, at 4:29 P.M. He had been driving in a westerly direction, the most direct and his normal route from the Embassy Apartments to the Ambassador West Apartments.

The claimant alleges that at the time the accident occurred, the decedent had not yet finished his days work, therefore, he was still in the course of his employment. To support this allegation, the claimant offers her testimony concerning the daily work routine usually followed by the decedent. The claimant pointed out that the decedent normally worked until around 7:00 P.M. everyday and that the accident occurred between 4:00 and 4:30 in the afternoon. The claimant also stated that if the decedent did have a principle place of business, that it would be the shop located at the Ambassador West Apartments and that the decedent would unload his tools from his car into the shop every night. The claimant also testified that as the decedent was leaving the apartment, he said that he had a lot of work to do, implying that he had more to do than merely install the light fixture at the Embassy. The claimant contends that the time of the accident compared to the decedent's normal working hours, the statement he made as he left his apartment and the fact that he "always" unloads his tools from his car into the shop, prove that he had not yet finished working for the day and that he was in the course of his employment at the time of his death.

The defendants allege that the decedent was not in the course of his employment at the time of his death, thus making the claimant ineligible to recover benefits under the Workmen's Compensation Act of Iowa. The defendants claim that when the decedent left the Embassy Apartments, he had finished his work and that he was on his way home, as opposed to the claimant's allegation that he was going to the shop. The defendants assume that the decedent was going home and attempt to invoke the "going to and coming from" rule which would remove the decedent from his course of employment. They contend that this rule should apply and that the decedent's actions of July 6, 1972 would not fit into either of the recognized exceptions to the rule. The defendants also argue that at the time of the accident, they had no control or right of control over the decedent, alleging this fact would remove the decedent from his course of employment.

In order for the claimant to obtain compensation for the death of her husband, she has the burden to establish by a preponderance of the evidence that the death was caused by a personal injury that arose out of and in the course of his employment. **Almquist v. Shenandoah Nurseries,**

Inc., 218 Ia. 724, 254 N.W. 35. This preponderance of evidence, though, does not mean that such proof must satisfy beyond a reasonable doubt. **Jones v. Eppley Hotels Co.**, 208 Iowa 1281, 227 N.W. 153.

> "An injury occurs in the course of the employment when it is within the period of the employment, at a place where the employee may reasonably be in performing his duties, and while he is fulfilling those duties or engaged in doing something incidental thereto." **Bushing v. Iowa Railway & Light Co.**, 208 Iowa 1010, 226 N.W. 719.

While the presence or absence of control or the right of control of an individual is a factor to be considered in determining if he is in the course of his employment, it is not decisive. **Pribyle v. Standard Electric Co.**, 246 Iowa 333, 67 N.W. 438. The findings must be based on evidence, either direct or circumstantial, and the reasonable inferences that may be drawn therefrom. **Bushing v. Iowa Railway & Light Co.**, supra. The evidence in this matter and the reasonable inferences therefrom definitely preponderate in favor of a finding that the decedent at the time of his demise was still in the course of his employment.

WHEREFORE, the Arbitration Decision is hereby affirmed.

It is found and held as findings of fact:

That Claimant's deceased spouse sustained a fatal injury arising out of and in the course of his employment with the defendant employer on July 6, 1972.

It is further found that the applicable rate for death benefits is sixty-three dollars ($63.00) per week.

It is further found that claimant incurred a funeral expense in the amount of six hundred and thirty-seven dollars and forty-eight cents ($637.48).

THEREFORE, defendants are ordered to pay the claimant three hundred (300) weeks of statutory death benefits at the rate of sixty-three dollars ($63.00) per week. Accrued amounts are to be paid in a lump sum with statutory interest.

Defendants are further ordered to reimburse the claimant for the six hundred and thirty-seven dollars and forty-eight cents ($637.48) funeral bill.

Defendants are to pay the costs of this action.

Signed and filed this 11th day of June, 1973.

ROBERT C. LANDESS
Industrial Commissioner

No Appeal

Chester Myers, Claimant,

vs.

Honeggers & Company, Inc., Employer,
and

Aetna Life & Casualty Company, Insurance Carrier, Defendants.

Review Decision

Mr. Harry W. Haskins, Attorney at Law, 803 Fleming Building, Des Moines, Iowa 50309, For Claimant.

Mr. E. J. Giovannetti, Attorney at Law, 510 Central Nat'l Bank Bldg., Des Moines, Iowa 50309, For Defendants.

This is a proceeding brought by the claimant, Chester Myers, 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, Honeggers & Company, Inc., and its insurance carrier, Aetna Life & Casualty Company, on account of injuries he allegedly sustained on June 19, 1968. The case on Review was submitted on transcript of the evidence and written briefs and arguments of counsel presented in the Arbitration proceeding. By agreement of the parties, the testimony of William J. Brandenburg, Jr., was not transcribed for consideration in the Review proceeding. No additional evidence was presented for consideration on Review.

Two issues are presented by this proceeding. Did the claimant sustain his burden of proof that he received an injury arising out of and in the course of his employment? Did the claimant give notice to his employer within ninety days from the date of his injury?

Claimant contends that he received an injury when he was struck on the left side of his head by a hog feeder which slipped while he was loading it onto a trailer on June 19, 1968, as part of his duties with the defendant employer. The left lens of his glasses was broken at this time. Upon return to the office, he called Austin Freeman and advised him that he had broken his glasses. He then went to Dr. Kenneth W. Winjum, an optometrist in Indianola, to order a new pair of glasses.

Claimant further testified that he again contacted Mr. Freeman about a week later and that "he filled out an accident report". Asked why he contacted Mr. Freeman again, Claimant stated, "Well, I think they should pay for my glasses so he filled out an accident report."

Austin Freeman testified that he was employed by defendant employer during 1968 and early 1969 in charge of all mill employees and office personnel. In this capacity, he was the one to whom Claimant would report any work related injuries. When injuries were reported, it was the procedure to make three copies of the report form and send one to the home office, one to the defendant insurer and retain one in the employee's personnel file at the defendant employer.

Mr. Freeman testified that he recalls the claimant advising him that he broke his glasses; that he filled out and mailed an injury report; that the report was signed by him; and that he does not recall when he filled out the report.

No copy of any report bearing the signature of Mr. Freeman concerning any injury to the claimant on or about June 19, 1968, was found in either the home office file, the defendant insurer's file or the employee's personnel records in the defendant employer's office.

Mr. Freeman's recollection of details surrounding the incident, reporting and investigation of this claim are, at best, vague. The details about which he is most definite are not substantiated by other testimony and evidence and those about which he is unclear are well established by other testimony and evidence.

The thrust of Mr. Freeman's testimony is that he was aware that Claimant had broken his glasses while on the job and that he had gone to a doctor to have them repaired. It is not apparent that Mr. Freeman was aware of any difficulties arising from the alleged incident, other than broken glasses, for quite some time.

Defendants contend that the first notice they had of any alleged injury to Claimant was in January of 1969, some six months after the incident. This was around the time when Glen Sparks, who is the Safety Director for the defendant employer, was at the plant in Indianola on a routine trip. Sparks was informed that the claimant was alleging an injury by Vern Selanders. Vern Selanders was identified by Sparks as the plant manager in Indianola. Selanders was not called to testify and it is unknown when he became aware of the alleged injury to the claimant. Sparks informed the insurance agent for defendant employer's workmen's compensation carrier who, in turn, filed a report with the defendant insurance carrier over Sparks' name. This is the only report which shows up in the file of the insurance carrier, home office, and plant office files regarding this alleged injury.

Dr. Kenneth Winjum, an optometrist in Indianola, testified that he examined the claimant on June 19, 1968, after his accident. The claimant had broken glasses and complained of having had somewhat blurry vision with both eyes for the last couple of weeks, and that he thought his left eye was weak. Dr. Winjum performed an examination of the claimant and diagnosed a scotoma at the location of the macula. He recommended that the claimant go to an ophthalmologist to have it checked out. January 6, 1969, the claimant returned, complaining that his left eye was getting worse. Dr. Winjum noted that Claimant's vision in the left eye was drastically reduced from his previous examination and again recommended that he seek medical treatment.

Dr. Winjum testified that from his examination he found no evidence of contusion, abrasion or laceration to the external portion of the eye and no evidence of hemorrhage. He found no foreign particles in the eye.

Dr. Vern J. Wilson, an ophthalmologist in Des Moines, examined the claimant on January 15, 1969. Dr. Wilson's examination revealed "a circular well-outlined, dark gray, flat nevi-like lesion involving the entire left macular region at approximately 6 o'clock and a little superior to the peripheral margin appears to be a very small deep red choroidal vessel." This indicated to Dr. Wilson "that there had been destruction of the retina and the choroid vessels were showing through in the macular area." In his opinion, this "could be a benign flat nevi, or a pre-cancerous melanoma. It could also be a healed hemorrhagic area caused by the traumatic injury to the left temporal area, or a combination of all three."

Dr. Harold J. McCoy, an M.D. specializing in eye, ear, nose and throat, examined the claimant on January 27, 1969. This was on referral from Dr. Wilson, for evaluation. Dr. McCoy observed "a macular lesion in the left eye with some fresh hemorrhages, and some pigmentation." He diagnosed chorioretinal degeneration.

Dr. Robert Foss, M.D., specializing in Ophthalmology, examined the claimant on February 11, 1971. His examination disclosed "a central atrophy of the macula partially surrounded by dense pigment and above this, two rather large hemorrhages, one fresh and one old." He diagnosed the claimant's condition as a Kuhnt-Juneus macular degeneration, which is a degenerative process probably starting in the choriocapillaris.

Although described in different terminology, the findings and diagnosis of the respective doctors are consistent with each other, taking into account the variance in the time of the examinations.

Dr. Wilson makes no definite determination as to the "probability" that the alleged trauma which the claimant received to the side of his head

precipitated or aggravated the condition in Claimant's left eye. At best, his testimony establishes a "possibility".

Dr. McCoy testified that he did not think the blow to the head would precipitate the condition of Claimant's left eye, but that it would aggravate the condition if it existed previously. In Dr. McCoy's 52 years of experience, he remembered only two incidents where blows to the head caused the condition from which the claimant suffered. One was from a skull fracture and the other was from subdural hematoma, which organized, and two years later the patient could not see. The evidence does not disclose the existence of a subdural hematoma or fracture in this claimant.

Dr. Foss testified that the alleged blow to the side of Claimant's head had no part to play in the condition of Claimant's left eye. In his opinion, any blow to the head would have to be to the eyeball itself to cause this condition and would be accompanied by other retinal hemorrhaging. It could also be caused by subdural hematoma following a skull fracture.

There is considerable evidence in the record to indicate that the incident, as alleged, could not or should not have happened. This is based upon the employer's records which appear to be complete, but fail to show that the claimant was or should have been involved with a hog feeder on or about the day in question.

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 Iowa 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 Iowa 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 Iowa 275, 101 N.W. 2d 167. This must be established beyond mere speculation and conjecture. **Nash v. Citizens Coal Co.,** 224 Iowa 1088, 277 N.W. 728.

WHEREFORE, the Arbitration Decision is hereby affirmed.

It is held and found as finding of fact that Claimant has failed to establish, by a preponderance of the evidence, that he received an injury arising out of and in the course of his employment on June 19, 1968, resulting in any compensable disability.

It is further found that Claimant failed to give notice of his alleged injury within 90 days from the occurrence of said injury.

THEREFORE, recovery must be and is hereby denied to the claimant. The parties are ordered to pay the cost of producing their own witnesses. Defendants are to pay the cost of the court reporter at the Arbitration proceedings.

Signed and filed this 24th day of August, 1972.

ROBERT C. LANDESS
Industrial Commissioner

Appealed to District Court; Affirmed.

Linda Sue Nelson, Claimant,

vs.

John B. Hebert, d/b/a Dugout Lounge, Employer and

Hartford Accident & Indemnity, Insurance Carrier, Defendants.

Review Decision

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

Mr. Frank T. Harrison, Attorney at Law, 510 Central Nat'l. Bank Bldg., Des Moines, Iowa 50309, For Defendants.

This is a proceeding brought by the claimant for Review, pursuant to the provisions of Section 86.24, of an Arbitration Decision wherein the claimant, Linda Sue Nelson, was denied recovery of workmen's compensation benefits from her alleged employer, John B. Hebert, d/b/a Dugout Lounge, and its insurance carrier, Hartford Accident & Indemnity, for injuries she sustained on May 20, 1970. The case on Review was submitted on a transcript of the evidence and the written briefs and arguments of counsel presented at the Arbitration proceeding, plus the oral arguments of counsel presented at the Review proceeding.

The Arbitration Decision denied benefits to the claimant, holding that she was an independent contractor.

Claimant was a go-go dancer. She acquired her job at the defendant's establishment through her agent. There was apparently no written contract between the defendant and Claimant's agent, nor between Claimant and Defendant. The agreement for Claimant's services was that she dance for one week with Defendant having the option to extend

the contract for another week; that Claimant was to receive $300.00 per week, 10% of which was to be paid by Defendant directly to her agent; that Claimant was to begin on a certain date; that Claimant would be provided with a room during the engagement; that Claimant was to dance for twenty minutes and take a break for twenty minutes during the evening or five songs on and five songs off.

The issue in this case is the legal relationship between the claimant and the defendant. If the claimant is an employee of the defendant, then she is entitled to workmen's compensation benefits. If she is an independent contractor, then she is not.

The burden of proof is upon the claimant to establish, by a preponderance of the evidence, that she was an employee of the defendant. **Nelson v. Cities Service Oil Co.**, 259 Iowa 1209, 146 N.W. 2d 289.

Code of Iowa, Section 85.61(2) states, in part:

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

The Iowa Supreme Court has consistently held that the criteria used to determine the existence of an employer-employee relationship are: (1) the employer's right of selection or to employ at will; (2) responsibility for the payment of wages by the employer; (3) the right to discharge or terminate the relationship; (4) the right to control the work; and (5) is the party sought to be held as employer the responsible authority in charge of the work or for whose benefit the work is performed. **Hjerleid v. State,** 229 Iowa 818, 295 N.W. 139; **Sister M. Benedict v. St. Mary's Corp.,** 255 Iowa 847; 124 N.W. 2d 548; **Nelson v. Cities Service Oil Co.,** supra.

Applying the facts of the instant action to the criteria set out, we find that the defendant did not have the right of selection or to employ at will. Defendant contacted an agent and asked the agent to send a dancer with certain skills and within a certain price range. The claimant was sent to the defendant in compliance with this request. Defendant had no prior information about the claimant, nor did he have the opportunity to interview the claimant prior to her arrival at his establishment. Although it is not clear from the record in this case, it is doubtful that the defendant would have been able to reject the services of the claimant as long as she generally fulfilled the requirements of the agreement between the defendant and Claimant's agent. Defendant did not have the right to employ the claimant at will. The terms were that he would have the services of the claimant for as much as two weeks, but after this, continued employment would have been subject to whether or not her agent had booked her elsewhere. Defendant did have the option at the end of the first week to obtain Claimant's services for one more week. If, however, Defendant terminated the relationship on his own during the interim of either of the weeks, he would have been liable for the entire week's contract price, subject of course to any defenses he might have available under contract law. The defendant was to pay the claimant $270.00 per week and provide her with lodging. The lodging, of course, was provided on a daily basis but the money was to be paid only after the satisfactory completion of a week of dancing.

The defendant did not have the right to terminate the relationship at will without recourse. They could, of course, discharge the claimant or terminate the relationship according to the terms of the agreement at the end of the first week or, if the option were exercised, at the end of the second week. Any termination between these dates would have created a liability on their part to the claimant and her agent unless it was for some breach of the agreement by the claimant.

The right to control the physical conduct of the person is often considered one of the most important considerations in determining whether a person giving service is an employee or an independent contractor. Every contract for work reserves to the employer a degree of control, at least to enable him to see that it is done according to the contract. Such limited control does not necessarily indicate a master-servant relationship. **Hassebroch v. Weaver Construction Co.,** 246 Iowa 622, 67 N.W. 2d 549; **Schlotter v. Lendt,** 255 Iowa 640, 123 N.W. 2d 434. In the instant action, the claimant was controlled by the defendant to the degree that she was to perform her services at the times and in the manner scheduled. Defendant did not, however, select the music to which the claimant would perform. The manner in which she danced was controlled only to the extent that it complied with the acceptable realm of decency established in the community.

It would seem that the amount of control that the defendant could exercise was only as much as to compel the claimant to comply with the terms of the contract. They had no control over her actions while she was between sets. They could not require her to perform a matinee unless it was part of the agreement. They could not require her to extend the length of her performance.

As to the fifth proposition, there is little question that the defendant was the one for whose benefit the work was being performed. The

claimant's services were for the purpose of attracting customers to the defendant's premises, with the hope that they would spend money on the goods sold by Defendant.

It is not clear from a reading of the lowa cases, to what degree the claimant must establish the five criteria used to establish an employer-employee relationship. In order to establish Claimant's case, by a preponderance of the evidence, it is not clear whether she must preponderate on each of the criteria, a majority of the criteria or certain of the criteria. Although the cases indicate that the criteria of control is probably entitled to greater weight, it is not clear in the absence of establishing that criteria what effect the lack of establishing one or more of the remaining criteria would have.

If a compensation claimant establishes a prima facie case, the burden is then upon the defendant to go forward with the evidence and overcome or rebut the case made by the claimant. Defendant must also establish by a preponderance of the evidence any pleaded affirmative defense or bar to compensation. **Nelson v. Cities Service Oil Co.,** supra. Assuming, without deciding, that Claimant established a prima facie case and that the defendant failed to overcome or rebut the case made by Claimant, we turn to review the evidence in support of defendants' contention that the claimant was an independent contractor.

The commonly recognized tests in lowa for the existence of an independent contractor relationship are reviewed in the **Nelson** case. They are: (1) the existence of a contract for the performance by a person of a certain piece or kind of work at a fixed price; (2) independent nature of his business or of his distinct calling; (3) his employment of assistants, with the right to supervise their activities; (4) his obligation to furnish necessary tools, supplies, and materials; (5) his right to control the progress of the work, except as to final results; (6) the time for which the workman is employed; (7) the method of payment, whether by time or by job; (8) whether the work is part of the regular business of the employer. Other factors which can be considered are the intention of the parties as to the relationship created and community custom in thinking that a kind of service is rendered by servants.

Restatement, Agency 2d, section 220(2), lists ten matters of fact to be considered in determining whether a person is acting as an independent contractor. "It is for the triers of fact to determine whether or not there is a sufficient group of favorable factors to establish the relation." Restatement, Agency 2d, section 220, comment c. **Daggett v. Nebraska-Eastern Exp., Inc.**, 252 lowa 341, 107 N.W. 2d 102.

In the instant case, the facts show the existence of a contract to perform go-go dancing for one week for the fee of $300.00 ($30 of which would go directly to Claimant's agent).There was, of course, the option to renew the contract for another week and the possibility that it could be extended longer. The type of work that the claimant was doing would fit into the general classification of entertainer. An entertainer can be either an employee or an independent contractor. Those entertainers who perform continuously or for an indefinite time at the same establishment are generally thought of as employees, while those who perform for a short duration at one locale and then move to another are thought of as independent contractors. In this case, the claimant could be considered an employee at a wage of $300.00 per week or an independent contractor who agreed to do a certain kind of work, i.e., perform as a go-go dancer for a week for a fee of $300.00. The latter seems to be the better view.

It does not seem necessary to discuss whether or not the claimant's business is independent in nature or of a distinct calling. Defendants desired the services of a go-go dancer, sought the services of a go-go dancer and obtained the services of Claimant through her agent, who held her out as one involved in the distinct calling as a go-go dancer.

The claimant did not employ assistants, as the nature of the business does not contemplate such.

The defendant was naturally required to furnish the area in which the claimant was to perform. They also furnished the music and lighting. It does not appear that there were any specifications set for any of these items. The claimant did not request anything other than what was already available and apparently did not require anything other than what was available. There is evidence which indicates that if the claimant had not liked the music that was available, she would or could have provided her own. The most important equipment for a go-go dancer must necessarily be provided by herself. In addition, she provides her own costumes.

The defendant did not control the progress of the claimant's work. She selected from the jukebox the music to which she would perform. She established her own routines. The final result in this case was that she perform according to the terms of the contract, which was periodically as agreed during certain hours for a specified duration.

"The time of employment and the method of payment are important. If the time of employment is short, the worker is less apt to subject himself

to control as to details and the job is more likely to be considered his job than the job of the one employing him. This is especially true if payment is to be made by the job and not by the hour." Restatement, Agency 2d, section 220, comment j.

Claimant's initial employment was for one week. Whether her compensation was based on time or upon completion of the job is debatable. In this case, there were no time records kept of her actual performance time. The record shows that the contract price for go-go dancers was set up on a weekly basis. Whether they danced a matinee, thereby working longer hours, did not increase the amount to which they were entitled. It would seem the better view to consider the obligation agreed upon to perform at specified times over a specified period for a specified duration as the job. This may be a strained construction, but suffice it to say that the compensation to be paid was established before the amount of time to be spent in performing the service was decided, which indicates that payment was on other than a time basis.

Whether go-go dancing is part of the regular business of the defendant is questionable. Defendant's business was that of running a tavern. The tavern could have continued to run with or without a go-go dancer. A decision had been made, however, to secure the services of a go-go dancer in order to improve business. Whether go-go dancing thus became an integral part of the defendant's business could be decided either way.

In any event, the preponderance of the evidence is in favor of the relationship of independent contractor as opposed to employer-employee. Additional evidence in support of this conclusion is the fact that no deductions were taken from the pay to the claimant, as in the case of other employees, and she was carried on the defendant's books as "entertainment".

WHEREFORE, the Arbitration Decision is hereby affirmed.

It is found and held as finding of fact:

That Linda Sue Nelson was not an employee of John Hebert, d/b/a Dugout Lounge on May 20, 1970.

That Linda Sue Nelson was an independent contractor at all times material hereto and accordingly is barred from recovery of workmen's compensation benefits by Section 85.61(3)(b) Code.

THEREFORE, recovery must be and is hereby denied to the claimant. The parties are ordered to pay the cost of producing their own evidence. The costs of the shorthand reporter and transcript of the Arbitration proceeding are taxed to the Defendant.

Signed and filed this 8th day of September, 1972.

ROBERT C. LANDESS
Industrial Commissioner

Appealed to District Court; Decision pending.

Ora E. Omstead, Deceased,
Erma E. Omstead, Spouse, Claimant,

vs.

Vitalis Truck Lines, Inc., Employer,
and

Truck Insurance Exchange, Insurance Carrier, Defendants.

Review Decision

Mr. Robert O. Barnes, Attorney at Law, 560 - 31st, Des Moines, Iowa 50312, For Claimant.

Mr. Roy M. Irish, Attorney at Law, 729 Insurance Exch. Bldg., Des Moines, Iowa 50309, For Defendants.

This is a proceeding brought by the claimant, pursuant to Section 86.24 of the Iowa Workmen's Compensation Act, for Review of an Arbitration Decision wherein the claimant was denied benefits for the death of her husband, Ora E. Omstead, as the deceased was held not to have been an employee of the defendant, Vitalis Truck Lines, Inc. (hereinafter called "Vitalis"), on November 13, 1971, the day of his demise. The matter was presented on Review on the transcript of the Arbitration proceedings and the oral arguments of counsel.

Vitalis is engaged in the business of interstate trucking. Vitalis owns approximately sixty trailers and thirty-five to forty road tractors. At various times throughout the year, the size of the Vitalis business is such as to require it to lease anywhere from ten to forty additional tractor-trailer combinations along with drivers to cover the extra work.

The deceased was the owner-operator of a tractor-trailer combination. The deceased had entered into an agreement with Robert J. Elliott, Inc. The exact nature of this agreement is unclear, as there was no direct testimony regarding the relationship that existed between Robert J. Elliott, Inc. and the deceased. What can be drawn from the record, however, is that an agreement did exist, by which Robert J. Elliott, Inc. leased the

deceased's tractor-trailer combination and his services as an operator. Robert J. Elliott, Inc. would then lease the tractor-trailer combination and the services of the deceased to the defendant. This lease would be for a twenty-nine (29) day period, which, according to some testimony in the record, would terminate upon the lessor leasing to another carrier.

On November 8, 1971, Robert J. Elliott, Inc. and Vitalis entered into such a twenty-nine day lease. The deceased signed the lease on behalf of Robert J. Elliott, Inc., and then hauled a load of beef to New Jersey, operating under the license of Vitalis. On the return trip, the deceased was hauling a load of newspaper supplements, when he was involved in a traffic accident on November 13, 1971 in Pleasant Hill, Iowa, which resulted in his death.

The claimant has contended throughout this proceeding that Vitalis was indeed the employer of the deceased. To support this contention, she has offered the testimony of herself, Billy Guenther and Charles D. Dales. The claimant testified generally as to the working relationship that existed between the deceased and Vitalis, as she understood it. She stated that she handled the bookkeeping in regard to the expenses incurred by the deceased in the operation and maintenance of his tractor-trailer combination. The claimant testified that as far as she knew, Vitalis was the only truck line for which the deceased had hauled over the last four or five years. She also testified that Vitalis' plates were attached to the sides of the deceased's truck. The claimant further testified that she did not know of Robert J. Elliott, Inc., but did know that Robert J. Elliott was the dispatcher for Vitalis. She further testified that the logs kept by the deceased were turned over to Vitalis. The claimant did not have knowledge of certain matters of importance in determining if an employer-employee relationship actually existed between deceased and Vitalis. She stated that she knew nothing of lease agreements or contracts entered into by the deceased and that she did not know what was the basis of his compensation. She claimed to know that he would keep a log during a trip, but did not know what it would contain.

In an attempt to clear up the question of how Vitalis viewed its relationship with the leased drivers, the claimant offered the testimony of Billy Guenther and Charles D. Dales. Guenther is an owner-operator who worked under the same type of lease agreements with Robert J. Elliott, Inc. and the defendant, as did the deceased. Guenther testified that on September 7, 1971, he was injured at Bookey Packing Co. in Des Moines, while picking up a load of beef. He further testified that he had received workmen's compensation benefits, as a result of this injury, from the insurance carrier for Vitalis.

Charles D. Dales is the Chief of Police in Pleasant Hill, Iowa, the location where the accident occurred. He testified that after the wrecked truck had been towed away, Mr. Elmer Vitalis, owner and operating manager of the defendant, came to him seeking to obtain a release of the load. He stated that Mr. Vitalis claimed the load was legitimate and that the deceased was his driver. The load was released to Mr. Vitalis some days later, and allegedly delivered to the proper location.

The contention of the defendants throughout this proceeding has been that the deceased was not the employee of Vitalis. In order to support its claim, the defendants offered the testimony of Elmer Vitalis and Paul Layman. Mr. Vitalis testified that approximately six months prior to the accident, the deceased requested that he be made a regular employee, in order to gain the benefits of a company employee. He stated that he had checked into the matter for the deceased and found that it wasn't possible, and informed him of this. Mr. Vitalis also testified concerning the authority to transport held by Vitalis. He stated that Vitalis did not have the authority to haul from the East to the West and also that it did not receive any remuneration from these return trips made by the leased drivers. Mr. Vitalis further testified that Vitalis did not have authority to haul newspaper supplements, but only had the authority to transport packing house products.

Paul Layman is the state claims manager for the Farmers Insurance Group, which includes Truck Insurance Exchange. He testified in regard to the payment of benefits to Billy Guenther following his accident at Bookey Packing Company. Mr. Layman stated that when the claim was filed, Mr. Guenther was listed as an employee of Vitalis, and that the claim had not been investigated prior to accepting the claim as compensable. He further testified that the matter was currently being investigated by his employer.

The claimant has the burden of proving the existence of the employer-employee relationship, by a preponderance of the evidence, if she is to be compensated. **Knudsen v. Jackson,** 191 Iowa 947, 183 N.W. 391. The tests to determine the existence of an employer-employee relationship in regard to the Iowa Workmen's Compensation Act are as follows:

1. The employer—s right of selection, or to employ at will;
2. The responsibility for payment of wages by the employer;
3. Right to discharge or terminate the relationship;
4. Right to control the work;

5. Is the party sought to be held as employer the responsible authority in charge of the work or for whose benefit the work is performed.

Sister Mary Benedict v. St. Mary's Corporation, 255 Iowa 847, 124 N.W. 2d 548.

In determining if the deceased was an employee of Vitalis, the tests listed above should be applied to the facts derived from this proceeding. The deceased had formed a working agreement with Robert J. Elliott, Inc., not with the defendant. Robert J. Elliott, Inc. alone had the right to select the workers supplied to the defendant. The only power held by the defendant was that it could refuse to allow unqualified drivers to haul the shipment. The decedent was paid by Robert J. Elliott, Inc., not by the defendant. Upon the completion of a trip, the defendant would pay Robert J. Elliott, Inc. the amount called for under the leasing agreement, and the decedent would then be paid by Robert J. Elliott, Inc. Mr. Vitalis testified that the leased drivers were free to choose which route they would take when hauling a load.

Although there is a distinct feeling on the part of the undersigned that relevant facts are lacking, necessary to make a proper determination of the true legal standing of the parties, it can only be stated on the basis of the record that the claimant has failed to sustain her burden of proving the existence of an employer-employee relationship between the decedent and the defendant.

WHEREFORE, the Arbitration Decision is hereby affirmed. It is found and held as a finding of fact that the decedent, on November 13, 1971, was not an employee of Vitalis Truck Lines, Inc.

THEREFORE, recovery must be and is hereby denied to the claimant.

Signed and filed this 8th day of August, 1973.

ROBERT C. LANDESS
Industrial Commissioner

No Appeal.

Albert Parsons, Claimant,

vs.

John J. Weber,d/b/a Jayve Mfg. Co., Employer, Defendant.

Review Order

Mr. Jerald R. Bronemann, Attorney at Law, 121 East First Street, Monticello, Iowa 52310, For Claimant.

Mr. David M. Remley, Attorney at Law, 121½ East Main Street, Anamosa, Iowa 52205, For Defendant.

NOW, on this 21st day of August, 1972, the matter of Claimant's Motion to Dismiss Defendant's Petition for Review and Amendment thereto, comes on for determination.

This matter was originally set for hearing on Claimant's Application for Arbitration on March 23, 1972. Defendant was notified of this hearing by certified mail. On March 23, 1972, the hearing commenced without the presence of the defendant. On that day, the defendant telephoned the undersigned to determine the location of the hearing. After being advised, the defendant then appeared at the proceedings and requested a continuance which was granted for the purpose of allowing defendant to obtain legal counsel. As a condition to the granting of the continuance, the defendant was required to pay for the services of the court reporter up to that time.

On May 4, 1972, Defendant was mailed Notice of Assignment for a hearing on June 15, 1972, at the same location as the first hearing. This notice was sent by certified mail and received by the defendant. The defendant did not appear, nor anyone for him at said hearing.

On June 16, 1972, an Arbitration Decision was filed in this matter and a copy was mailed to Defendant on that date by certified mail. By letter postmarked June 19, 1972, the defendant attempted to explain his absence from the hearing due to "circumstances beyond my control". No prior attempt to explain his absence was made as had been done in the first hearing.

Defendant's Petition for Review was filed July 5, 1972, some nineteen (19) days after the Arbitration Decision was filed. The Petition for Review and Defendant's Resistance to Claimant's Motion to Dismiss allege the defendant did not receive the Arbitration Decision until June 30, 1972, as both he and his wife were out of the City of Monticello during regular post office hours from June 16 until that date. The return receipt indicates the Arbitration Decision was delivered on June 29, 1972. Up to this time, twelve (12) items have been sent to and received by the defendant from this office involving this matter by certified mail. On April 13 and May 22, the defendant was sent and received letters from this office, both of which stated in part:

> "The captioned matter was continued at your request for the purpose of obtaining legal counsel to assist you in this matter.
>
> "To date no attorney has appeared of record on your behalf.***
>
> "It is requested that we hear from you or your attorney with regard to your intentions."

On April 27, 1972, Deputy Mueller of this office called and talked with the defendant's wife. He received assurances from defendant's wife that the defendant would be in contact with this office. No response to either the letters of April 13 and May 22, or the telephone call of April 27 was made by the defendant to this office.

Section 86.24, Code 1971, provides in part:

> "86.24 Review. 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 petition and notify the parties."

The case of **Barlow v. Midwest Roofing Co.**, 249 Iowa 1358, 92 N.W. 2d 406, indicates that the Industrial Commissioner is without jurisdiction to review a decision that is not filed within ten days from the date the decision is filed.

It would appear, therefore, that neither the law nor the equities are in favor of the defendant. If he has, as he contends, a valid defense to the claim it is unfortunate that he did not pursue it, as he was given ample opportunity and cooperation from this office in order to do so.

WHEREFORE, Claimant's Motion to Dismiss Defendant's Petition for Review is hereby sustained.

Signed and filed this 22nd day of August, 1972.

ROBERT C. LANDESS
Industrial Commissioner

Appealed to District Court; Decision Pending.

Stanley Reed, Claimant,

vs.

Eagle Mills Promico, Inc., Employer,
and

Home Insurance Company, Insurance Carrier,
Defendants.

Review-Reopening Decision

Mr. Terry W. Guinan, Attorney at Law, Suite 403 Snell Building, Fort Dodge, Iowa 50501, For the Claimant.

Mr. Paul Moser, Jr., Attorney at Law, 1324 Des Moines Building, Des Moines, Iowa 50309, For the Defendants.

This is a proceeding in Review-Reopening brought by the claimant, Stanley Reed, against his employer, Eagle Mills Promico, Inc., and its insurance carrier, Home Insurance Company, to recover benefits under the Iowa Workmen's Compensation Act on account of an injury sustained on September 24, 1968. The case came on for hearing before the undersigned at the courthouse in Fort Dodge, Iowa, on Friday, November 5, 1971, at 1:30 P.M.

The issue to be determined in this case is the extent of the permanent partial disability compensation and healing period compensation due as a result of a crushed hand and wrist occurring on September 24, 1968. The defendants filed a Memorandum of Agreement with the Industrial Commissioner's Office on October 30, 1968. No medical bills are in issue.

Dr. Julian M. Bruner, M.D., and specialist in hand surgery, performed surgery for and treated Claimant's hand following the injury. He rates Claimant's impairment to the left upper extremity at twenty-five percent (25%). Dr. Roy O. Sebek, who examined Claimant in 1970, rates the impairment to the left upper extremity at twenty-three percent (23%). Both doctors indicate damage to the wrist and forearm.

The area of dispute is whether or not pains on occasion in Claimant's shoulder are such that Claimant's disability should be to the body as a whole as opposed to a scheduled injury under Section 85.34, Code of Iowa. If the result of the injury is limited to a scheduled member, such factors as the subjective ability to earn wages are not to be considered. **Barton v. Nevada Poultry Co.**, 253 Iowa 285.

In determining whether or not the schedule is applicable, the situs of the injury is not controlling, **Barton v. Nevada Poultry Co.**, supra. If the result of the injury extends beyond the scheduled member, then the disability compensation is not limited by the schedule. **Barton v. Nevada Poultry Co.**, supra; **Kellogg v. Shute & Lewis Coal Co.**, 256 Iowa 1257. Any effect which extends beyond the scheduled member must pass two tests. First, it must be more than the "natural consequence", **Kellogg v. Shute & Lewis Coal Co.**, supra, or the "ensuing natural result", **Barton v. Nevada Poultry Co.**, supra, and it must "contribute to or cause disability", **Kellogg v. Shute & Lewis Coal Co.**, supra.

A reading of the above cases indicates that "natural consequence" is something less than all consequences proximately caused by a given

injury. The language means that effect which ordinarily accompanies a loss of or loss of use of a scheduled member. The vascular deficiency in **Barton** is obviously beyond a "natural consequence".

The testimony concerning disability beyond a scheduled member in the instant case relates to only intermittent pains in Claimant's left shoulder. The pains appear in cold weather and when Claimant drives a truck for lengthy periods. While discomfort is present, the shoulder pain does not appear to have interfered with Claimant's work. The disability stems from Claimant's hand and wrist. On cross-examination, Dr. Bruner acquiesces to the phrase, "natural result". It is not clear if he means that a causal relationship exists or if this is an ordinary difficulty accompanying such an injury. Dr. Bruner refers to the shoulder pain only briefly.

Dr. Sebek gives a more detailed explanation of the source of the shoulder pain. He attributes the shoulder pain to the scar tissue which forms after any injury. Scar tissue surrounds blood vessels and nerves. With a drop in temperature or barometric pressure, the blood vessels and nerve function can be slightly impaired. The doctor's language would indicate such scar tissue formation is an ordinary bodily function following an injury. On cross-examination, Dr. Sebek indicated no nerve deficiency exists above the elbow and that blood vessel involvement is primarily in the hand and wrist. Dr. Sebek's disability rating is based upon the motion and nerve involvement in the hand and forearm areas. No limitation of motion is present in the shoulder. The whole body rating given by Dr. Sebek is merely an equation of his twenty-three percent (23%) of the upper extremity.

Claimant was released from Younkers Rehabilitation Center on November 16, 1968. Dr. Bruner indicates a permanent status in Claimant's left arm in July, 1969. Claimant, however, had the capacity to begin schooling in February, 1969. While no income was received while going to school, the ability to go to school would indicate a point where his temporary total incapacity from working ended. The period of time from September 24, 1968, to February 1, 1969, is eighteen and three-sevenths (18 3/7) weeks.

The maximum rate for permanent partial disability is applicable. The healing period rate is $48.00 per week.

WHEREFORE, it is found that Claimant sustained an injury arising out of and in the course of his employment with the defendant employer on September 24, 1968, resulting in a permanent partial disability to the left arm of twenty-five percent (25%). It is further found that Claimant was incapacitated from working for eighteen and three-sevenths (18 3/7) weeks.

THEREFORE, Defendants are ordered to pay Claimant fifty-seven and one-half (57 1/2) weeks of permanent partial disability compensation at the rate of $47.50 per week. Defendants are further ordered to pay Claimant eighteen and three-sevenths (18 3/7) weeks of healing compensation at the rate of $48.00 per week. Credit is to be given for the forty-six (46) weeks of permanent partial disability compensation and seven and five-sevenths (7 5/7) weeks of temporary disability compensation previously paid.

Costs of the action are taxed to the defendants.

Signed and filed this 12 day of July, 1972.

ALAN R. GARDNER
Deputy Industrial Commissioner

No Appeal

Maynard Harvey Rees, Claimant

vs.

Garst & Thomas Hybrid Corn Co., Employer, and

Employers Mutual Casualty Co., Insurance Carrier, Defendants.

Review Decision

Mr. Robert L. Horak, Attorney at Law, 204 North Wilson Avenue, Jefferson, Iowa 50129, For the Claimant.

Mr. Fred D. Huebner, Attorney at Law, 510 Central Nat'l. Bank Bldg., Des Moines, Iowa 50309, For the Defendants.

This is a proceeding brought by the Employer, Garst & Thomas Hybrid Corn Co., and its Insurance Carrier, Employers Mutual Casualty Co., seeking a Review under the provisions of Section 86.24 of the Iowa Workmen's Compensation Act of an Arbitration Decision wherein the Claimant, Maynard Harvey Rees, was awarded benefits on account of alleged injuries sustained on or about February 24, 1969 and February 10, 1970. The case on Review was presented on the Deputy's notes taken at the Arbitration proceeding and the exhibits presented thereat, along with the briefs and arguments of counsel, plus additional evidence on behalf of the

defendants in the form of a deposition of Dr. F. Eberle Thornton.

The claimant, in his mid-fifties, had an eighth grade education. He has been employed throughout his adult life in various laboring capacities. For the last eighteen years, prior to the Arbitration proceeding, he had been in the employ of defendant Garst & Thomas. Over these years, he had worked in various capacities as a laborer and foreman.

In February of 1955, Claimant received an injury when he stepped down out of a doorway and slipped on the ice. He was carrying a 125-lb. sack of corn samples, which came down upon him. He was later hospitalized and had treatments for a while, and returned to work with pain still in his back. He was later sent to a hospital in Omaha, where surgery was performed by Dr. J. Jay Keegan. This surgery consisted of a left lower lumbar laminectomy. He again injured his back in 1956, and subsequent to this he wore a back brace for approximately a year and a half. He continued to work without any major interruptions until February of 1969, when he again slipped on the ice when starting down a grade to Building #9, while returning from lunch. He fell on his rear with his arm behind him. He experienced a real bad sharp pain throughout the back. He later had a stiff neck. He was taken to Dr. Josef R. Martin. He was placed in the hospital for a short time, in traction. He then returned to work and was sent on a job to Missouri. He developed an ache in his right arm. He went to Dr. C. T. Riley in Richmond, Missouri, who diagnosed his condition as cervical and dorsal spine arthritis. He was placed on medication for his arthritic condition, and had what was apparently a drug reaction but thought possibly to be a heart attack. He was hospitalized in Richmond for a few days. After his release, his employer desired some confirmation as to his physical status. He then went to Mayo Clinic, where he received treatment for a pinched nerve in his neck. He was placed in a cervical collar and given instructions on home traction. Apparently, the heart attack was discounted. The treatments that he received relieved his pain and after release from Mayo Clinic, he went back to work in the fall of 1969. In 1970, while he was sewing a bag of seed on a sew machine, some treating dust from the bag that he was sewing came up into his face and caused him to sneeze. After his sneeze, he went down to his knees and had to have help to get up. He had pain in his back and into his right leg. He went again to Dr. Martin, who put him in the hospital in traction for about four to five days. He was then sent to Dr. Thornton. Dr. Thornton prescribed treatment and a brace. Claimant testified that he was wearing his back brace and getting along fine, that if he took his pills and wore his back brace, that he didn't have any pain.

The medical evidence at the Arbitration proceeding came in by way of doctor and hospital reports.

The operative report of Dr. J. Jay Keegan, M.D., indicates that a left lower lumbar laminectomy was performed on December 23, 1955, to remove extensive degenerated fibrocartilage of the fourth lumbar disc. The result was felt to be good.

Dr. J. R. Martin, M.D., treated the claimant for back problems from March 8, 1955, through September 1, 1971. There is a long lull in treatments between 1956 and 1964. His diagnosis was slight progressive change of the articulating surface of the 3rd, 4th and 5th lumbar vertebrae with spurring and degeneration of the disc space below L-4 & 5 and some disability as a result of progressing arthritis and a previous ruptured disc.

While the claimant was at Mayo Clinic, he was attended by Drs. W. E. Wellman, M.D., G. W. Simons, M.D., and others. Dr. Wellman concluded a final diagnosis of cervical degenerative disc disease with radicular pain; mild back and leg pain; post-laminectomy, lumbar spine; anxiety-tension state.

Dr. F. Eberle Thornton examined the claimant on March 24, 1970. Dr. Thornton diagnosed degenerative arthritic changes of the spine, particularly at L-4, L-5 and L-5, S-1 with minor residuals of a herniated disc at L-5, S-1. He felt that there was a large amount of psychosomatic element, but that he does have some arthritic changes in the back which he aggravates by bending and twisting.

The only doctors to indicate a rating of permanent disability of the claimant are Martin and Thornton. Dr. Martin rates Claimant's overall disability at 5-10%; Dr. Thornton rates his overall disability at 20-25%.

One problem that makes this case difficult is that the claimant received an injury in 1955 which resulted in permanent disability for which the claimant was never compensated. Another problem is that the claimant has degenerative arthritis which may have been hastened by his earlier injury. Another problem is that although the record shows that the claimant had recurring back pains since an operation in 1955, and received treatments for back problems related to various events in 1965, 1965 and 1968, we are here trying to single out two later incidents which occurred during the claimant's employment as having caused some degree of permanent disability. Another problem is that throughout the period of the claimant's employment with the defendant employer, he continued to work when he could and was paid his regular wages for those times when he was off work.

There is no doubt that the claimant had some degree of permanent disability as a result of his laminectomy. We do not have a rating, however, as to his extent of disability immediately subsequent thereto. There is no doubt that the claimant has a degree of disabling degenerative arthritis. The extent of this alone is also not shown.

After the claimant received his injury from which he received his laminectomy, he returned to his former employment. For that matter, the claimant has returned to work after each of his injuries, although not always to the same type of duties. The record does not disclose that the claimant was off work after the February 24, 1969 or February 10, 1970 incidents beyond the requisite seven days to entitle him to compensation for temporary disability.

The good intentions of the defendant employer in this matter by keeping the claimant on full salary during periods of disability are commendable. However, it is these same good intentions which have, to a large degree, created the problem in this matter, as any permanent disability which the claimant previously received was not given proper attention. Claimant is shown to have had residuals from a herniated disc and degenerative arthritis prior to the incidents in question.

The medical evidence supports a finding that the incidents would aggravate Claimant's condition. Taking the record as a whole and all of the evidence and proper inferences therefrom, the claimant on the two occasions under consideration aggravated his condition to such a degree as to add to his permanent disability.

Although it is the opinion of the undersigned that the claimant received some increased disability as a result of the incidents sub judice, the record does not support the amount awarded in the Arbitration Decision. Claimant's disability is industrial and the amount of increase in its permanency as a result of these two incidents is minimal.

THEREFORE, the Arbitration Decision is hereby modified.

It is found and held as finding of fact:

That on February 24, 1969 and February 10, 1970, the claimant sustained injuries arising out of and in the course of his employment, resulting in a combined total permanent disability of 5% of the body as a whole.

That healing period disability has been compensated through continuation of regular wage.

WHEREFORE, it is ordered that the Defendants pay 25 weeks of compensation at the rate of $47.50 per week, accrued payments to be made in a lump sum together with statutory interest.

It is further ordered that the Defendants pay the medical expenses awarded in the Arbitration Decision.

It is further ordered that the Defendants pay the expenses incurred for the trips to Mayo Clinic, evidenced by Review Exhibit AA in the total amount of $2,362.72 and the back brace evidenced by Review Exhibit BB in the amount of $28.07.

The costs of this proceeding are taxed to the Defendants.

Signed and filed this 2 day of May, 1973.

ROBERT C. LANDESS
Industrial Commissioner

Maynard Harvey Rees, Claimant,

vs.

Garst & Thomas Hybrid Corn Co., Employer,
and
Employers Mutual Casualty Co., Insurance Carrier, Defendants.

Amendment To Review Decision

Mr. Robert L. Horak, Attorney at Law, 204 North Wilson Avenue, Jefferson, Iowa 50129, For the Claimant.

Mr. Fred D. Huebner, Attorney at Law, 510 Central Nat'l. Bank Bldg., Des Moines, Iowa 50309, For the Defendants.

It having been brought to the attention of the undersigned that the amount contained in Review Exhibit AA indicating mileage of 2,150.00 was not intended to represent a dollar amount, but a total amount of mileage of 2,150. By agreement of the parties, the Review Decision filed May 2, 1973 is hereby amended to reduce the amount of expenses incurred for the trips to Mayo Clinic evidenced by Review Exhibit AA to a total amount of $427.62, thereby allowing ten cents (10¢) per mile for the 2,150 miles plus the parking and motel expenses.

WHEREFORE, the Review Decision filed May 2, 1973 is amended by striking the $2,362.72 indicated as expenses incurred for the trips to Mayo Clinic evidenced by Review Exhibit AA and inserting in lieu thereof, the amount of $427.72.

Signed and filed this 8 day of May, 1973.

ROBERT C. LANDESS
Industrial Commissioner

No Appeal

Robert E. Reese, Claimant,

vs.

J. I. Case Company, Employer, Self-Insured, Defendant.

Review - Reopening Decision

Mr. John J. Carlin, Attorney at Law, 419 Union Arcade Building, Davenport, Iowa 52801, For Claimant.

Mr. Richard M. McMahon, Attorney at Law, 609 Putnam Building, Davenport, Iowa 52801, For Defendant.

This is a proceeding in Review-Reopening brought by the claimant, Robert E. Reese, against his employer, J. I. Case Company, self-insured, to recover benefits on account of an injury sustained on December 1, 1971. The matter came on for hearing before the undersigned at the courthouse in Davenport, Iowa, on Tuesday, August 21, 1973, at 8:30 a.m. The matter was left open for the submission of medical testimony. The record was completed on October 29, 1973.

The issue to be determined in this matter is whether or not the claimant sustained compensable disability in addition to that previously paid and medical expenses not previously paid as a result of the injury sustained on or about December 1, 1971.

Defendant's Answer raised an issue as to whether or not the injury arose out of and in the course of Claimant's employment. The issue has been resolved by the Ruling of this office filed November 28, 1972, and the Ruling of the District Court of Scott County, Iowa, filed May 18, 1973.

There is no conflict in the evidence that the claimant sustained a fracture of the proximal tibia which included the surface of a knee joint when he landed on his feet following a jump. Dr. Harold J. Jersild, M.D., an orthopedic surgeon, testified on Claimant's behalf. Dr. Ralph H. Congdon, M.D., an orthopedic surgeon, testified on Defendant's behalf. The diagnosis of both doctors is virtually identical. Dr. Congdon saw Claimant at a date later in time than Dr. Jersild. His diagnosis includes more arthritic changes in the knee joint than noted by Dr. Jersild.

The only areas of apparent conflict in the medical evidence are the degree of permanent disability and whether or not the condition in Claimant's knee will deteriorate. It may be that due to the passage of time between Dr. Jersild's examination and Dr. Congdon's examination and the inclusion in Dr. Jersild's disability rating of factors other than mere functional impairment, such as the probable arthritic progression, that no real conflict exists as to the degree of disability.

Dr. Jersild feels Claimant's condition will definitely worsen. Dr. Congdon states Claimant's condition might worsen and it might improve. A resolution of this conflict is unnecessary as no finding in this opinion is to be construed as a finding as to the degree of any future disability. This decision approaches only the disability as of the date of the hearing.

Dr. Jersild feels Claimant has a seventy-five percent (75%) permanent impairment of the knee. He later refers to a seventy-five percent (75%) permanent impairment of the lower extremity. This rating includes a "prognosis of posttraumatic arthritis" and "inability of this individual to work at any work involving significant ambulation." On cross-examination Dr. Jersild conceded that limitation of motion tests as in the AMA Guides to Permanent Impairment would allow a rating in the "area of 35-50%."

Dr. Congdon feels Claimant has a sixty to seventy percent (60-70%) impairment of the lower extremity. This is based on the "degree of loss of motion, the amount of discomfort, and instability."

It is the finding of this deputy commissioner that Claimant has a seventy percent (70%) permanent partial functional impairment of the lower extremity due to the injury of December 1, 1971.

Certain surgical procedures are probably desirable. Nothing in this record, however, requires any finding in that area at present.

"Claimant's Exhibit 1" in the amount of eight hundred ninety-six and 30/100 dollars ($896.30) is for a hospital stay in July of 1972. Testimony of Dr. Jersild indicates this is a charge for surgery on Claimant's leg. The bill is allowed in full. Dr. Jersild's bill is sufficiently related to treatment of the claimant's leg. The bill is allowed except for a seventy-five dollar ($75) testifying fee. The amount allowed is three hundred seventy-three dollars ($373).

Apparently previous medical bills were paid by the Defendant.

Claimant has been paid a number of weeks of disability compensation by the defendant. "Joint Exhibit 1" shows the amounts paid. Notations on the exhibit seem to indicate Claimant was paid twenty-one dollars ($21) a week for sickness and accident benefits. Apparently thirty-four (34) weeks of benefits were paid at eighty-five dollars ($85) per week. This includes twenty-one dollars ($21) a week for sickness and accident benefits and sixty-four dollars ($64) per week for workmen's compensation benefits. As the twenty-one dollars ($21) a week appears to be in addition to workmen's compensation benefits,

Defendant does not get credit for the weeks when only twenty-one dollars ($21) was paid. The defendant gets credit for thirty-four (34) weeks of temporary total disability benefits paid. It should be noted that perhaps some benefits were paid as workmen's compensation benefits during the period ending March 19, 1972. If so, credit would be allowed.

Dr. Jersild's testimony concerning Claimant's inability to return to work is essentially uncontradicted. Dr. Jersild refers to Claimant's lack of ability to perform work requiring ambulation. While perhaps stronger evidence of total incapacity is desired, it is the finding of this deputy commissioner that Claimant was totally incapacitated from all gainful employment up to April 9, 1973, the date of Dr. Jersild's last examination. The period of time from December 1, 1971, to April 9, 1972, is seventy and four-sevenths (70 4/7) weeks.

Claimant's compensation rate for healing period compensation is sixty-four dollars ($64) per week. Claimant's compensation rate for permanent partial disability benefits is fifty-nine dollars ($59) per week.

THEREFORE, Defendant is ordered to pay Claimant one hundred forty (140) weeks of permanent partial disability compensation at the rate of fifty-nine dollars ($59) per week. Defendant is further ordered to pay Claimant seventy and four-sevenths (70 4/7) weeks of healing period disability compensation at the rate of sixty-four dollars ($64) per week. Credit is to be given for at least thirty-four (34) weeks of temporary total disability compensation benefits previously paid by the defendant.

Costs of this proceeding are taxed to the defendant.

Signed and filed this 16 day of April, 1974.

ALAN R. GARDNER
Deputy Industrial Commissioner

No Appeal

Barbara J. Reynolds, Claimant,

vs.

L. B. Price Mercantile Company, Employer, and

Employers Insurance of Wausau, Insurance Carrier, Defendants.

Review Decision

Mr. Thomas F. Daley, Jr., Attorney at Law, 609 Putnam Building, Davenport, Iowa 52801, For Claimant.

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

This is a proceeding brought by the claimant, Barbara J. Reynolds, against her employer, L. B. Price Mercantile Company, and its insurance carrier, Employers Insurance of Wausau, for Review, pursuant to the provisions of Section 86.24 of the Iowa Workmen's Compensation Act, of an Arbitration Decision wherein Claimant was denied workmen's compensation benefits for an injury allegedly arising out of and in the course of her employment on October 7, 1971. The case was presented on the transcript of the evidence presented at the Arbitration hearing, and oral arguments of counsel.

The issue to be decided in this case is whether or not the claimant sustained an injury arising out of and in the course of her employment.

Both parties have agreed that the claimant was an employee at the time of her accident. The claimant and her husband were salespeople for the defendant employer at the time of her accident. The defendant employer merchandises home items such as small appliances, curtains, bedspreads, etc. The merchandising is conducted by sales personnel such as the claimant. The items are sold directly to the home, and no retail store is involved. Sales are made by contracts with established customers, referrals, and on rare occasion, door-to-door sales. Each employee has a designated route.

Claimant does not have a set number of hours to work, and her work is done outside the office of the defendant employer, located at Fourth and Cedar Streets in Davenport, Iowa. Usually, the sales personnel will check into the office at least once daily, to pick up needed merchandise and turn in contracts and collections. Frequent visits to the office by sales personnel are not encouraged, since functions of the office staff are thereby interrupted. However, it was part of the claimant's normal activity to come into the office more than once on some days, depending on what she needed in the course of a particular day's work.

Sales personnel are to deliver merchandise and pick up collections at customer's residences, which requires considerable travel. On the day of the accident, Claimant was to have serviced a portion of her territory in Maquoketa, Iowa. Claimant customarily made the trip to Maquoketa

on Thursday of each week, but the sickness of one of her daughters caused her to remain in Davenport on Thursday, October 7, 1971. Claimant and her husband reported to the office on October 7, 1971, between 10:00 A.M. and 10:30 A.M. They informed Mr. Lee Stansberry, manager of the office in Davenport, that claimant could not go to Maquoketa because their daughter was ill. It was decided that Mr. Reynolds would take his wife's van, since it was already loaded with the items necessary for the Maquoketa trip to service the Maquoketa area, and that Stansberry would use Mr. Reynold's car to service Mr. Reynold's territory in Moline, Illinois.

Mrs. Reynolds transferred a few items of merchandise from her van to Stansberry's car and then took Stansberry's car and drove home. This merchandise was delivered by Mrs. Reynolds in Stansberry's car during the day. After delivering these items, Claimant spent most of her time at home with her sick child. On a subsequent trip, Claimant was involved in an automobile accident causing her injuries.

Claimant's recollection of the events surrounding the accident are quite hazy. On the trip during which the accident occurred, Claimant was on a route to the defendant employer's office. Claimant's testimony indicates that she was to pick up her other daughter, who had remained after school, at 3:20 P.M. The school is one block from the defendant employer's office. Claimant would often pick up her daughter either at school or at the office and transact some business at the same time, although this had never previously been done on a Thursday. The accident occurred about 3:30 P.M. The testimony indicates that the claimant had no order forms, sales contracts, or merchandise with her at the time of the accident. The sales contracts were later found by the claimant's husband, in her briefcase at home. No sales or collections were made on the day of the accident.

Claimant testified in her deposition that she was going to pick up her daughter and drop off some collections made on the previous day. At the Arbitration hearing, the claimant had no recollection as to whether or not she was going to the office for any particular purpose at the time the accident occurred. The testimony on this point is conflicting, but it is possible that the claimant had two or three hundred dollars with her at the time of the accident, which represented collections made on previous days. Claimant testified further that she was not returning Stansberry's car and that it would be all right to return it the following morning.

A considerable amount of testimony was presented and later argued on Review, concerning a visit by the claimant to the home of a Mary Jo Carel for collection purposes. Claimant stated in her deposition of August 23, 1972, that she clearly remembered going to the home of Mrs. Carel on the morning of the accident. Since Mrs. Carel was not home or not awake, she left a note stating she would be back at 4:00 P.M. to collect. At the hearing, Claimant was unable to recall this event, and stated that she was relating what Mrs. Carel had told her. On cross-examination, Mrs. Carel was unsure of the exact date on which the note was left in her mailbox. She stated that the claimant's daughter told her the collection was not made on the day the note was written, because of the accident. Mrs. Carel admitted that based on the statement of the claimant's daughter, who had no personal knowledge of when the note was written, she assumed that the two occurred on the same day.

It is possible that the accident and the writing of the note occurred on the same date. Accepting, arguendo, this to be true, it is possible that the claimant may have intended to go to Mrs. Carel's house to collect after picking up her daughter and going to the office. However, Claimant had no independent recollection of whether or not she intended to visit Mrs. Carel, or that she had stopped at Mrs. Carel's house earlier on the day of the accident.

The claimant has the burden of proving that her injury arose out of and in the course of her employment, by a preponderance of the evidence. **Musselman v. Central Telephone Co.**, 261 Iowa 352, 154 N.W. 2d 128(1967). In **McClure v. Union, et al, Counties,** 188 N.W. 2d 283, The Iowa Supreme Court stated:

> "We have frequently said 'in the course of' the employment refers to time, place, and circumstances of the injury.***An injury occurs in the course of employment when it is within the period of employment at a place where the employee reasonably may be performing his duties, and while he is fulfilling those duties or engaged in doing something incidental thereto. (citations omitted.)"

The claimant has presented evidence that she was fulfilling the dual purpose of dropping off some collection money at her place of employment and picking up her child from school. The Iowa Supreme Court has stated the principle in **Pohler v. T. W. Snow Construction Co.**, 239 Iowa 1018, 1023, 33 N.W.2d 416, that:

> "If the work of the employee creates the necessity for travel, he is in the course of his employment, though he is serving at the same time some purpose of his own...If, however, the work has had no part in creating

the necessity for travel, if the journey would have gone forward though the business errand had been dropped, and would have been canceled upon failure of the private purpose though the business errand was undone, the travel is then personal, and a personal risk."

At the time of the accident, the claimant was on her way to pick up her daughter who had remained after school. Claimant asserts that she was also on her way to the office to transact some business. The only possible business purpose attributable to this trip was the possible turning in of money from previous days' collections. It is clear from the claimant's deposition of August 23, 1972, that her purpose in picking up her daughter was the prime factor which generated the trip on which the injury occurred. Even if the business errand was canceled, Claimant's testimony strongly indicates that she would have picked up her daughter from school. However, had her daughter not needed a ride home, the delivery of the collections would have waited. Counsel for the claimant stated in argument at the Review hearing that the work done by sales personnel was not of a pressing nature. Employees worked their own hours and reported into the office at their own convenience. Claimant had reported in on the morning of the accident and did not bring the previous days' collections with her. The evidence indicates that the turning in of the collection money was not of pressing importance, which would have caused the claimant to make the trip if she did not have to pick up her daughter. The claimant has proposed several possibilities to place her within the course of her employment, but these possibilities are speculative in nature and fail to carry the claimant's burden of proof.

Claimant further contends that she was going to stop at the home of Mrs. Carel after picking up her daughter and transacting some business at the office. The evidence presented on this point was, at best, speculative. Claimant could not remember going to Mrs. Carel's house in the morning before the accident, or writing a note to Mrs. Carel stating she would return at 4:00 P.M. to collect. Mrs. Carel was unable to testify as to the date she received the note from the claimant. She assumed she received it on the day of the accident because of a statement made to her by the claimant's daughter, who did not know when the note was written. This testimony was clearly hearsay, and it alone cannot carry the claimant's burden of proof. **DeLong v. Iowa State Highway Commission,** 229 Iowa 763, 296 N.W. 362 (1941).

A collateral issue raised at the Review hearing concerns whether or not deposition testimony is treated as part of the record. Claimant's counsel argued that the depositions taken in this case were discovery depositions only. Since these were not formally offered into evidence, counsel argues that they were not part of the record and should not have been relied on by the Deputy Commissioner in making his Arbitration Decision. Counsel for the defendants stated that the depositions were taken under the Iowa Rules of Civil Procedure, as they apply to the Workmen's Compensation Act, and that they were not restricted only to discovery.

It has long been held that the intent of the Workmen's Compensation Act should not be construed with the strictness and according to the technical rules of evidence and procedure that are applied in other legal proceedings. **Yates v. Humphrey,** 218 Iowa 792, 255 N.W. 639(1934). Section 86.18 of the Workmen's Compensation Act provides for liberal rules of evidence, stating that:

> "While sitting as a board of arbitration, or when conducting a hearing on review, or in making any investigation or inquiry, neither the board of arbitration nor the commissioner or his deputies shall be bound by common law or statutory rules of evidence or by technical or formal rules of procedure; but they shall hold such arbitrations, or conduct such hearings and make such investigations and inquiries in such manner as is best suited to ascertain and conserve the substantial rights of all parties thereto. Process and procedure under this chapter shall be as summary as reasonably may be."

Since strict rules of evidence and procedure are not applicable in workmen's compensation cases, it was proper for the Deputy to consider the depositions, particularly those of Mrs. Reynolds and Stansberry, in making his decision.

WHEREFORE, the Arbitration Decision is hereby affirmed.

It is found and held as a finding of fact that the injury to the claimant, Barbara J. Reynolds, did not arise in the course of her employment with the defendant employer, L. B. Price Mercantile Company.

THEREFORE, recovery of benefits under the Workmen's Compensation Act must be and is hereby denied to the claimant. The parties shall pay the costs of producing their own evidence, the defendants shall pay the fees of the court reporter and the transcript of the Arbitration proceeding.

Signed and filed this 3 day of April, 1974.

ROBERT C. LANDESS
Industrial Commissioner

No Appeal

Clyde E. Roby, Claimant,

vs.

John Deere Waterloo Tractor Works, Employer, Self-Insured, Defendant.

Review - Reopening Decision

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

Mr. Wirt P. Hoxie, Attorney at Law, 1000 Waterloo Building, Waterloo, Iowa 50704, For Defendant.

This is a proceeding in Review-Reopening brought by the claimant, Clyde E. Roby, against John Deere Waterloo Tractor Works, his employer and an authorized self-insurer, to recover additional benefits under the Iowa Workmen's Compensation Act as the result of an injury that occurred on March 19, 1968. This matter came on for hearing before the undersigned Deputy Industrial Commissioner sitting as sole arbitrator at the courthouse in and for Black Hawk County at Waterloo, Iowa, on October 10, 1972. Counsel were given leave to obtain evidentiary medical depositions and to file briefs. The last brief having been filed on November 29, 1973, the record then was closed.

The Industrial Commissioner's file discloses a Memorandum of Agreement filed and approved on April 3, 1968, and a Form 5 indicating that the last date on which workmen's compensation was paid was April 14, 1968. This Application for Review-Reopening was filed July 20, 1972.

There is sufficient evidence contained in this record to support the following findings of facts, to wit:

The claimant, age 29, married and a veteran of two years' duty with the armed services, began his employment for his employer on October 18, 1965. On the date of his injury, March 19, 1968, the claimant was working in the core department. He was injured when a forklift truck carrying a load of cores squeezed the claimant between the forklift truckload and rack of cores. The claimant was given immediate medical attention by Dr. Richard Corton, M.D., the plant physician. The claimant began a tour of duty with the Army Reserve on April 13, 1968, complaining at that time of back problems, and returned to his civilian status and his normal duties for his employer on May 27, 1968.

Dr. Warren Nash, M.D., saw the claimant in June and July of 1968, and the claimant was complaining of back problems at that time. The condition did not improve, and Dr. Nash referred Claimant to Dr. Bernard Diamond, M.D., an orthopedic surgeon, who performed a laminectomy on November 22, 1968, fusing the vertebrae at L4-L5-S1. The claimant had also been seen on various occasions by Dr. Richard Corton, M.D., and Dr. Richard D. Acker, M.D.

Claimant was discharged by his employer in June of 1969. At the conclusion of the hearing, Defendant asked for and received permission to amend the Answer, and for the first time in these proceedings invoked the affirmative defense of the statute of limitations.

The primary issue of jurisdiction of the subject matter requires attention. Since jurisdiction cannot be conferred by agreement of the parties upon this department, it follows that the fundamental question to be resolved is: Does the Industrial Commissioner retain jurisdiction of a controversy notwithstanding that the time within which to bring the action has, upon a reading of the pleadings, expired. In short, is the application of the statute of limitations jurisdictional or procedural?

Section 85.26 provides as follows:

> **Limitation of actions.** 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.
>
> No claim or proceedings for benefits shall be maintained by any person other than the injured employee, his dependent or his legal representative, if entitled to benefits.

This provision has been reviewed in the case of **Mousel v. Bituminous Material & Supply Co.,** 169 N.W. 2d 763. In that case the defendants had failed to plead affirmatively that more than two years had expired between the date of injury and the commencement of the Application for Arbitration. In ruling on that issue, the court said:

> Claimant's remaining complaint that it was error to hold it was not necessary for defendants to plead the bar of section 85.26 as a special defense, is without merit. The argument is based on the last sentence of section 86.14: "A defense other than a general denial of claimant's alleged facts must be pleaded as a special defense."

The rule in this state is that our Workmen's Compensation Act creates a right of action but section 85.26 conditions the institution of proceedings within the prescribed period of two years. The legislature, having the power to create the right, may affix the conditions under which it is to be enforced, and a compliance with these conditions is essential. It is the right to claim benefits under the act that is lost after the lapse of two years. **Otis**

v. Parrott, supra, 233 Iowa 1039, 1045-1046, 8 N.W. 2d 708, 712-713; **Secrest v. Galloway Co.,** 239 Iowa 168, 172-176, 30 N.W. 2d 793. See also **Paveglio v. Firestone Tire & Rubber Co.,** 167 N.W. 2d 636, 639.

It is apparent that the statute of limitations as respects 85.26 is jurisdictional.

However, the limitation in Section 86.34, Code of Iowa, provides as follows:

> **Review of award or settlement.** Any award for payments or agreement for settlement made under this chapter where the amount has not been commuted, may be reviewed by the industrial commissioner or a deputy commissioner at the request of the employer or of the employee at any time within three years from the date of the last payment of compensation made under such award or agreement, and if on such review the commissioner finds the condition of the employee warrants such action, he may end, diminish, or increase the compensation so awarded or agreed upon. Any party aggrieved by any decision or order of the industrial commissioner or a deputy commissioner on a review of award or settlement as provided in this section, may appeal to the district court of the county in which the injury occurred and in the same manner as is provided in section 86.26.

Secrest v. Galloway Co., 239 Iowa 168, 30 N.W. 2d 793, concluded that the limitation of Section 86.34, Code of Iowa, was not a limitation upon jurisdiction but rather upon the right to receive benefits under Section 86.34. **Secrest** further concluded that it was "not the commencement of a new proceedings but rather a continuation of one already pending." In that context, it is held that the application of the statute of limitations contained in Section 86.34, Code of Iowa, is procedural. It follows, then, that the industrial commissioner continues to have jurisdiction and may take evidence in a Review Reopening even though the time within which to bring the action may have expired.

In the case of **Paveglio v. Firestone Tire and Rubber Company,** 167 N.W. 2d 636, 639, wherein **Secrest v. Galloway,** supra, is cited with approval we also find the following language:

> "We hold appellant failed to allege sufficient well-pleaded facts to estop employer from raising the limitation provided in section 86.34 as a defense to appellant's application for review-reopening, so the issue of estoppel was not in the proceedings before the commissioner."

If the claimant is prevented from the issue of estoppel for failure to allege sufficient well-pleaded facts, it would seem to follow that the defendant should be barred from asserting the statute of limitations if he fails to allege it in well-pleaded facts. Therein lies one of the issues in this case: Did the untimely amendment dictated into the record by defense counsel at the conclusion of the October 10, 1972 hearing, waive his right to assert the affirmative defense?

The Rules of Practice adopted by this department read as follows:

> 1.9 **Amendments.** Amendments may be made to any pleading before hearing or to conform to proof.
>
> This rule is intended to implement sections 86.17 and 86.18.
>
> 1.10 **Answer.** In the answer, the employer and insurance carrier shall admit or deny each allegation of the claimant's application. The answer shall state the conceded extent of temporary or permanent disability, the wage rate, and the amount of benefits paid, and shall state in what counties or towns the employer and insurance carrier agree that the hearing be held. **A defense other than a general denial must be plead as a special defense.** (Emphasis added)
>
> This rule is intended to implement sections 86.14 and 86.35.

The above rules adopted by this department appear to take the form called for in Rule 88 of the Iowa Rules of Civil Procedure, which reads as follows:

> Any pleading may be amended before a pleading has been filed responding to it. The court, in furtherance of justice, may allow later amendments, including those to conform to the proof and which **do not substantially change the claim or defense.** The court may impose terms, or grant a continuance with or without terms, as a condition of such allowance. (Emphasis added)

The defendant, having failed to assert the affirmative defense of the running of the statute of limitations prior to the hearing, and, in fact, prior to the conclusion of the claimant's testimony, is now barred by operation of the Rules of Practice of the Iowa Industrial Commissioner and the Rules of Civil Procedure from asserting the statute of limitations as an affirmative defense. The issue was apparent on the face of the claimant's pleadings. Defendant should have timely filed its special defense rather than lull the claimant into believing that it was being waived. It was not an amendment to "conform to the proof" as it was present from the outset.

This failure to timely file an affirmative defense prolonged the time and the commensurate cost to the taxpayer of an extended hearing. It is the

intent of the Iowa Workmen's Compensation statute to provide speedy determination of items in controversy, and this case stands as a classic example of the time that may be consumed in these matters. It should be noted that this deputy fails to see the reasoning that led defense counsel to delay his asserting the affirmative defense of the running of the statute of limitations, for on the basis of this record it is apparent that, had the defense been properly urged, the claim would have been defeated. This decision affirms the right of this tribunal to allow the filing of appropriate amendments, and it further affirms the right to disregard special defenses that are not pleaded affirmatively.

It is therefore the ruling of this deputy that the department of the Iowa Industrial Commissioner has continuing jurisdiction of this subject matter, and by virtue of the breach of the Rules of Practice that occurred in this matter, that this department has the authority to find that the affirmative defense of the running of the statute of limitations in 86.34 is not available to these defendants.

The further problems presented by this matter are those of medical causation. The thrust of the defendant's opposition to the matter in controversy is that there was no evidence connecting the findings of the attending surgeon in November of 1968, with those findings related to the March, 1968, industrial injury. The record includes the evidentiary depositions of Dr. Richard Corton, M.D. and Dr. Richard D. Acker, M.D. As treating and attending physicians, their expert judgment is that whatever ailment the claimant suffered in November, 1968, was not caused by the industrial injury episode of March, 1968. Specifically, the doctors' opinion was that the chest wall injury which Mr. Roby suffered in March, 1968, had nothing to do with his subsequent back problems.

The testimony of Dr. Bernard Diamond, M.D., contradicts the medical opinions of Drs. Corton and Acker. As a specialist in orthopedics, Dr. Diamond expressed the medical opinion that the claimant sustained an injury to the fourth disc of L-4 and L-5. The surgery allowed a visual examination, confirming the doctor's diagnosis of disc injury described as a condition of a degenerative lumbar disc with evidence of central prolapse of the fourth disc. Dr. Diamond further expressed the medical opinion that his treatment of the claimant and the history that he obtained from the claimant allowed him to express the medical opinion that there is a medical causation between the condition found in November of 1968 and the injury of March, 1968. This deputy agrees with Dr. Diamond's conclusion, basing his judgment primarily on the doctor's specialty of orthopedics and the fact that he was the surgeon and thus would be the appropriate individual to advise the undersigned deputy as to his findings as the result of such surgery. The doctor further expressed the opinion that by reason of the surgery the claimant has sustained a fifteen percent (15%) functional disability of the body as a whole.

The claimant has sustained the burden of proof by showing additional consequences, facts and circumstances on which to base his application, and further, sustained the burden of showing that they resulted proximately from the original accident. **Henderson v. Iles,** 96 N.W. 2d 321. The defendant's argument, ably presented, that the diagnosis of the family physician, Dr. Warren Nash, M.D., was at variance with the record, which shows on the Travelers Insurance forms that the injury for which benefits were claimed was not work related, is herewith rejected.

THEREFORE, after taking all of the credible evidence contained in this record into account, it is held as a finding of fact that the claimant sustained an industrial injury on March 19, 1968, and that said injury arose out of and in the course of his employment for his employer. It is further found as a finding of fact that the claimant has sustained an industrial disability of fifteen percent (15%) of the body as a whole.

WHEREFORE, it is ordered that the defendant pay the claimant seventy-five (75) weeks permanent partial disability at the rate of forty-seven dollars and fifty cents ($47.50) a week. It is further ordered that the defendant pay the claimant forty-five (45) weeks statutory healing period at the rate of forty-eight dollars($48) per week.

It is further ordered that the defendant set off and reimburse The Travelers Insurance Company the sum of two thousand six hundred and five dollars and seventy-three cents ($2,605.73) for weekly indemnity previously paid under a non-occupational policy of insurance provided by them. It is further ordered that the defendant reimburse The Travelers Insurance Company the reasonable medical expenses of the cost of the hospitalization of November, 1968, and the cost of Dr. Nash's and Dr. Diamond's bills for services performed.

It is further ordered that the defendant pay the costs of these proceedings as well as the attendance of the shorthand reporter at the hearing.

Signed and filed this 9th day of January, 1974, at the office of the Iowa Industrial Commissioner.

HELMUT MUELLER
Deputy Industrial Commissioner

Appealed to District Court; Affirmed.

William Russeff, Claimant,

vs.

Armour & Co., Employer, Self-Insured, Defendant.

Review-Reopening Decision

Mr. William Russeff, 689 13th Street, S. E., Mason City, Iowa 50401, Pro Se.

Mr. Don W. Burington, Attorney at Law, 300 Mutual Federal Building, Mason City, Iowa 50401, For Defendant.

This is a proceeding in Review-Reopening brought by the claimant, William Russeff, against his employer, Armour & Co., a licensed self-insurer, to recover additional benefits under the Iowa Workmen's Compensation Act by virtue of an industrial injury that occurred on September 13, 1973. This matter came on for hearing before the undersigned Deputy Industrial Commissioner in the courthouse in and for Cerro Gordo County on Thursday, June 6, 1974. At the conclusion of that hearing the record was closed.

An examination of the Commissioner's file reveals an appropriate First Report of Injury and a Memorandum of Agreement has been filed and approved by this department on September 29, 1973, said Memorandum of Agreement calling for a temporary disability payment to the claimant of ninety-one dollars ($91). A Form 5 disclosing the payment of one and three-sevenths (1 3/7) weeks temporary disability and an appropriate amount of medical expense was filed with this department on February 8, 1974.

There is sufficient evidence in the record to support the following statement of facts:

Claimant, age forty-three (43), has been employed by Armour & Co. for the past twenty-four (24) years. On September 11, 1973, Claimant sustained a back injury while lifting a well casing. The claimant requested that he be allowed to seek treatment for the recent industrial injury he sustained at the office of Dr. Ron Master, D. C. This request was refused by Robert H. Jackson the casualty manager for the defendant. Mr. Jackson arranged for medical treatment at the Park Clinic in Mason City, Iowa. The claimant was unable to perform gainful employment for a period of two and three-sevenths (2 3/7) weeks. The medical charges incurred at the Park Clinic were in the amount of ninety-two and 91/100 dollars ($92.91) and were paid by the defendant. The claimant felt the need for additional medical care. He did not request the defendant to provide this assistance, but rather went to the Masters Chiropractic Clinic on November 23, 1973, without the knowledge of the defendant. He was seen over a period of time between November 23, 1973, and January 4, 1974, and incurred charges in the amount of eighty-four dollars ($84).

The defendant refuses to reimburse the claimant for this medical expense, claiming this item was not authorized by them. Therein lies the issue in this matter.

The department adheres to the following policy: The employer, being obligated to furnish reasonable professional and hospital care to treat an injured employee, has the right to choose the care. The treatment must be offered promptly and be reasonably suited to treat the injury without undue inconvenience to the employee. If the employee has reason to be dissatisfied with the care offered he should request the employer to provide him with another hospital or doctor, or the choice of a number of other doctors. If the request is denied, without good cause, the commissioner may, upon application and reasonable proofs of the necessity therefor, allow and order other professional and hospital services. In an emergency, the employee may choose his care at the employer's expense. (OAG May 17, 1962) 99 CJS Workmen's Compensation §273.

The record shows that the claimant failed to request a change in medical treatment or additional medical treatment. The claimant's failure to avail himself of the continuing medical care provided for in the foregoing rule cannot now ask the defendant to pay this medical expense item.

THEREFORE, after taking all of the credible evidence contained in this record, the following findings of fact are made:

1. That the claimant sustained an industrial injury on September 13, 1973, and that said industrial injury resulted in a temporary disability of two and three-sevenths (2 3/7) weeks;

2. That the defendant discharged its obligation to the claimant under §85.37, Code of Iowa, by providing reasonable medical care;

3. That the claimant failed to request additional medical to be provided by the employer; and

4. That the expense incurred by the claimant at Masters Chiropractic Clinic was unauthorized.

WHEREFORE IT IS ORDERED that the claimant take nothing from this proceeding and that each party bear their own costs.

Signed and filed this 30th day of July, 1974, at the Offices of the Iowa Industrial Commissioner at Des Moines, Iowa.

HELMUT MUELLER
Deputy Industrial Commissioner

No Appeal.

Phyllis Joan Sayer, Claimant,

vs.

Plains Poultry Farms, Inc., Employer,
and

Hawkeye Security Insurance Company, Insurance Carrier, Defendants.

Review-Reopening Decision

Mr. Wallace L. Taylor, Attorney at Law, 605 Citizens Nat'l Building, Boone, Iowa 50036, For Claimant.

Mr. A. Roger Witke, Attorney at Law, 1400 Central Nat'l Bank Bldg., Des Moines, Iowa 50309, For Defendants.

This is a proceeding in Review-Reopening brought by the claimant, Phyllis Joan Sayer, against her employer, Plains Poultry Farms, Inc., and its insurance carrier, Hawkeye Security Insurance Company, to recover benefits under the Iowa Workmen's Compensation Act on account of an injury sustained on October 23, 1970. The case came on for hearing before the undersigned on Monday, August 27, 1973, at the Industrial Commissioner's Office in Des Moines, Iowa. The record was left open for submission of briefs and arguments by counsel. The record was closed on October 1, 1973.

Deputy Commissioner Alan R. Gardner held in a prior Review-Reopening Decision filed November 14, 1972, that Claimant, as a result of the injury of October 23, 1970, sustained temporary disability from October 23, 1970, to November 1, 1971. He further found that Claimant sustained no permanent disability.

The first issue to be determined is whether or not the condition of the claimant has changed since the previous Review-Reopening Decision of November 14, 1972, or whether or not any facts have been discovered relative to the injury which existed but were undiscovered and could not, by the exercise of reasonable diligence have been discovered at the time of the hearing. **Gosek v. Garmer-Stiles,** 158 N. W. 2d 731.

Claimant testified that she first saw Tedford Dennis, D.C., for one visit on September 28, 1971. Subsequently, she visited Dr. Dennis on March 15, 1973, and has been treated by him ever since that date.

Since the last hearing, Claimant has attempted to perform waitress work consisting of three hours of work on two consecutive days. She testified that she was unable to perform such labor. On another occasion she tried typing but was unable to continue due to pain in her shoulder and neck. She further testified that she performs housework "little by little." On cross-examination Claimant testified that she was better now than in March of 1972. She further indicated in a deposition taken by Defendants on August 2, 1973, that when she began seeing Dr. Dennis in March of 1973, she did not have any new areas of discomfort as compared to the discomfort experienced in March of 1972.

Dr. Dennis first examined Claimant on September 28, 1971. On this date he tested her spinal balance by the use of a plumb line and a pair of Matts scales. He further tested the degree to which she could turn her head in both directions and utilized additional chiropractic procedures to locate spinal sublaxation. Dr. Dennis' diagnosis was (a) that Claimant had a severely distorted atlas ring, (b) that the cervical vertebrae were quite tender, and (c) that there was muscle strain in the region of the left shoulder and the left hip.

Claimant was next examined by Dr. Dennis on March 15, 1973. Dr. Dennis on direct examination testified that he took a cervical x-ray in addition to repeating the tests he performed on September 28, 1971. On this occasion, Dr. Dennis once again determined that Claimant had a severely distorted atlas ring. He further determined that there was a rotation to the left of the first, second, and third dorsal vertebrae. On cross-examination, Dr. Dennis was not able to answer whether the x-rays were taken on September 15, 1971, or March 15, 1973.

The testimony of Claimant and Dr. Dennis show neither a change of condition of the claimant nor any unknown factors which were not present at the previous Review-Reopening hearing. Claimant testified that since March of 1972 she was better and had no new areas of discomfort. Dr. Dennis' testimony indicated that the condition diagnosed by him in September, 1971 was the same as the condition diagnosed by him on March 15, 1973. The testimony of Dr. Dennis merely shows another expert's opinion of facts present and adjudicated at the prior hearing. This is not sufficient to sustain an additional award. **Bousfield v. Sisters of Mercy,** 249 Iowa 64, 86 N.W. 2d 109.

The last issue to be determined is the request by Claimant that the Industrial Commissioner, pursuant to §85.27, Code of Iowa, authorize the treatment of Dr. Dennis and require Defendants to pay for the services of Dr. Dennis.

Section 85.27, Code of Iowa, requires the employer to furnish reasonable medical care when he has notice or knowledge of an injury to an employee. Medical services furnished by the employer included Robert C. Jones, M.D., a neurologist; Donald W. Blair, M.D., an

orthopedist; and K. E. Check, M.D., a general practitioner. Claimant failed to show that the medical services provided by Dr. Jones, Dr. Blair, and Dr. Check were not reasonable nor that such medical services were not tendered by the defendants.

WHEREFORE, it is found that Claimant has failed to sustain her burden of proof by a preponderance of the evidence, that her condition has changed since the determination of November 14, 1972, or that facts related to the injury existed at the previous adjudication but were unknown and could not have been discovered by the exercise of reasonable diligence.

It is further found that Claimant has failed to show that the medical services provided by Defendants were not reasonable.

THEREFORE, Claimant's Application for Review-Reopening is dismissed. The request for authorization by the Industrial Commissioner for the treatment by Dr. Dennis is denied.

Signed and filed this 25th day of October, 1973.

DENNIS L. HANSSEN
Deputy Industrial Commissioner

Appealed to District Court; Affirmed.

Edward Schmid, Claimant,

vs.

Byron Jackson, Inc., Employer,
and

Liberty Mutual Ins. Co., Insurance Carrier, Defendants.

Review-Reopening Decision

Mr. J. Patrick Wheeler, Attorney at Law, 501 Clark Street, Canton, Missouri 53435, For Claimant.

Mr. Richard C. Bauerle, Attorney at Law, 112 West Second Street, Ottumwa, Iowa 52501, For Defendants.

This is a proceeding in Review-Reopening brought by the claimant, Edward Schmid, against his employer, Byron Jackson, Inc., and its insurance carrier, Liberty Mutual Ins. Co., to recover benefits under the Iowa Workmen's Compensation Act on account of an injury sustained on August 27, 1971. No hearing was held. The entire record consists of two medical depositions and pleadings. The record was fully submitted on July 9, 1973.

The issue to be determined in this matter is whether or not the claimant is entitled to additional disability benefits in excess of those previously paid by the defendants for the impairment of the middle and little fingers of Claimant's left hand. Claimant has been paid for one hundred percent (100%) of the ring finger of the left hand.

Section 86.34, Code of Iowa, provides that where an award for payments or agreement for settlement has been made, a claimant may reopen his case whenever his condition worsens. No award for payments has been made. A Memorandum of Agreement, Form 4, has been filed by the defendants. Accordingly, the proper proceeding is one in review-reopening.

The burden of proof falling upon the claimant in a review-reopening proceeding is that he must show a change of condition from that previously determined by an award or in an agreement. In addition, a claimant may introduce facts which now have come to light and could not have been discovered with reasonable diligence at the time of the award or agreement previously made. **Gosek v. Garmer-Stiles,** 158 N.W. 2d 731.

This burden of proof cannot be applicable in every review-reopening case. The filing of the Memorandum of Agreement, Form 4, adjudicates only that a claimant is an employee of the employer filing the Memorandum of Agreement, Form 4, and that an injury on the specified date arose out of and in the course of the employee's employment with the defendant employer. **Whitters & Sons, Inc. v. Karr,** 180 N.W. 2d 444. No change of condition from one point of time to another needs to be shown as no agreement as to the claimant's condition exists. The Memorandum of Agreement, Form 4, is almost always filed unilaterally by the compensation insurance carrier and payments of compensation are made. The employee may not know on what basis he is being paid. When this is the case, the Industrial Commissioner's Office will evaluate all evidence together to determine the degree of disability.

Before the burden of proof of showing a change of condition is placed upon the claimant, the defendants must present a prima facie case that the condition of the claimant at a certain date is fixed by an agreement. This prima facie case is met in this instance by the Form 5 Receipt signed by the claimant and indicating a percentage of disability to the fingers in issue. No evidence whatsoever is introduced to contradict this prima facie case. The claimant thus has the burden of proof of showing a change of condition from that set forth on the face of the Form 5 Receipt.

Two doctors testified. Dr. Don K. Gilchrist, M.D., an orthopedic surgeon, testified on Claimant's behalf. Dr. Julian M. Bruner, M.D., an

orthopedic specialist, testified on Defendants' behalf. It must be noted that Dr. Bruner examined Claimant on March 6, 1972, prior to the signing of the Form 5 Receipt. Dr. Gilchrist examined Claimant on April 25, 1973, following the signing of the Form 5 Receipt.

Dr. Bruner gave a functional impairment rating to the middle and little fingers of Claimant's left hand of sixty percent (60%). Dr. Gilchrist rated the same fingers at seventy-five percent (75%) functional impairment. Both doctors agree that Claimant is unable to make a tight fist with the left hand. Both doctors agree that Claimant's left little finger is in contracture. The proximal interphalangeal joint of the middle finger is enlarged. Dr. Bruner notes Claimant's little finger is in moderate contracture due to scar tissue. Dr. Gilchrist does not note this. Dr. Gilchrist indicates that Claimant's little finger is affected by arthrofibrosis.

Both doctors give a range of motion for the joints of the middle and little fingers of the left hand. The method in determining range of motion used by both doctors is basically the same. However, Dr. Gilchrist indicates zero degrees (0°) to be the straightened or fully extended position for the joint. Ninety degrees plus (90° +) is the fully contracted position. Dr. Bruner indicates that one hundred eighty degrees (180°) is the straightened or fully extended position for the joint. Ninety degrees minus (90° —) is the fully contracted position.

The motion ratings for the left middle and left little finger phalangeal joints given by Dr. Gilchrist are as follows: (The figure on the right is the same measurement using the one hundred eighty degree extended position as a starting point.)

Middle proximal interphalangeal joint
0-75° 180-105°
Middle distal interphalangeal joint
0-55° 180-125°
Little proximal interphalangeal joint
0-65° 180-115°
Little distal interphalangeal joint
35-95° 145- 90°

The motion ratings for the same joints stated by Dr. Bruner are as follows: (The figure on the right is the same measurement using the zero degrees extended position as the starting point.)

Middle proximal interphalangeal joint
170-120° 10-60°
Middle distal interphalangeal joint
180-140° 0-40°
Little proximal interphalangeal joint
140-130° 40-50°
Little distal interphalangeal joint
160-140° 20-40°

While Dr. Gilchrist's rating of functional disability is higher than that of Dr. Bruner, the underlying basis for the disability, functional impairment of the fingers, shows some slight improvement in motion. No increased award can be given on such an analysis of the medical opinions. A medical opinion is of no greater weight than its basis.

In paragraph three (3) of Claimant's Application for Review-Reopening, the allegation is made that Claimant was disabled from working from August 28, 1971, through December 10, 1972, a period in excess of sixteen and five-tenths (16.5) weeks. This paragraph is admitted in Defendants' Answer. According to the pleadings, Claimant was incapacitated from gainful employment for at least thirty percent (30%) of the period of time paid for the permanent partial disability. Claimant is thus entitled to an additional period for healing period compensation over that previously paid.

No medical expenses are sought.

WHEREFORE, it is found that Claimant has failed to sustain the burden of proof that Claimant's condition is such as to merit additional compensation for permanent partial disability.

It is further found that the claimant is entitled to sixteen and five-tenths (16.5) weeks of healing period compensation payable at the rate of sixty-four dollars ($64) per week.

THEREFORE, the relief sought in Claimant's Application for Review-Reopening with respect to permanent partial disability compensation is denied.

The defendants are ordered to pay the claimant sixteen and five-tenths (16.5) weeks of healing period compensation at the rate of sixty-four dollars ($64) per week. Credit is to be given for the twelve and two-sevenths (12 2/7) weeks of healing period compensation previously paid by the defendants.

Costs of the action are taxed to the defendants.

Signed and filed this 18th day of July, 1973.

ALAN R. GARDNER
Deputy Industrial Commissioner

No Appeal.

Betty J. Seeger, Claimant,

vs.

Howard Juncker, d/b/a Howard's Radio and TV Service, Employer,
and
Western Fire Insurance Company, Insurance Carrier, Defendants.

Review Decision

Mr. G. A. Cady, Attorney at Law, Hampton, Iowa 50441, For Claimant.

Mr. Warren L. DeVries, Attorney at Law, 208 First St., N.W., Mason City, Iowa 50401, For Defendants.

This is a proceeding for Review, pursuant to the provisions of Section 86.24 of the Iowa Workmen's Compensation Act of an Arbitration Decision wherein the claimant was awarded benefits at the rate of fifty-nine dollars ($59.00) per week for three hundred (300) weeks, as a result of injuries resulting in the death of her husband, Donald K. Seeger, on November 12, 1971, while employed by Defendant Employer. The case was submitted on a stipulation of facts in the Arbitration proceeding. Upon the stipulation of facts and arguments of counsel, the case was submitted on Review.

The only issue to be determined is the rate at which the claimant should be paid weekly death benefits. All other matters concerning the liability of the employer to the claimant have been determined.

Defendants contend that Section 85.37 is controlling. Section 85.37 in no way has any effect over the instant action, as by its express terms it applies only to a situation involving "...a personal injury causing temporary disability, or causing a permanent partial disability for which compensation is payable during a healing period..." It is assumed that Defendants meant to refer to the somewhat similar provisions covering a death case contained in Section 85.31(1).

Section 85.31(1) states:

> "When death results from the injury, the employer shall pay the dependents who were wholly dependent on the earnings of the employee for support at the time of his injury, during their lifetime, compensation upon the basis of sixty-six and two-thirds percent per week of the employee's average weekly earnings, payable in three hundred equal weekly installments commencing from the date of his injury, but not to exceed a weekly benefit amount, rounded to the nearest dollar, equal to forty-six percent of the state average weekly wage paid employees as determined by the Iowa employment security commission under the provisions of section 96.3 and in effect at the time of the injury; provided further, that such weekly compensation shall not be less than eighteen dollars per week, except if at the time of his injury his earnings are less than eighteen dollars per week, then the weekly compensation shall be a sum equal to the full amount of his weekly earnings. Such compensation shall be in addition to the benefits provided by sections 85.27 and 85.28."

Claimant contends that the applicable portion of the Act is Section 85.36(5), which states:

> "In case of injured employees who earn either no wages or less than three hundred times the usual daily wage or earnings of the adult day laborer in the same line of industry of that locality, the yearly wage shall be reckoned as three hundred times the average daily local wages of the average wage earner in that particular kind or class of work; or if information of that kind is not obtainable, then the class most kindred or similar in the same general employment in the same neighborhood."

The essential facts in this case are that decedent worked a full time job with another employer; that he had worked on a part time basis with the defendant employer for approximately 20 years; that he was paid at the rate of $3.00 per hour; that there were no set hours of any one day, nor set number of days during any week when the decedent was to work, but his work was at the will and pleasure of the defendant employer; that during the year next preceding decedent's death, he worked for Defendant Employer a total of 292.83 hours for which he was paid $878.50.

Decedent worked for the defendant employer more during the year next preceding his death, as his regular employer was on strike for a portion thereof. The stipulation indicates that he was usually paid weekly for the number of hours he worked in the previous week. At least on one occasion it would appear, however, that he was paid for a period of two days between March 29th and March 31st, 1971, in which he worked for 13⅓ hours.

It was generally agreed, although not specifically stipulated, that the usual daily wage or earnings of the adult day laborer in the same line of industry in the locality could be determined by multiplying the hourly rate paid to the decedent times what is normally considered a day of work or eight hours. In any event, for whatever effect it may have as it applies to the instant action, the usual daily wage is found to be at least twenty-four dollars ($24.00) per day.

Defendants contend that if Section 85.31(1) does not apply to this case, then it has no application whatsoever and that the legislature would not have enacted a statute that had no effect. Whatever the wisdom of Defendant's argument, it would appear that the application of Section 85.36(5) to a situation such as this had been decided by the Supreme Court of Iowa a sufficient number of times to consider the issue well determined.

The most recent pronouncement is **Stines v. Farmers Lumber & Supply Co.,** 251 Iowa 321, 100 N.W. 2d 415. In this case, the court said:

> "Unquestionably the contract of employment was for a short four-hour day and the decedent so worked. However, the contract of employment is no concern of ours. The statute does not allow or require us to base any determination upon the contract. The statute simply provides compensation shall be computed on the basis of annual earnings and the manner of determining annual earnings under different circumstances. The circumstances here presented come squarely under the provisions of subsection 5 set out above. (85.36(5)) Decedent was earning less than three hundred times the usual daily wage or earnings of the adult day laborer in the same line of industry of that locality. Therefore we must apply the formula set out in such subsection, '***the yearly wage shall be reckoned as three hundred times the average daily local wages of the average wage earner in that particular kind or class of work; ***.' ****"

A case even more on point because of the almost identical similarity of facts is **Shuttleworth v. Interstate Power Co.,** 217 Iowa 398, 251 N.W. 727. In that case, the decedent had a regular full time job. In addition, he worked part time for the defendant employer in that action, performing certain duties for which he was paid a small monthly salary plus a piece rate for certain other functions. After considerable discussion about the Defendant's apparent lack of concern for the value of a human life, the court applied what is now Section 85.36(5), saying:

> "***The appellant power company had to have the services such as were performed by (decedent). This work did not require a great deal of time, but it was vital to operation. The plain intent of the compensation statute is to protect the workman and his family against loss of his earning capacity and protection. (Decedent) lost his life in the service of (Defendant Employer). He performed valuable services for that company. He was engaged in a hazardous occupation. His family is entitled to the benefits which the workmen's compensation law provides. Not the mere pittance that the appellants seem to think this human life was worth."

As also bearing upon the application of Section 85.36(5), see **Harvey v. Rocklin Manufacturing Company,** 237 Iowa 1058, 24 N.W. 2d 402 and **Richards v. Central Iowa Fuel Company,** 184 Iowa 1378, 159 N.W. 696.

WHEREFORE, the Arbitration Decision is hereby affirmed.

It is found and held as finding of fact:

That on November 12, 1971, Donald K. Seeger sustained injuries resulting in death arising out of and in the course of his employment with Howard Juncker, d/b/a Howard's Radio and TV Service.

That the decedent earned less than three hundred times the usual daily wage or earnings of the adult day laborer in the same line of industry in that locality.

That the average daily local wages of the average wage earner in that particular kind or class of work was at least twenty-four dollars ($24.00) per day.

That Claimant is the surviving spouse of Donald K. Seeger.

That Claimant is entitled to weekly benefits at the rate of fifty-nine dollars ($59.00) per week.

That hospital, doctor bills and funeral benefits have been paid by the defendants.

THEREFORE, Defendants are hereby ordered to pay to the claimant weekly benefits at the rate of $59.00 per week for a period of 300 weeks, accrued payments to be made in a lump sum together with statutory interest. Costs of this action, if any, are taxed to the defendants.

Signed and filed this 19th day of December, 1972.

ROBERT C. LANDESS
Industrial Commissioner

Appealed to District Court; Affirmed.
Appealed to Supreme Court; Decision Pending.

Austin C. Smith, Claimant,

vs.

Saylor Feed and Grain Co., Employer,
and

Hawkeye Security Insurance Co., and Aid Insurance Co., Insurance Carrier, Defendants.

Review Decision

Mr. James W. Brown, Attorney at Law, 200 W. Jefferson Street, Osceola, Iowa 50213, For Claimant.

Mr. Francis J. Mullen, Attorney at Law, 100½ N. Grand Street, Chariton, Iowa 50049, For Defendants.

This is a proceeding brought by Claimant, Austin D. Smith, seeking a Review of an Arbitration decision under the provisions of

Section 86.24 of the Iowa Workmen's Compensation Act, wherein the claimant was denied benefits from his employer, Saylor Feed & Grain Co., and its present insurance carrier, Hawkeye-Security Insurance Co., on account of injuries he allegedly sustained on November 18, 1970. The case was submitted on a transcript of the Arbitration proceedings, the depositions of further witnesses, and the briefs and arguments of counsel.

Pursuant to an Order by the deputy commissioner, the claimant's Application for Review-Reopening was consolidated with the Application for Arbitration prior to the hearing. The Review-Reopening was brought by the claimant against his employer, Saylor Feed and Grain Co., and its previous insurance carrier, AID Insurance Service. The two applications were consolidated into one hearing. While the deputy commissioner denied compensation as to the claimant under the Application for Arbitration, the claimant was granted benefits from Saylor Feed & Grain Co. and its prior insurance carrier, AID Insurance Service, based upon the Review-Reopening. Only the Arbitration decision is under Review by the Industrial Commissioner.

The evidence shows that the claimant suffered a compensable injury while employed by Saylor Feed Co. on September 14, 1968. While working on the premises of his employer, the claimant fell from a ramp. The accident resulted in a lower back injury. As a result of this injury, the claimant received twenty-three (23) weeks temporary total disability at the rate of $44.00 per week and a permanent partial disability payment of ten percent (10%) of the body as a whole or fifty (50) weeks at the rate of $47.50. This amount was paid by AID Insurance Service, who was the insurance carrier of Saylor Feed Co. at that time.

After the 1968 injury, the claimant worked parttime for Saylor Feed Co. for approximately a year, and then went back to work on a fulltime basis as a route salesman. While the claimant was in the process of handling his route on November 18, 1970, he pulled his car off the road in order to inspect the tires. While alighting from the car, the claimant remembered that he hadn't checked the rear view mirror for approaching traffic. As he turned around to check for traffic, he experienced a severe pain in his lower back. The claimant has not worked since that day. It is upon this November 18, 1970 incident that the claimant filed his Application for Arbitration. The claim is based upon the alleged theory that the November 18, 1970 incident was a compensable injury arising out of and in the course of his employment. Prior to the November, 1970 incident, Hawkeye Security Insurance Co. replaced AID Insurance Service as Saylor Feed Co's. insurance carrier, and is thus the defendant in this action. Hawkeye-Security Insurance Co. claims that the November, 1970 incident was not a compensable injury, but simply a continuation of the September, 1968 injury, thus holding AID Insurance Service liable.

The major issue in this proceeding is whether the November, 1970 incident was a separable and distinct injury and thus compensable, or rather a continuation of medical difficulties experienced by the claimant as a result of the September, 1968 injury. If the November, 1970 incident was simply the continued deterioration of his previous injury, then no new injury did, in fact, occur. A secondary issue is whether the alleged injury "arose out of" his employment.

A personal injury means an injury to the body, the impairment of health, or 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 the employee. **Almquist v. Shenandoah,** 218 Iowa 724, 254 N.W. 35 (1934). 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 Iowa 296, 18 N.W. 2d 607 (1945). Claimant is entitled to compensation if he had a pre-existing condition or disability which was aggravated, accelerated, or worsened by an injury which arose out of and in the course of employment. **Musselman v. Central Telephone Co.,** 154 N.W. 2d 128 (1967). If an employee's employment resulted in 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. Iowa Workmen's Compensation Act, Section 85.36(8); **Ziegler v. United States Gypsum Co.,** 252 Iowa 613, 106 N.W. 2d 591 (1961); **Hanson v. Dickinson,** 188 Iowa 728, 176 N.W. 823 (1920).

Taking the evidence in a light most favorable to the claimant, it would appear that the claimant did experience a separable and distinct injury on November 18, 1970. This finding of fact is based on the testimony of the claimant and the evidentiary deposition of Dr. Donald W. Blair, M.D., the claimant's treating physician.

The claimant testified that following the September, 1968 injury, he suffered a severe pain in his lower back. He received numerous chiropractic treatments for approximately a year following the injury. He was also examined by Dr. Blair, who has been his attending physician since the 1968 injury. The pain in Claimant's back was irregular over the next two years, and he suffered occasional pain up to the time of the incident in question. The pain usually became evident after prolonged sitting, and he periodically wore a

backbrace. Claimant testified that the pain became less severe as time progressed, and that he was making gradual improvement. After Claimant went back to work fulltime only one year after the 1968 injury, he missed only a few days of work prior to the 1970 incident. On the day of the November 18, 1970 incident, Claimant experienced no pain prior to the incident.

Following the September, 1968 injury, the claimant has been under the care of Dr. Blair, an orthopedic surgeon, of Des Moines. Dr. Blair, or his prior associate, Dr. VandenBrink, examined the claimant on six occasions after the 1970 incident. Dr. Blair, testifying by way of deposition, diagnosed that the claimant, following the September, 1968 injury, had some congenital anomalies which consisted of a spondylolisthesis at L-5 and a spondylolysis at L-4. The defect consisted of a failure of the pars interarticularis to develop. Dr. Blair concluded that there was fifteen percent (15%) of permanent disability of which five percent (5%) is attributable to the pre-existing condition and the remaining ten percent (10%) to the fall in September, 1968. Dr. Blair further testified that he examined the claimant after the November, 1970 incident and that disability was at twenty-five percent (25%) of the body as a whole. He attributed the additional ten percent (10%) to the November, 1970 incident. A myelogram was performed and revealed a herniated disc between L-4 and L-5. A laminectomy for removal of the disc at L-4, L-5 was performed by Dr. Blair in December, 1971.

It was Dr. Blair's opinion, as treating physician, that the claimant's back injury was gradually improving prior to the November, 1970 incident. Between September, 1968 and November, 1970, the claimant's back injury had healed sufficiently and had satisfactorily stabilized. It was his opinion, based upon his knowledge of the November, 1970 incident, that the additional disability now suffered by Claimant was directly caused by that incident, and was not a continuation of a prior deteriorating injury. In an answer to a hypothetical question, Dr. Blair testified that in his opinion, the ten percent (10%) additional disability was, to a reasonable degree of medical certainty, caused by the November, 1970 incident.

Dr. Thomas Summers, M.D., a neurosurgeon from Des Moines, also testified by way of evidentiary deposition. He examined Claimant on two separate occasions subsequent to the November, 1970 incident. On the first occasion, May, 1971, Dr. Summers found no evidence of serious injury or residuals of injury, and concluded that Claimant was capable of employment. But in the examination, September, 1971, based on the subsequent myelogram ordered by Dr. Blair, Dr. Summers was of the opinion that the November, 1970 incident was merely a continuation of the main difficulty sustained in the initial episode of September, 1968. Dr. Summers felt that the claimant's condition was continually deteriorating and that the November, 1970 incident was only coincidental to the manifestation of the severe pain and loss of sensory systems sustained by Claimant after the 1970 incident. He concluded that it was a "most likely possibility" that Claimant suffered from a herniated disc following the 1968 injury, and that the November, 1970 incident precipitated symptoms which had been continuous since the 1968 injury. In his opinion, Claimant was sustaining a progressive deterioration and degeneration because of his age and the existence of the congenital defect.

Whether the November, 1970 incident is compensable as an injury under the Workmen's Compensation Act turns upon the medical testimony of the two experts. Based upon Dr. Blair's position as treating physician, a greater weight may be given his medical opinion in considering the rights of the parties. Dr. Blair had the benefit of continually observing the Claimant's condition from 1968 to the present. It should be noted that Dr. Summer's opinion as to a continuing deterioration was not based upon any observation or examination during the crucial period, but only upon examination nearly six months after the November, 1970 incident. Dr. Summer's inconsistent diagnosis of two separate occasions causes doubts to be raised, even though the first diagnosis was without benefit of the myelogram. For this reason, a greater weight must be given to Dr. Blair's opinion that, based upon a reasonable degree of medical certainty, the Claimant's September, 1968 injury had sufficiently healed and that his condition had stabilized prior to the November, 1970 incident. Thus, the claimant's twisting movement while attempting to check traffic was not simply a minor occurrence, but was a substantial movement which, by a preponderance of the evidence, did cause a compensable injury under the Workmen's Compensation Act.

A collateral issue which must also be resolved is whether the injury did, in fact, "arise out of" his employment. To determine this, a causal connection between the injury and the employment must be established. Where a car is an instrumentality of the employment, the employee's use of the car is subjecting him to the hazards and dangers which arise out of the attendance of the car. The car is incidental to the nature of the work, as are the hazards which accompany its use. Where the employee is doing

some duty incidental to the nature of his employment, an injury arising en route is considered arising out of and in the course of his employment. **Marley v. Orval P. Johnson & Co.**, 215 Iowa 151, 244 N.W. 833(1932).

The evidence in this case clearly establishes that the use of Claimant's car was a necessary ingredient to his employment, as evidenced by the fact that his employer paid him $60 per month for the operation of that vehicle for business purposes. Since the car was incidental to his employment, the duties associated with the operation of that car are also incidental to his employment. The claimant's checking of the tires and his also checking for approaching traffic should be viewed as an obligation required by the claimant in operating the car, that obligation being safety. Since the car was a necessary instrumentality in his employment, and since the checking of tires was in the interest of his employer and incidental to the nature of his work, the injury did indeed "arise out of" his employment.

THEREFORE, the Arbitration Decision is hereby reversed.

It is found and held as a finding of fact:

That Claimant did sustain an injury arising out of and in the course of his employment with the defendant, Saylor Feed and Grain Co., on November 18, 1970.

It is further held as a finding of fact that the claimant's November 18, 1970 incident was not a continuation of previous medical difficulties, but a separable and distinct injury.

It is further held that the claimant sustained a ten percent (10%) permanent partial disability to the body as a whole as a result of his injury of November 18, 1970.

WHEREFORE, it is ordered that the defendant, Saylor Feed and Grain Co. and its insurance carrier, Hawkeye-Security Insurance Co., pay fifty (50) weeks permanent partial disability at the rate of fifty-six dollars ($56.00) per week, plus a healing period of thirty (30) weeks at the rate of sixty-one dollars ($61.00) per week, payments dating from November 18, 1970, accrued payments to be made in a lump sum together with statutory interest. It is further ordered that Defendant, Hawkeye-Security Insurance Co., reimburse the AID Insurance Service for any monies expended by said AID for the payment of medical and hospital services incurred as a result of the required surgery, pursuant to the Order of October 14, 1971, and the resulting surgery of December 8, 1971. It is further ordered that Hawkeye-Security reimburse AID that portion of $1,215.80 that was paid by AID as a result of the October 14, 1971 Order.

Signed and filed this 6th day of March, 1973.

ROBERT C. LANDESS
Industrial Commissioner

No Appeal.

Shirley Smith, Claimant,

vs.

Methodist Manor, Employer,
and

Employer's Commercial Union Insurance Company, Insurance Carrier, Defendants.

Review Decision

Mr. James A. Schall, Attorney at Law, Fifth & Cayuga Streets, Storm Lake, Iowa 50588, For Claimant.

Mr. John A. McClintock, Attorney at Law, 803 Fleming Building, Des Moines, Iowa 50309, For Defendants.

This is a proceeding brought by the claimant, Shirley F. Smith, against her employer, Methodist Manor, and its insurance carrier, Employer's Commercial Union, pursuant to the provisions of Section 86.24 of the Iowa Workmen's Compensation Act for Review of an Arbitration Decision wherein the claimant was denied workmen's compensation benefits for an alleged injury occurring on February 24, 1972.

The parties were advised of the date of the Review hearing by letter from the Industrial Commissioner, dated June 12, 1973. The hearing was set for July 13 at 1:00 P.M. Claimant's attorney, in a letter to the Industrial Commissioner dated June 8, 1973, indicated that he anticipated calling additional witnesses. No notice was given to the opposing party or his attorney at this time. On July 6, 1973, Defendants' attorney filed with the Industrial Commissioner a notice of additional evidence. A copy of this notice was sent by the Industrial Commissioner's office to the claimant's attorney on July 9, 1973, and received by the claimant's attorney on July 10, 1973. At the hearing on July 13, 1973, Claimant's attorney presented the defendants' attorney with a written notice of additional evidence. Both parties objected to the opposing party's notice as not being proper and therefore disallowing the introduction of additional evidence on the other party's behalf. Defendants,

at the hearing, withdrew their notice of additional evidence. Additional evidence was presented by the claimant at the Review proceeding, subject to the objection of the defendants.

Code Section 86.24, which provides for Review of an Arbitration Decision, states in part:

> "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."

As indicated, the defendants withdrew their notice of additional evidence and presented none at the Review proceeding. Claimant, on the other hand, presented evidence which was allowed subject to the objection of the defendants. This manner of procedure was followed, as the hearing was being held in Storm Lake where the witnesses resided. It was the opinion of the undersigned that if the evidence were disallowed and an appeal therefrom reversed that ruling, that it would then necessitate a further Review hearing. This would then not only increase the costs to the parties in again producing their witnesses and counsel at the hearing, but also the testimony would be much more distant in point of time from the original incident giving rise to this action, and the recollection of all witnesses would be less clear. In view of this, the testimony was received and transcribed so that in the event of a remand, it would be perpetuated. However, it is now held that the provisions of Section 86.24 relative to the introduction of additional evidence are mandatory, and that the commissioner is without authority to allow the introduction of such evidence unless the mandatory conditions are met. Therefore, any additional evidence presented at the Review proceeding will not be taken into consideration in this opinion and this opinion will be based only upon the record as it exists without the additional evidence as presented in the Review proceeding.

Claimant's testimony revealed that at the time of the Arbitration proceeding, she was 39 years of age, married and had four sons. She had completed a high school education. At the time of her alleged injury, she was employed by Methodist Manor as a nurses' aide working in the infirmary where there were 52 patients. She began her employment with defendant employer in September, 1971. For two weeks prior to February 24, 1972, she was off work as a result of injuries she received to her leg and lower back occasioned by falling over a footstool at home. She was treated for those injuries by Dr. Arthur Ames, M.D. He took x-rays and indicated to the claimant that she had pulled some muscles and sprained her lower back and leg. He wrapped her leg and advised her to stay off of the leg for two weeks, after which she was returned to light work.

Claimant testified that she returned to work on February 24, 1972, at 3:00 P.M. After her daily briefing, she commenced her rounds. One patient who weighed around 315 pounds needed assistance in getting from the chair in which she was seated onto a bedpan. Claimant pulled her forward with the assistance of Kathy Ward, another aide, and then lowered her back onto the bedpan. She was not seated properly the first time, so it was necessary to repeat the procedure. Claimant testified that at this time her neck started hurting and that as the day went on, the pain grew worse. She said she notified the nurse on duty, Gladys Thul, several times that the pain was getting worse. Mrs. Thul suggested that it might be in conjunction with her leg injury. Claimant attempted to give some patients baths, but the pain became more intense and she became nauseous. She took some Darvon, applied ice to her neck and went to the lounge to lie down. Around 7:45 P.M., Gladys Thul told her she had better call her son to come get her.

Claimant testified she was taken to the Buena Vista County Hospital, where she was placed in traction. She stated the pain was so severe that they had to give her a shot of Demerol before they could put a gown on her to take x-rays. She remained in the hospital in traction for nine days. Following this, she was seen by Dr. D. J. Paulsrud, M.D., an orthopedic surgeon, in Sioux City, on March 8 and again on April 3, 1972. Dr. Paulsrud prescribed an orthopedic collar, physical therapy and home traction and advised against engaging in any work. Around May 5, Claimant returned to the hospital in Storm Lake for a week, after which she was sent to St. Luke's Hospital in Sioux City, where she was placed in traction, myelography was performed and underwent surgery for a cervical fusion.

Around 1959, Claimant had been in an automobile accident in which she had sustained neck injuries she described as a crushed vertebra at the very top of her neck, for which she wore a neck brace for 17 months. After the accident in 1959, Claimant underwent physical therapy for an hour every day for two weeks. She claimed that she had completely recovered from this incident and that she had had very little problems with her neck since that time up to February 24, 1972.

Claimant had a pre-employment physical in September, 1971. Gladys Thul, the nurse in charge on Claimant's shift, testified that Claimant was a willing worker and that she had not had trouble doing her work prior to the injury, except for the two week period that Claimant was off

work due to her leg injury. Kathy Ward, another nurses' aide, testified that she was working with Claimant during the time of the alleged injury. She stated that Claimant didn't complain to her of any injury at the time they assisted Minnie Hoberman, but that she did not observe Claimant later in the day. She did notice Claimant lying down in the lounge after her supper break. She stated that Claimant was a willing worker and did not complain or loaf.

Mrs. Jorgensen, the Defendant's nursing supervisor who hired Claimant, stated that Claimant was a good worker who had not previously evidenced any neck disability.

Claimant had returned to work on February 24, 1972, with a note from Dr. Ames, Defendants' Exhibit A, stating that she should "do no heavy lifting for at least two more weeks." Claimant stated that she felt that it was all right for her to do some lifting, or otherwise she couldn't have resumed work. The testimony of the claimant and Kathy Ward indicates that their procedure with Minnie Hoberman did not require much lifting. They pulled her forward from a sitting position, inserted a bedpan on the chair, and lowered her back onto the bedpan. Gladys Thul stated that Minnie Hoberman sits in a chair and can balance herself somewhat when she is pulled forward. "(T)hey lean her forward and put the pan under her, and then balance her back onto it. With the right motion, why, it doesn't take much."

Dr. Ames stated in a deposition that the claimant's prior fall at home had produced no symptoms and no complaints above her waist, and that there was no connection between the home accident and her current neck problem. Dr. Ames had treated Claimant for the prior three years, during which time he could recall no neck symptoms. He was aware of her previous neck problems, but that she had "been getting along beautifully with her neck as long as I had known her." He stated that he felt that "her lifting at the Manor caused the new acute neck problem."

Dr. Ames examined Claimant at the hospital on the evening of the alleged injury and stated that she had quite a bit of spasm of the neck muscles on both sides. His diagnosis was an acute cervical strain. Claimant was then put into traction.

Defendants assert that Claimant had intermittent neck problems leading up to the alleged work injury on February 24, 1972, and refers to x-rays taken of Claimant's neck at the Buena Vista County Hospital on June 30, 1969, and September 15, 1970. Defendants also referred to a letter dated March 9, 1972, identified as Defendants' Exhibit A, from Dr. Paulsrud to Dr. Ames, which stated that Claimant had had several minor mishaps in the past few months which accentuated the pain. Defendants contend that Claimant's prior neck problems contributed to the present injury and that there is no proof that the present injury arose out of and in the course of her employment. Defendants urge that the Deputy Commissioner's denial of compensation be upheld, because he had the advantage of observing the demeanor of the witnesses and evaluating their credibility.

On page 2, line 18 of the Arbitration Decision, it is stated that "(t)he claimant is alleged to have told the witness that her neck problem was related to her fall at home on February 10, 1972." This statement appears to be an improper finding of fact. The record does not support such an allegation, and at page 58, line 22 of the Arbitration hearing transcript, the witness, Mrs. Gladys Thul, denied that the claimant had ever related to her how this neck problem was caused.

The deputy commissioner, in the Arbitration Decision, did not indicate that he doubted the credibility of any of the witnesses or disbelieved any of the evidence. **Catalfo v. Firestone Tire & Rubber Co.**, 213 N.W. 2d 506, infers that such an indication should be made. Nothing is found in the record to raise any doubt as to the credibility of any of the witnesses. The deputy found that the claimant had failed to sustain her burden of proof to establish the alleged injury was causally connected to and arose out of her employment. The facts are not substantially in dispute. The record is more than adequate to support a prima facie case for the Claimant. The burden thereupon falls to the defendant to overcome or rebut Claimant's case. **Nelson v. Cities Service Oil Co.**, 259 Iowa 1209, 146 N.W. 2d 261. The defendant has failed to present sufficient evidence to overcome or rebut Claimant's prima facie case, therefore, the preponderance of the evidence remains with the claimant.

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 Iowa 724, 254 N.W. 35.

If a claimant has a pre-existing condition or disability aggravated, accelerated, worsened, or "lighted up" by an injury which arises out of and in the course of his employment resulting in disability, he is entitled to compensation. **Musselman v. Central Telephone Co.**, 261 Iowa 352, 154 N.W. 2d 128. Uncontroverted evidence indicates that Claimant's neck injury did not stem from her fall at home and that there was a direct causal connection between Claimant's employment activities and her subsequent injury.

Questions of causal relationship are essentially within the domain of expert testimony. **Bradshaw v. Iowa Methodist Hospital,** 251 Iowa 375, 101 N.W. 2d 167. It is found that Claimant's neck injuries which prompted the hospitalization and surgery in question arose out of and in the course of her employment with Defendant Methodist Manor.

Under the provisions of Code Section 85.34(2)(u), Claimant's disability is to the body as a whole and must be evaluated industrially and not merely functionally. **Dailey v. Pooley Lumber Co.,** 233 Iowa 758, 10 N.W. 2d 569. In determining industrial disability, consideration may be given to the injured employee's age, education, qualifications, experience, and her inability because of the injury to engage in employment for which she is fitted. **Olson v. Goodyear Service Stores,** 255 Iowa 112, 125 N.W. 2d 251. It is the reduction of earning capacity, not merely functional disability, which must be determined. **Barton v. Nevada Poultry Co.,** 253 Iowa 285, 110 N.W. 2d 660.

Dr. Paulsrud, who performed the surgery for a cervical fusion, estimated that Claimant has suffered permanent partial disability in the range of five to ten percent of her body as a whole. Dr. Ames testified that Claimant's permanent partial disability would be ten to fifteen percent.

Dr. Ames testified that the x-rays of 1969 and 1970 showed a narrowing between C-3/4 and C-4/5, but that this narrowing of the space between the vertebra is often caused by normal wear and tear of life. Dr. Ames stated that Claimant had no prior disability because there was no pain before the present injury.

Based upon Claimant's age, education, qualifications and experience, it is determined that Claimant has suffered an industrial disability of ten percent (10%).

The record is unclear as to the Claimant's average weekly wage. She testified that she started out working forty hours a week and after two weeks began working various shifts. At one point in the record she stated that she averaged fifty-five hours a week; at another, she stated that her weeks would vary between thirty and forty hours. The undersigned has elected to base compensation on the basis of a five day, forty hour week at a wage of $1.65 an hour.

WHEREFORE, THE Arbitration Decision is hereby reversed.

It is found and held as finding of fact:

That the claimant sustained a personal injury arising out of and in the course of her employment with the defendant, Methodist Manor, on February 24, 1972.

That the claimant's February 24, 1972 incident was not a continuation of previous medical difficulties, but a separate and distinct injury.

That the claimant sustained a permanent partial disability of ten percent (10%) of the body as a whole, as a result of her injury on February 24, 1972.

That the following medical bills are related to Claimant's injury:

Dr. Arthur Ames, M.D.	$ 78.00
Buena Vista County Hospital	871.00
Dr. D. J. Paulsrud, M.D.	907.00
Coles Orthopedic Brace & Shoe Co.	18.02
St. Luke's Medical Center	1,915.45
Dr. James E. Reeder, Jr., M.D.	6.00
Drs. Harrington, Wagner & Zucher, M.D.	56.00
Sioux City Radiological Group	100.00
	$3,951.47

THEREFORE, it is ordered that the defendant, Methodist Manor, and its insurance carrier, Employer's Commercial Union, pay the claimant fifty (50) weeks of permanent total disability at the rate of $51.92 per week, and thirty (30) weeks healing period at the rate of $51.92 per week. Accrued payments are to be made in a lump sum together with interest from the date of this award. The defendants are also ordered to pay the medical expenses itemized above.

It is further ordered that the defendants pay the costs of this and the Arbitration proceeding, including that of the attendance of the shorthand reporter at the Arbitration hearing.

Signed and filed this 24th day of April, 1974.

ROBERT C. LANDESS
Industrial Commissioner

No Appeal.

Leo Sondag, Claimant,

vs.

Ferris Hardware, Employer,
and

Grain Dealers Mutual Insurance Company, Insurance Carrier, Defendants.

Review Decision

Mr. Michael Mundt, Attorney at Law, 203 North Main Street, Denison, Iowa 51442, For Claimant.

Mr. Burns H. Davison, II, Attorney at Law, 1324 Des Moines Building, Des Moines, Iowa 50309, For Defendants.

This is a proceeding brought by the claimant, Leo Sondag, against his employer, Ferris Hardware, and its insurance carrier, Grain Dealers Mutual Insurance Company, defendants, for Review under the provisions of Section 86.24 of the Iowa Workmen's Compensation Act of an Arbitration Decision wherein he was denied benefits as a result of an alleged injury received on August 20, 1971. The case came on for Review upon the transcript of the Arbitration proceedings and the written briefs and arguments of counsel.

The claimant was 57 years of age and married at the time of the Arbitration proceeding. He had been employed by the defendant employer and its predecessors for some fourteen years. Claimant had formal education into the eighth grade. Prior to working in the defendant's hardware store, he had worked as a farmer, pool hall operator and tire serviceman. His work at the hardware store included working as a clerk, a serviceman on appliances and an order and stock clerk. Primarily, the claimant was a serviceman and installed new appliances. Service was usually performed at the job site unless it was necessary to bring it back to the store for major repair.

On August 20, 1971, the claimant was recalled to work from his vacation to assist Mr. Ferris unload six washing machines from a box car. He started work at 9:00 A.M. The first thing they did was to load some "junkers" in the basement of the store onto a pickup truck and stack some others up to make room for the new ones. They then took the load of "junkers" to the dump. On the way back from the dump they stopped at the railroad car. There were six crates of machines weighing between three to four hundred pounds each and stacked two high. Claimant jumped into the boxcar and slid the top machines off and "pushed and tip-toed" them about fifteen feet to the door of the boxcar. Ferris then took them and slid them onto the pickup truck. As Claimant was moving the crates, he commenced having chest pains. After loading three machines onto the pickup, they took them to the store approximately a half mile away. While they were riding to the store, the pain subsided. When they got to the store, Claimant got up into the pickup and slid the machines out onto a two wheel cart which Ferris used to move them into the store. They then returned to the boxcar to unload the last three machines. While Claimant was moving the crates toward the pickup on this occasion, the pain resumed and was more severe. While riding to the store the second time, the pain persisted. After unloading one machine from the pickup the claimant testified the pain became so severe that he couldn't continue. He then told Ferris that he couldn't continue. Ferris asked if he should take the claimant home. Claimant replied that he thought he could make it, as his car was only a few feet away. On his way home, the pain increased. His trip took him past his daughter-in-law's house where he stopped and asked one of his grandchildren to get their mother. She then drove Claimant home, where they picked up his wife and then proceeded to the hospital.

Claimant was admitted to the hospital where he was given shots and an EKG. He remained in the Crawford County Hospital in Denison around three weeks. He was then transferred to the Nebraska Methodist Hospital in Omaha, where he remained for ten days. There an operation was performed upon the claimant. He was out of the hospital for a couple of days and then was readmitted for another two weeks in Denison. He was later admitted at Nebraska Methodist for tests, and tests were later run at the Mayo Clinic in Rochester, Minnesota.

Claimant testified that he first began to feel chest pains around 1968. They would occur after a real hard strain or a long lift, or while carrying something a long ways. When these pains first started, he went to a Dr. Hutchinson who prescribed nitroglycerin pills. In June of 1971, after carrying a lawnmower some 150 feet across the store and loading it into a car, the claimant suffered chest pains. He was hospitalized for three days after this incident. Some six to eight months prior to this, the claimant suffered chest pains when pulling a washing machine up from a basement. After a rest, he felt fine on this occasion.

Dr. Donald J. Soll M.D., a general practitioner, was Claimant's family physician. He first examined the claimant on September 2, 1970, when Claimant was complaining of chest pains. His diagnosis at that time was angina pectoris. He prescribed nitroglycerin and suggested that Claimant consult with a cardiologist. He next saw the claimant relative to chest pains on June 18, 1971. He had just been in the hospital and was released with severe chest pain. Dr. Soll conducted an examination which was essentially normal. The next time Dr. Soll saw the claimant was in the hospital on August 20, 1971. An examination was conducted. The EKG showed a fresh epicardial infarction. Other tests were run, the results of which were consistent with the infarction. Shortly after admission to the hospital, the claimant's heart fibrillated. Claimant remained in the Crawford County Hospital until September 12, 1971. He then developed an embolus in his right femoral artery and was transferred to Nebraska Methodist Hospital, where he was operated upon by Dr. Delbert D. Neis for removal of the blood clot. Dr. Soll next saw the claimant on September 22, 1971. At that time, his condition was described as "pretty good." On September 24

through October 5, 1971, the claimant was back in the hospital complaining of chest pains and shortness of breath. An EKG was again performed, which showed a recent inferior infarct (the same one as before) with some improvement in the different leads. Dr. Soll's diagnosis at this time was again angina. Dr. Soll was of the opinion that the claimant had moderate atherosclerosis. Dr. Soll saw the claimant on a regular basis for several months. At the time of Dr. Soll's examination of the claimant on April 27, 1972, the claimant was no longer taking nitroglycerin, but was taking anticoagulant medication and a pill which is supposed to help prevent arrhythmia. Dr. Soll was of the opinion that the claimant was disabled from anything other than sedentary occupation and that his condition was permanent unless he had coronary artery surgery, which might improve his condition. The advisability of such an operation was debatable.

In a report to the defendant insurance carrier dated September 24, 1971, Dr. Soll stated:

> "The episode (acute myocardial infarction) began while he was at work however he stated he was not doing any unusually strenuous work. I feel that this episode would have occurred regardless of the type of work as I feel he has a moderate amount of atherosclerosis."

In Dr. Soll's deposition of May 22, 1972, he answered negatively to the question as to whether or not at that time he had any reason to change any of the statements in his report dated September 24, 1971.

Dr. Louis Banitt, M.D., a specialist in internal medicine, testified in response to a hypothetical question that, in his opinion, although the myocardial infarction may have occurred on August 20, 1971, regardless of the amount of physical activity, that Claimant's continuing to work after symptoms of the myocardial infarction would have aggravated the condition. The essence of Dr. Banitt's opinion was the fact that the claimant had continued to work for approximately an hour with severe chest pains. He stated that the specific time of onset of infarction can be anytime, under any conditions, but that "continuing to work with chest pain would in my opinion aggravate it and perhaps worsen the infarction." He felt that the warm, humid weather would also play a role in the situation. He further testified that the beginning pathological process leading to the infarct could have begun regardless of whether this man was working or not. He could not state with certainty that continuing activity insured an infarction and that had immediate rest been instituted the infarction would not have occurred.

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 body, but because of the traumatic or other hurt or damage to the body of an employee. **Almquist v. Shenandoah Nurseries, Inc.,** 218 Iowa 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 Iowa 296, 18 N.W. 2d 607.

If a claimant has a pre-existing condition or disability, aggravated, accelerated, worsened or "lighted up" by an injury which arises out of and in the course of his employment resulting in disability found to exist, he is entitled to compensation. **Musselman v. Central Telephone Company,** 154 N.W. 2d 128.

A disease which under any rational work is likely to progress so as to finally become disabling does not become a "personal injury" merely because it reaches a point of disablement while work for an employer is being pursued. It is only when there is a direct causal connection between exertion of the employment and the injury that a compensation award can be made. The question is whether the diseased condition was the cause, or whether the employment was a proximate contributing cause. **Musselman v. Central Telephone Company,** supra. Questions of causal relationship are essentially within the domain of expert medical testimony. **Bradshaw v. Iowa Methodist Hospital,** 251 Iowa 375, 101 N.W. 2d 167.

The burden of proof is upon the claimant to establish his case by a preponderance of the evidence. **Almquist v. Shenandoah Nurseries, Inc.,** supra. This burden is not discharged by creating an equipoise. **Volk v. International Harvester Co.,** 252 Iowa 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 Iowa 691, 73 N.W. 2d 732.

It was both doctors' opinions that the claimant may have sustained a myocardial infarction on August 20, 1971, regardless of what he was doing at the time. Dr. Banitt opined that although it may have happened on that date, that working after symptoms of the infarct would have aggravated the condition.

In **Ziegler v. United States Gypsum Co.,** 252 Iowa 613, 620; 106 N.W. 2d 591, the Iowa Supreme Court said:

> "It is, of course, well settled that when an employee is hired, the employer takes him

subject to any active or dormant health impairments incurred prior to his employment. If his condition is **more than slightly** aggravated, the resultant condition is considered a personal injury within the Iowa law." (citations omitted—emphasis supplied.)

In **Yeager v. Firestone Tire and Rubber Co.**, 253 Iowa 369; 112 N.W. 2d 299, the court quotes with approval from C.J.S.:

" 'Causal connection is established when it is shown that an employee has received a compensable injury which **materially** aggravates or accelerates a pre-existing latent disease which becomes a direct and immediate cause of his disability or death.' " (emphasis supplied)

The record shows that on at least two such occasions prior to the incident in question, he suffered an attack of angina pectoris. The record further shows that an EKG was performed on the claimant even prior to these two incidents. There is little question that the claimant was a prime candidate for a heart attack. His personal physician was apparently resigned to its inevitability. Dr. Banitt, without ever examining the claimant or any medical reports concerning the claimant's condition, based only upon the facts presented to him in the hypothetical opinion considered the claimant a prime candidate for a heart attack regardless of his physical activity.

It would seem that the progression of the claimant's heart disease finally became disabling without the benefit of any personal injury arising out of his employment.

WHEREFORE, the Arbitration Decision is hereby affirmed.

It is found and held as finding of fact:

That the claimant did not sustain a personal injury arising out of and in the course of his employment by Ferris Hardware on August 20, 1971.

THEREFORE, recovery must be and is hereby denied to the claimant. Each party shall pay the costs of producing their own witnesses. Defendants shall pay the fee of the shorthand reporter at the Arbitration hearing.

Signed and filed this 21 day of March, 1973.

ROBERT C. LANDESS
Industrial Commissioner

Appealed to District Court; Affirmed

Appealed to Supreme Court, Reversed and Remanded to Industrial Commissioner

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Mark Randall Terrill, Claimant

vs

E. C. Henningsen Co., Inc., Employer
and

United States Fidelity & Guaranty Company, Insurance Carrier, Defendants.

Review Decision

Mr. Richard G. Howard, Attorney at Law, 17 West 4th Street, Atlantic, Iowa 50022, For Claimant.

Mr. Ronald W. Feilmeyer, Attorney at Law, 4 East Sixth Street, Atlantic, Iowa 50022, For Defendants.

This is a proceeding brought by the claimant, Mark R. Terrill, surviving son of John R. Terrill, deceased, against E. C. Henningsen Co., Inc., the employer of John R. Terrill, and the United States Fidelity & Guaranty Company, the insurance carrier, pursuant to the provisions of Section 86.24 of the Iowa Workmen's Compensation Act, for Review of an Arbitration Decision wherein the claimant was determined to be a dependent of John R. Terrill and awarded benefits in the amount of $25.00 per week for a period of 300 weeks. The case was presented on the transcript of the testimony at the Arbitration proceeding and the briefs and oral arguments of counsel.

John R. Terrill (hereinafter called Terrill) died as a result of an industrial accident on June 9, 1970. He left no surviving spouse, as he was divorced from Claimant's mother on May 15, 1967. Under the terms of the divorce decree, Terrill was to pay to his former wife $50.00 per week for support and maintenance of the three minor children of their marriage. The two older children were self supporting at the time of Terrill's demise. The claimant was 16 years old at the time of Terrill's demise and had been in the care of foster parents since June of 1969. The foster parents of Claimant were receiving $100.00 a month from Cass County for the support of the claimant. On April 22, 1970, Mrs. Dorothy Forristall, a social worker with the Cass County Department of Social Services, had a conference with Terrill relative to the possibility of him paying child support for the claimant. As a result of this conference, Terrill agreed he would pay $400.00 at that time, which would be reimbursement for the foster care, which had previously been advanced, and that he would continue to pay $150.00 a month which would be credited as $100.00 a month for current foster

care, and $50.00 toward amounts previously advanced from the poor fund. On April 24, 1970, Terrill paid to the Cass County Treasurer, $400.00. On June 3, he made a payment of $160.00

As the claimant was 16 years of age at the time of Terrill's demise, he is not conclusively presumed dependent as provided in Section 85.42, Code of Iowa.

Section 85.44, Code, provides:

> "In all other cases, questions of dependency in whole or in part shall be determined in accordance with the facts as of the date of the injury; and in such other cases if there is more than one person wholly dependent, the death benefit shall be equally divided among them. If there is no one wholly dependent and more than one person partially dependent, the death benefit shall be divided among them in the proportion each dependency bears to their aggregate dependency."

As indicated, actual dependency must be determined "in accordance with the facts as of the date of the injury." Six days prior to the date of the injury resulting in Terrill's death, he had made a payment to the Cass County Treasurer of $160.00. Testimony of Mrs. Forristall indicated that $100.00 of this amount would be used for current support of the claimant, with the remainder to be credited against the amount previously paid by the County for support of the claimant. Mrs. Forristall indicated that the $100.00 a month constituted full and complete support of the claimant.

Claimant contends that the Arbitration Decision should be modified to award the full weekly death benefit to the claimant. Defendants contend that the Arbitration Decision should be affirmed.

The deputy, in the Arbitration Decision, found that the claimant was dependent upon the decedent on the date of the injury resulting in his demise. He then found that the claimant was dependent to the extent of $100.00 a month, and therefore awarded $25.00 a week death benefits to the claimant. The question is not what dollar amount the claimant is dependent upon the decedent, but whether he is, in fact, wholly dependent or partially dependent upon the decedent for support.

The evidence establishes that the amount of $100.00 per month was the full and complete amount of support needed by the claimant at the time of Terrill's demise.

WHEREFORE, the Arbitration Decision is hereby modified. It is held and found as a finding of fact that the claimant was wholly dependent upon the decedent on the date of his injury resulting in death.

THEREFORE, it is ordered that the defendants pay to the Clerk of the District Court for Cass County, pursuant to Section 85.49, Code, weekly death benefits in the amount of $47.50 for three hundred (300) weeks. It is further ordered that the defendants pay the costs of these proceedings, including that of the attendance of the shorthand reporter at the Arbitration hearing.

Signed and filed this 15 day of June, 1973.

ROBERT C. LANDESS
Industrial Commissioner

No Appeal

Mark Randall Terrill, Claimant,

vs.

E. C. Henningsen Co., Inc., Employer,
and

United States Fidelity & Guaranty Company,
Insurance Carrier, Defendants.

Supplementary Review Decision

Mr. Richard G. Howard, Attorney at Law, 17 West 4th Street, Atlantic, Iowa 50022, For Claimant.

Mr. Ronald W. Feilmeyer, Attorney at Law, 4 East 6th Street, Atlantic, Iowa 50022, For Defendants.

NOW, on this 18 day of July, 1973, the matter of the stipulation entered into by the parties to this proceeding comes on for determination.

The claimant and the defendants filed a stipulation with this office on July 11, 1973, stating that the claimant, Mark Randall Terrill, was at the time of the filing of the Review Decision neither a minor nor mentally incompetent within the provisions of Section 85.49, Code of Iowa. They further stipulated that all payments made to the claimant, as provided by the Review Decision, may and should be made directly to the claimant rather than to the Clerk of the District Court of Cass County.

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

That the claimant, on June 15, 1973, was neither a minor nor mentally incompetent.

THEREFORE, it is hereby ordered that those payments previously ordered to be made to the Clerk of the District Court for Cass County, in the Review Decision of June 15, 1973, be made directly to the claimant.

Signed and filed this 18 day of July, 1973.

ROBERT C. LANDESS
Industrial Commissioner

Opal Ueberrhein, Claimant,

vs.

Glen Haven Rest Home, Employer,
and

Insurance Company of North American, Insurance Carrier, Defendants.

Review-Reopening Decision

Mr. Robert M. Dippel, Attorney at Law, 403 First National Bank Bldg., Council Bluffs, Iowa 51501, For Claimant.

Mr. Richard A. Heininger, Attorney at Law, 301-09 Park Bldg., Council Bluffs, Iowa 51501, For Defendants.

This is a proceeding in Review-Reopening brought by the claimant, Opal Ueberrhein, against Glen Haven Rest Home, her employer, and Insurance Company of North America, the insurance carrier, to recover benefits under the Iowa Workmen's Compensation Act on account of an injury that occurred on June 17, 1970. This matter came on for hearing before the undersigned Deputy Industrial Commissioner on September 7, 1972, in the courthouse in and for Pottawattamie County at Council Bluffs. The record was allowed to remain open until the submission of certain medical evidentiary depositions. These were filed on February 13, 1973, and at that time the record was closed.

There is sufficient evidence in the record to sustain the following statement of facts, to wit:

The claimant, aged 48 years, married, was employed as a nurses' aide by the defendant employer. On June 17, 1970, the claimant injured her back while attending a patient. An appropriate Form 4 was filed calling for a temporary disability and healing period weekly rate of fifty-six dollars ($56.00) and a permanent partial disability and permanent total disability weekly rate of forty-seven dollars and fifty cents ($47.50). The Form 5 discloses that the claimant was paid seventy-three (73) weeks disability from June 18, 1970, to and including November 10, 1971. She was given a permanent partial disability allowance of fifty (50) weeks based upon a ten percent (10%) permanent partial disabiity rating of the body as a whole. She was further granted twenty-three (23) weeks healing period.

She has been under the care of Dr. Charles D. Stinard, M.D., from the date of the accident until November 11, 1972. Dr. Stinard diagnoses the claimant's condition as being one of a low back sprain with the possibility of an intervertebral disk rupture. Dr. Stinard referred the claimant to Dr. Maurice P. Margules, M.D., a neurosurgeon. Dr. Stinard's charges for the treatment he rendered between the dates of June 19, 1970, and February 16, 1972, were $159.00.

Dr. Margules suggests the possibility of a herniated lumbar disk at the L4-L5 interspace, and further concludes that the claimant is to be considered totally disabled until a completion of neurological studies.

The claimant has also been under the care of Dr. M. C. Fernald, D.C., commencing with June 18, 1970, through January 29, 1973. Between the dates of December 1, 1970, and January 31, 1973, the claimant received many chiropractic adjustments and treatments from Dr. Fernald. His charge for that treatment is $680.00. Dr. Fernald also suggested to the claimant that she see Dr. Margules.

The claimant had been examined on behalf of the defendants by Dr. Frank J. Iwersen, M.D. Dr. Iwersen is a board-certified member of the American Board of Orthopedic Surgeons. He examined the claimant in September of 1970. After some therapy and medication, the doctor suggested that the claimant have a myelographic study done, and in November of 1970 the doctor felt that the claimant was suffering from a ten percent (10%) permanent impairment of the body as a whole. In June of 1972 the claimant was again examined and the doctor's advice as to a myelogram and his opinion as to her permanent partial disability of the body as a whole had not changed, there being no substantial difference in the conditions as he found them.

There is complete agreement in the minds of the treating and examining members of the healing arts that the claimant should submit to the diagnostic study of a myelogram. The claimant has refused to accept the recommendations of the four men involved, and as well has declined the offer made by the defendants to pay for such a study.

The question presented here is a narrow one, to wit: Is the refusal of the claimant to submit to diagnostic procedure so unreasonable so as to forfeit her rights for an additional disability rating?

An investigation of the Decisions indicates that a similar question has been passed upon in the case of **Stufflebean v. City of Fort Dodge**, 233 Iowa 438. The Stufflebean case considered the question of whether or not the claimant's refusal to accept an offer of surgery to reduce a hernia was unreasonable. The Supreme Court held that such a refusal was not unreasonable.

The compensation statutes do not provide for a reduction of benefits for permanent partial disabilities in the event of an arbitrary or

unreasonable refusal on the part of a claimant to submit to offered medical or surgical treatment.

The issue in this case can be distinguished from the rule announced in **Stufflebean v. City of Fort Dodge,** supra, in that the medical procedure under consideration in this case is one of a diagnostic nature. It is vital that the office of the Iowa Industrial Commissioner receive in evidence such testimony so as to allow him to be aware of sufficient facts, in order to do justice to the parties.

In this case, the claimant's refusal to submit to a diagnostic procedure limits the nature of the testimony that is available and in this case operates against the claimant wherein she now fails to sustain the burden of proof required of her. **Almquist v. Shenandoah Nurseries, Inc.,** 218 Iowa 724, 254 N.W. 35.

Professor Arthur Larson's treatise on **The Law of Workmen's Compensation,** Vol. 1, Sec. 13.22, entitled "Refusal of Reasonable Surgery," illustrates the problem. In the absence of a specific legislative rule, the courts seem to follow the rule of reasonableness.

The solution of the problem presented by this case turns on the definition of the word **reasonable**, and since there is no showing in this record that the myelogram is a threat to the claimant's life or will in and of itself cause further disability, we find that as a matter of law the claimant's refusal to accept the offered myelographic study is unreasonable.

THEREFORE, after taking all of the credible evidence contained in this record into account, it is held as a finding of fact that the claimant sustained an injury on June 17, 1970, which arose out of and in the course of her employment. It is further found and held as a finding of fact that the claimant is to be compensated at the rate of fifty dollars and seventy-seven cents ($50.77) per week for thirty (30) weeks. It is further found and held that the claimant has received a permanent partial disability of ten percent (10%) of the body as a whole.

WHEREFORE, it is ordered that the defendants pay the claimant a healing period of thirty (30) weeks at the rate of fifty dollars and seventy-seven cents ($50.77) per week, and further that the defendants pay the claimant fifty (50) weeks permanent partial disability at the rate of forty-seven dollars and fifty cents ($47.50), and that the defendants be given credit for those amounts previously paid. It is further ordered that the defendants pay the following medical expenses:

Dr. M. C. Fernald	$680.00
Dr. Charles D. Stinard	159.00
LaRue Drug Co.	87.81

It is further ordered that the defendants pay the costs of these proceedings as well as the cost of the transcription of the evidentiary depositions of Dr. Charles D. Stinard, M.D., and Dr. M. C. Fernald, D.C., as well as the cost of the court reporter in attendance at the hearing.

Signed and filed this 5 day of March, 1973.

HELMUT MUELLER
Deputy Industrial Commissioner

No Appeal

Nina L. Vaughn, Claimant,

vs.

Bishops Buffet, Employer,
and

Bituminous Insurance Company, Insurance Carrier, Defendants.

Review Decision

Mr. James A. O'Callaghan, Attorney at Law, 821 Savings & Loan Bldg., Des Moines, Iowa 50309, For Claimant.

Mr. John A. McClintock, Attorney at Law, 803 Fleming Building, Des Moines, Iowa 50309, For Defendants.

This is a proceeding brought by the claimant, Nina L. Vaughn, pursuant to Section 86.24 of the Iowa Workmen's Compensation Act, for Review of an Arbitration Decision wherein the claimant was denied recovery from her employer, Bishops Buffet, and its insurance carrier, Bituminous Insurance Company, for injuries she allegedly sustained on or about November 2, 1970. The case was submitted on the transcript of the Arbitration proceeding and the written briefs of counsel.

The sole issue to be decided in this proceeding is whether or not adequate notice of the alleged work-related injury was given by the claimant to the defendant-employer, pursuant to Sections 85.23 and 85.24 of the Workmen's Compensation Act.

The claimant testified that while at work, she sustained an injury to her back lifting a sack of potatoes weighing approximately 25 pounds. The claimant stated that immediately following the alleged injury, she reported the incident to her immediate supervisor, Robert Todd. The record, though, presents some discrepancy in this regard

as the claimant, in answers to interrogatories, stated that oral notice was given to Todd on the 5th or 6th of November, 1970, while she claims the injury was sustained on the 2nd of November, 1970.

The claimant's ex-husband, Donald Vaughn, testified that following the alleged injury, he made several trips to the defendant-employer's restaurant in order to acquire any information necessary concerning insurance, and also to get any papers which would have to be completed by the claimant. On the first two trips, Mr. Vaughn testified that he asked to see Todd, but that he was not there. On the third visit, he saw Edwin Young, the manager of the defendant-employer's restaurant. He stated that when he saw Young, he informed him that he needed "papers" for the hospital and he picked up his wife's paycheck. He testified that he believed he mentioned to Young the cause of the injury, but he was "not exactly sure".

Todd was the food manager for the defendant-employer at the time of the alleged injury. At the time of the hearing, he was no longer employed by the defendant-employer. He testified that no notice, in any form, was given to him that the claimant had received a work-related injury to her back. He stated that he had knowledge she was in the hospital with back problems, but was unaware of their origin. Todd visited the claimant in the hospital on one occasion, but both he and the claimant agree that no work-related injury was discussed at that time.

Young is the manager of the defendant-employer's restaurant. He testified that when Mr. Vaughn came to his office and picked up the claimant's paycheck, nothing was said that would inform him that the injury to the claimant was work-related. Young stated that he knew the claimant was in the hospital with back trouble, but that he had no knowledge that it was work-related.

If the claimant is to recover in this matter, the employer must have had actual knowledge or notice of the alleged injury. Code of Iowa §85.23, 85.24. The absence of such knowledge or notice is an affirmative defense and the burden of proving this rests with the defendant. **De Long v. Iowa State Highway Commission,** 229 Iowa 700, 295 N.W. 91. Due to the discrepancy in the record concerning the notice claimed to have been given by the claimant, the uncertaintly on the part of Mr. Vaughn as to what was said by him to Young and the denial by both Todd and Young, it appears as though the defendant has met its burden of proof.

WHEREFORE, the Arbitration Decision is hereby affirmed. It is found and held as a finding of fact that adequate notice pursuant to §85.23 and 85.24 of the Code of Iowa was not given the defendant-employer by the claimant.

THEREFORE, recovery must be and is hereby denied to the claimant. The parties are ordered to pay the costs of producing their own evidence, except the defendants are ordered to pay the fee of the shorthand reporter and transcription fees.

Signed and filed this 14 day of September, 1973.

ROBERT C. LANDESS
Industrial Commissioner

Appealed To District Court; Decision Pending.

Myron L. Vietmeier, Claimant

vs.

Indiana Refrigerator Lines and Michael Irwin, Employer, Defendant.

Review Decision

Mr. Paul Deck, Attorney at Law, 222 Davidson Building, Sioux City, Iowa 51101, For Claimant.

Mr. Duncan M. Harper, Attorney at Law, 200 Home Federal Building, Sioux City, Iowa 51101, For Defendant Indiana Refrigerator Lines.

Mr. Philip D. Furlong, Attorney at Law, 401 Commerce Building, Sioux City, Iowa 51101, For Defendant, Michael Irwin.

This is a proceeding brought by the claimant, Myron L. Vietmeier, against his alleged employers, Indiana Refrigerator Lines and Michael Irwin, pursuant to the provisions of Section 86.24 of the Iowa Workmen's Compensation Act for Review of an Arbitration Decision wherein the claimant's action was dismissed for want of jurisdiction. The case on Review was presented on the notes and exhibits of the Arbitration proceedings and a joint stipulation by all parties. No further evidence or arguments were presented by any of the parties.

As the accident producing the injury occurred on March 24, 1972, near Fort Wayne, Indiana, the questions for determination are whether or not there was a contract for hire and if so, was it made in Iowa.

The facts are as follows:

The claimant was a Nebraska resident. Defendant Irwin was a resident of Iowa. There were several conversations between the claimant and Irwin regarding a working relationship

between themselves concerning a truck owned by Irwin and to be operated by Claimant. Some of these conversations took place in Iowa and some in Nebraska. Some were in person and others were by telephone between the states. Irwin was not knowledgeable about the trucking business, whereas the claimant had been in the business for some time and was driving a truck for another trucking firm at the time of these conversations. In early January, 1972, a working arrangement was agreed upon by Claimant and Irwin.

Defendant Irwin had several conversations with a representative of Defendant Indiana Refrigerator Lines. These conversations resulted in Irwin and Indiana entering into a working arrangement, whereby Indiana would lease the truck from Irwin on an individual trip basis. Advances were made to Irwin by Indiana, but these were deducted from his share of each load hauled under the individual trip lease. Irwin did not have to take each load offered by Indiana and, in fact, there were some he did not take because he did not believe he could make enough money.

At the time of his injury, Claimant was driving the truck owned by Irwin and leased to Indiana. The individual trip lease between Irwin and Indiana provided, among other things, that Irwin would maintain the truck in good condition, furnish all gas, oil and repairs, be responsible for any taxes, licenses and fines assessed because of improper equipment or operation of the truck, pay the driver's salary, compensation coverage, payroll taxes and indemnify Indiana for any loss resulting from the injury or death of the driver.

The parties stipulated that the agreement between Claimant and Irwin was that the gross revenue from the operation of the truck was to be split 75% to Irwin and 25% to Claimant. No Social Security or withholding was to be withheld from either parties' percentage of the gross revenue and both were to pay their own Social Security and income taxes. Each carried their own medical and hospital insurance. All decisions as to whether or not to haul a load were to be made jointly. All decisions on the operations of the truck and routes to take were made by Claimant. All decisions regarding the maintenance of the truck were made by Irwin. Irwin was to pay the costs of repairs, gas and oil from his share. Neither party could fire the other, although either party could terminate the agreement. Neither party intended that there be an employer-employee relationship.

The burden of proof is upon the claimant to establish, by a preponderance of the evidence, that he was an employee of the defendant. **Nelson v. Cities Service Oil Co.,** 259 Iowa 1209, 146 N.W. 2d 289.

Code of Iowa, Section 85.61(2), states in part:

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

The Iowa Supreme Court has consistently held the criteria used to determine the existence of an employer-employee relationship are: (1) the employer's right of selection or to employ at will; (2) responsibility for the payment of wages by the employer; (3) the right to discharge or terminate the relationship) (4) the right to control the work; and (5) is the party sought to be held as employer the responsible authority in charge of the work or for whose benefit the work is performed.

Another element to be considered is the intention of the parties as to the relationship they are creating. **Hassebrock v. Weaver Construction Co.,** 246 Iowa 622, 67 N.W. 2d 549. **Usgaard v. Silver Crest Golf Club,** 259 Iowa 453, 127 N.W. 2d 636.

There is virtually no evidence or, in any event, insufficient evidence of any agreement establishing an employer-employee relationship between the Claimant and Indiana directly. If Indiana were to be held as employer, it would have to be through its relationship with Irwin. There is no need to determine the relationship between Indiana and Irwin, as the relationship between Irwin and claimant is determinative of the issue herein involved.

Analyzing the criteria, we find that both parties had the right to select the trips that were to be taken, and the claimant could refuse if he so desired; there were no wages paid by Irwin to the claimant, but merely a division of gross revenue, both parties had the right to discharge or terminate the relationship, the claimant controlled the operation of the truck and the routes to be taken and Indiana was the ultimate benefactor for whom the work was being performed. It is also clear that the claimant and Irwin had no intention to create an employer-employee relationship.

As the injury occurred outside of Iowa and there was no contract of hire made between the claimant and either of the defendants, the industrial commissioner is without jurisdiction to determine the nature and extent of the claimant's disability. **Haverly v. Union Construction Co.,** 236 Iowa 278, 18 N.W. 2d 629. **Schmidt v. Pittsburgh Plate Glass Co.,** 243 Iowa 1307, 55 N.W. 2nd 227. As the commissioner is without jurisdiction, we cannot determine the relationship of the parties under the laws of another state.

THEREFORE, the Arbitration Decision is hereby affirmed in part and reversed in part.

It is found and held as findings of fact:

That Myron L. Vietmeier did not receive an injury in Iowa on March 24, 1972, and that there is insufficient evidence to establish that the claimant was an employee of either defendant.

It is held as conclusions of law that the industrial commissioner is without jurisdiction to determine the rights of the parties and, therefore, the portion of the Arbitration Decision which holds "that the claimant did enter into a contract of employment with Defendant Irwin in the State of Nebraska" is hereby reversed.

WHEREFORE, it is ordered that the Petition for Review of the Arbitration Decision is hereby dismissed. It is further ordered that each party pay its own costs except the cost of the attendance of the court reporter shall be shared equally by the defendants.

Signed and filed this 7 day of January, 1974.

ROBERT C. LANDESS
Industrial Commissioner

No Appeal

Bruce S. Wells, Claimant,

vs.

Jobbers Supply Company, Employer,
and

Truck Insurance Exchange, Insurance Carrier,
Defendants.

Review - Reopening Decision

Mr. Arthur C. Hedberg, Jr., Attorney at Law, 840 Fifth Avenue, Des Moines, Iowa 50309, For Claimant.

Mr. Roy M. Irish, Attorney at Law, 729 Insurance Exchange Building, Des Moines, Iowa 50309, For Defendants.

This is a proceeding in Review-Reopening brought by the claimant, Bruce S. Wells, against his employer, Jobbers Supply Company, and their insurance carrier, Truck Insurance Exchange, for the recovery of benefits for injuries sustained by him on November 8, 1968. The case came on for hearing before the undersigned Deputy Industrial Commissioner on October 26, 1973, at the Industrial Commissioner's Office in Des Moines, Iowa. The record was closed on April 19, 1974.

The issue to be determined is the extent of compensable disability sustained by Claimant as a result of the injury of November 8, 1968.

A Memorandum of Agreement was filed by Defendants on December 26, 1968. The memorandum was approved on the same date by the Industrial Commissioner's Office.

Claimant began work for Defendant Employer during August of 1968. On November 8, 1968, Claimant twisted his left knee as he was climbing down from the cab of a truck. He was treated for this injury by D. C. Wirtz, M.D., an orthopedic surgeon. Dr. D. Wirtz testified on behalf of Claimant.

Dr. D. Wirtz first treated Claimant's left knee on May 17, 1965. A history was given by Claimant to Dr. D. Wirtz which indicated that Claimant had slipped and injured his knee and thumb in a blizzard. Claimant further stated to Dr. D. Wirtz that on March 17, 1965, he fell under a car and bumped his knee. Examination of the left knee by Dr. D. Wirtz revealed Claimant to have swelling of his knee and some fluid present in the knee joint. Dr. D. Wirtz on this date believed that claimant might have a mild arthritis or synovitis of the left knee.

Claimant was next seen by Dr. D. Wirtz on August 19, 1966, for complaints concerning his left knee. He attributed the complaints to an injury occurring approximately two months earlier. Examination of the left knee by Dr. D. Wirtz revealed swelling, fluid, and tenderness localized over the medial aspect of the knee. Dr. D. Wirtz recommended surgical removal of the medial meniscus.

Surgery for removal of the medial meniscus was performed by Dr. D. Wirtz on September 14, 1966. Dr. D. Wirtz also noted osteoarthritic spurring of the medial condyle of the femur, thickening of the synovial membrane, and chondromalacia.

The next problem Claimant had with his knee was on October 19, 1966. On that occasion, Dr. D. Wirtz "expressed a lot of necrotic fatty type of material from the joint." Dr. D. Wirtz on November 11, 1966, made the diagnosis of secondary septic arthritis to the left knee. Claimant continued under the care of Dr. Wirtz until February of 1967.

During February of 1967, Dr. D. Wirtz performed further surgery on Claimant's left knee. Dr. D. Wirtz dissected a draining sinus. Once again, on opening the joint, Dr. D. Wirtz noted rather extensive chronic synovitis and extensive chondromalacia. Claimant was hospitalized until April 5, 1967. Dr. D. Wirtz on April 20, 1967, stated that the wound had healed. He also noted some crepitation in the knee as a result of the chondromalacia. Concerning this examination, Dr. D. Wirtz testified on cross-examination that Claimant as of this date was always going to have some disability. Claimant was released to return to work on April 24, 1967. His final diagnosis for this episode was a ruptured medial meniscus and

an asceptic necrosis of the patellar fat pad of the left knee.

The next problem Claimant had with his left knee was on November 8, 1968, the subject of this Review-Reopening proceeding. Physical examination of Claimant's left knee by Dr. D. Wirtz revealed a little swelling in his knee with pain localized mainly to the attachment of the medial collateral ligament to the femur. Dr. D. Wirtz also noted that flexion and extension was only slightly limited due to the swelling. He further indicated there was no evidence of fracture or ligament rupture. Dr. D. Wirtz' diagnosis of Claimant's problem was a sprain of the medial collateral ligament of the left knee. Claimant was admitted to Iowa Lutheran Hospital on November 8, 1968, and was released on December 7, 1968.

Claimant was examined again on January 25, 1969. X-rays showed "...a rather extensive destructive process involving the medial condyle of the tibia and also the femur of this left knee..." Dr. D. Wirtz advised Claimant "...to have his knee fused because of the extensive problems he had had..." On February 8, 1969, Dr. D. Wirtz performed a fusion or ankylosis on Claimant's left knee. He was discharged from the hospital on March 31, 1969, with a cast on his leg.

The cast was removed on May 6, 1969. Dr. D. Wirtz recommended to Claimant that he could start weight bearing with crutches by permitting 25 percent of his weight on the leg. He was released to return to work on August 1, 1969.

Claimant returned to Dr. D. Wirtz on May 31, 1970, with complaints concerning his right knee. Physical examination of the right knee revealed tenderness over the medial meniscus, swelling, and fluid. Three ounces of fluid was aspirated from the right knee by Dr. D. Wirtz. Claimant was advised that he had a rupture of the medial meniscus of the right knee. Medication was prescribed for Claimant by Dr. D. Wirtz.

On December 22, 1970, Claimant was treated by Dr. D. Wirtz for an aggravation of the condition in his right knee. Another three ounces of fluid were aspirated from his right knee. X-rays taken on January 8, 1971, were interpreted by Dr. D. Wirtz as evidencing a thinning medial intercondylar space and a spurring of the inferior portion of his right knee. On March 5, 1971, Dr. D. Wirtz made a diagnosis of chronic synovitis of the right knee. Claimant was followed conservatively until August 23, 1971.

On August 23, 1971, Dr. D. Wirtz once again aspirated three ounces of fluid from Claimant's right knee. On this date Dr. D. Wirtz recommended a synovectomy of the right knee. The synovectomy was performed on September 10, 1971. The surgery revealed a marked thickening of the capsule of the lining of the knee joint, extensive arthritic changes along the medial condyle, and a damaged meniscus. Claimant was discharged from the hospital on October 21, 1971. As of December 10, 1971, Dr. D. Wirtz believed Claimant's right knee was doing quite well.

During December of 1971, Claimant was treated for a minor problem involving his left knee. On December 1, 1972, Claimant made complaints to Dr. D. Wirtz of his right knee locking. Examination revealed crepitation with flexion and extension. X-rays indicated Claimant to have cartilage damage to the articular surface of the medial condyle of the right femur. Surgery on the right knee was performed by Dr. D. Wirtz on December 8, 1972. Dr. D. Wirtz dissected loose an extensive amount of scar tissue in the joint. He also noted some synovial irritation. Claimant was followed by Dr. D. Wirtz until February 13, 1973. On that date Dr. D. Wirtz noted that Claimant had good extension and flexion but with crepitation. He also noted that Claimant was almost pain free. Since February of 1973, Claimant has not been treated by Dr. D. Wirtz.

Dr. D. Wirtz testified that Claimant's functional disability to his left leg was 50 percent as a result of his injury of November 8, 1968. No opinion was expressed by Dr. D. Wirtz as to any disability to Claimant's right leg as a result of the injury of November 8, 1968.

Claimant was first examined for complaints of right knee pain with standing and walking by P. D. Wirtz, M.D., an orthopedic surgeon, on May 8, 1973. Physical examination revealed minimal limitation with genu varum. X-rays indicated degenerative arthritis of Claimant's right knee secondary to the genu varum. After consulting Claimant's past medical records, Dr. P. Wirtz suggested a tibial osteotomy.

On June 19, 1973, Claimant was admitted to Iowa Lutheran Hospital. The tibial osteotomy was performed by Dr. P. Wirtz on June 22, 1973. He was discharged from the hospital on July 6, 1973, with a cast on his knee. The cast was removed on August 29, 1973. Pain medications were prescribed by Dr. P. Wirtz.

Dr. P. Wirtz last saw Claimant on November 2, 1973. Dr. P. Wirtz testified that motion with the right knee had increased to a degree commensurate with his preoperative status. X-rays revealed continued healing of the knee. Dr. P. Wirtz stated that his prognosis was "real guarded" due to lack of knowledge as to how severe the disease will become. However, he indicated that the general symptomatology had decreased.

Concerning connection between the left leg and the right leg problems, Dr. P. Wirtz testified as follows:

Q. Now, doctor, do you have an opinion, based upon a reasonable degree of medical certainty, whether or not there is any connection of the difficulty that you found in his right leg with the fusion and the condition you found in the left leg?

A. Yes. The left knee fusion causes an altered gait habit, and, in so having, it would cause more strain on the functioning opposite lower extremity, with different activities, such as walking, standing, lifting.

Q. Then is it your opinion, based upon a reasonable degree of medical certainty, that the condition he had in his right leg was brought about sooner or brought about more quickly because of the condition he had in his left leg?

MR. IRISH: We will object to that for the reason it is leading and suggestive in form.

Q. Do you have --
THE WITNESS: Still answer?
MR. HEDBERG: Yes.

A. The left knee problem would be a contributing factor to the right knee symptomatology.

Q. Now, doctor, have you formed an opinion, based upon a reasonable degree of medical certainty, as to the fact whether or not he has any permanent disability in his lower extremities?

A. Yes.

Q. And what is your opinion of the permanent disability he has in his left leg?

A. Now, you want disabilities of the leg?

Q. In terms of percentage, yes, just first of each leg and then maybe of the body as a whole.

A. Well, the left lower leg, I would estimate that he has a 50 percent loss of function, when you compare the leg in relating to the ankle, the knee, and the hip joint.
Now, in comparing the right lower extremity in the same manner, I would say that it probably would be a 25 percent disability of those three joints in relationship.
Now, in comparing the function of the body as a whole, the two together would probably estimate 60 percent of the body as a whole.

Claimant has the burden of establishing by a preponderance of the evidence that the injury of November 8, 1968, was the cause of his disability on which he bases his claim. **Lindahl v. L. O. Boggs,** 236 Iowa 296, 18 N.W. 2d 607. While a claimant is not entitled to compensation for the results of a preexisting injury or disease, the mere existence at the time of a subsequent injury is not a defense. If the claimant had a preexisting condition or disability that is aggravated, accelerated, worsened or "lighted up" so it results in a disability found to exist, he is entitled to compensation to the extent of the injury. **Yeager v. Firestone Tire and Rubber Company,** 253 Iowa 369, 112 N.W. 2d 299. **Nicks v. Davenport Produce Co.,** 254 Iowa 130, 115 N.W. 2d 812. The extent of compensation payments to which a claimant may be entitled is determined by the loss (disability) resulting from the injury and not by the producing cause (injury). **Barton v. Nevada Poultry Co.,** 235 Iowa 285, 110 N.W. 2d 660.

The question of causal connection is essentially within the domain of expert testimony. **Bradshaw v. Iowa Methodist Hospital,** 251 Iowa 375, 101 N.W. 2d 167. A possibility is insufficient; a probability is necessary. **Burt v. John Deere Waterloo Tractor Works,** 247 Iowa 691, 73 N.W. 2d 732. An award cannot be predicated on conjecture, speculation, or mere surmise. **Sparks v. Consolidated Indiana Coal Co.,** 195 Iowa 334, 190 N.W. 593.

Considering the evidence offered in light of the foregoing principles, Claimant sustained his burden of proof as to the causal connection between his injury of November 8, 1968, and his disability to his left leg. However, Claimant failed to sustain his burden of proof as to causal connection between his injury of November 8, 1968, and his disability to his right leg.

The medical evidence in this case revealed that Claimant had a preexisting disability in his left knee prior to the injury of November 8, 1968. Dr. D. Wirtz on March 17, 1965, felt that Claimant had a mild arthritis or synovitis of the left knee. On November 14, 1966, Dr. D. Wirtz removed the medial meniscus and noted osteo-arthritic spurring of the medial condyle of the femur, thickening of the synovial membrane, and chondromalacia, a softening of the left knee cartilage. A diagnosis of secondary septic arthritis was made by Dr. D. Wirtz on November 11, 1966. In February of 1967 Dr. D. Wirtz dissected a draining sinus from Claimant's left knee and noted extensive synovitis and chondromalacia. He also noted that Claimant on this date had some disability to his left leg.

On November 8, 1968, the date of the injury that is the subject of this proceeding, Dr. D. Wirtz diagnosed Claimant's problem as a sprain of the medial collateral ligament. X-rays on January 25, 1969, showed an extensive destructive process involving the medial condyle of the tibia and the femur of the left knee. No testimony related the findings noted in the X-rays as resulting from the sprain of the medial collateral ligament diagnosed on November 8, 1968. Dr. D. Wirtz had previously noted osteoarthritic spurring of the medial condyle of the femur on November 14, 1966. A

review of the medical evidence clearly indicates that the fusion was not necessitated solely by the injury of November 8, 1968, and that Claimant had a preexisting disability in his left knee. No opinion was expressed by Dr. D. Wirtz as to the functional disability existing in Claimant's left leg prior to the injury of November 8, 1968, or what functional disability Claimant presently has as a result of his preexisiting disability and his disability from the injury of November 8, 1968. His only testimony as to disability was that Claimant incurred a 50 percent functional disability as a result of the injury of November 8, 1968.

Concerning Claimant's right knee, Dr. D. Wirtz treated it from May 31, 1970, to February 13, 1973. On March 5, 1971, Dr. D. Wirtz diagnosed the condition of chronic synovitis of the right knee. A synovectomy was performed on September 10, 1971. The surgery revealed a marked thickening of the capsule in the lining of the knee joint, extensive arthritic changes along the medial condyle. Further surgery was performed by Dr. D. Wirtz on December 8, 1972, for removal and loosening of scar tissue in the joint. No opinion was expressed by Dr. Wirtz as to the causal connection between the conditions diagnosed by him in the Claimant's right leg and the injury of November 8, 1968.

On May 8, 1973, Claimant was examined for the first time by Dr. P. Wirtz. X-rays and physical examination of Claimant's right knee revealed degenerative arthritis secondary to genu varum. An osteotomy was performed on June 22, 1973. No opinion was expressed by Dr. P. Wirtz that this condition was causally connected to the injury of November 8, 1968.

Although Dr. P. Wirtz rated Claimant as having a 25 percent disability to his right leg, no opinion was expressed by him that the disability of 25 percent was caused by the injury of November 8, 1968, nor that the fusion of February 8, 1969, was causally connected to the injury of November 8, 1968. The testimony by Dr. P. Wirtz that the left knee fusion caused an altered gait habit which would cause more strain on the right leg and that "...the left knee problem would be a contributing factor to the right knee symptomatology..." does not sustain Claimant's burden of proof. With Claimant's preexisting difficulties in his left knee, the language "left knee fusion" and "left knee problem" cannot be interpreted to be synonymous with the "injury of November 8, 1968." Additionally, the language "contributing to the right knee symptomatology" cannot be construed to mean functional disability. Such testimony is speculative and conjectural as to Claimant's burden of proof that the injury of November 8, 1968, caused a functional disability to Claimant's right leg.

As to healing period compensation due Claimant as a result of his injury of November 8, 1968, Claimant testified that he was hospitalized until December 7, 1968, and remained home until December 15, 1968. During the middle of December of 1968, Claimant began work for White Motor Company as a sales representative for fleet accounts. He continued in this capacity until February of 1969. On February 8, 1969, Dr. D. Wirtz performed a fusion of the left knee. Although Dr. Wirtz released Claimant to return to work on August 1, 1969, Claimant did not begin work with Mack Trucks until November, 1969. He left Mack Trucks in November, 1970, and began work for Housby Mack during that same month. Claimant has not worked since his employment with Housby Mack on August 27, 1971. Claimant testified that the only problem he had with his left knee is an abscess which was treated on December 27, 1971. Dr. D. Wirtz testified that there was no change from his permanent partial disability rating of the left leg on August 25, 1969, of 50 percent. Although Claimant has not worked since August 27, 1971, there was no medical testimony attributing Claimant's inability to work to his injury of November 8, 1968. Claimant is entitled to healing period compensation from November 9, 1968, until December 15, 1968, and from February 7, 1969, until August 1, 1969.

A number of medical bills were offered by Claimant. The parties to this proceeding stiuplated that the bills were fair and reasonable. The only bill offered that the testimony supported as being necessary treatment resulting from the injury of November 8, 1968, was a bill from Dr. D. Wirtz dated February 1, 1972. The bill stated that Dr. Wirtz checked and treated Claimant's left knee on December 10, 17, 27, and 30 of 1971 and January 7, 14, 21, and 28 of 1972. The amount of the bill was $57.

WHEREFORE, it is found that Claimant on November 8, 1968, sustained an injury which arose out of and in the course of his employment and resulted in a fifty percent (50%) permanent partial disability to his left leg which is compensable at the rate of forty-seven and 50/100 dollars ($47.50) per week. It is further found that Claimant was incapacitated from working for thirty and one-seventh (30 1/7) weeks which entitles Claimant to healing period compensation at the rate of fifty-two dollars ($52) per week. The medical bill of Dr. D. Wirtz in the amount of fifty-seven dollars ($57) is to be paid by Defendants.

THEREFORE, Defendants are ordered to pay Claimant one hundred (100) weeks of permanent partial disability compensation at the rate of forty-seven and 50/100 dollars ($47.50) per week.

Defendants are further ordered to pay Claimant thirty and one-seventh (30 1/7) weeks of healing period compensation at the rate of fifty-two dollars ($52) per week and to pay the medical bill of fifty-seven dollars ($57).

Credit is to be given to Defendants for compensation already paid by them.

Costs of the hearing and of the depositions of Drs. D. Wirtz and P. Wirtz are taxed to the defendants.

Interest on the award pursuant to §85.30, Code of Iowa, is to accrue from the date of this decision.

Signed and filed this 13 day of June, 1974.

DENNIS L. HANSSEN
Deputy Industrial Commissioner

Appealed to District Court; Decision Pending

Sally West, Claimant,

vs.

Des Moines Transfer & Storage, Employer,
and

State Auto & Casualty Underwriters, Insurance Carrier, Defendants.

Review - Reopening Decision

Mrs. Sally West, P. O. Box 34, Ankeny, Iowa 50021, Pro Se.

Mr. Anthony J. Pastorek, Attorney at Law, P. O. Box 394, Des Moines, Iowa 50302, For Defendants.

This is a proceeding in Review-Reopening brought by the claimant, Sally West, against her employer, Des Moines Transfer & Storage, and State Auto & Casualty Underwriters, the insurance carrier, to recover benefits under the Iowa State Workmen's Compensation Act by reason of an injury that occurred on June 21, 1971. This matter came on for hearing before the undersigned Deputy Industrial Commissioner sitting as sole arbitrator on July 11, 1973, in the office of the Iowa Industrial Commissioner in Des Moines.

It was stipulated and agreed that the claimant sustained an industrial injury on March 17, 1971, and that her disability began on June 22, 1971. It was further stipulated and agreed that this temporary total disability lasted for eighty-seven (87) weeks.

It was further stipulated and agreed that as a result of the occurrence of March 17, 1971, the claimant has sustained a twenty percent (20%) permanent partial disability of the right upper extremity.

The issue to be resolved in this case is whether or not the charges for services of the St. Francis Hospital of Grand Island, Nebraska, rendered to the claimant are fair and reasonable. The record stands without contradiction that the claimant was given medical permission to leave the St. Francis Hospital for 12 days. The record further supports the allegation that the number of bed patients in the hospital never exceeded the number of hospital beds available. From an examination of the current state of the record, the charges of the St. Francis Hospital do not appear reasonable.

THEREFORE, after taking all of the credible evidence contained in this record into account, it is held as a finding of fact that the claimant did sustain an industrial injury arising out of and in the course of her employment for her employer, and that said injury resulted in eighty-seven (87) weeks temporary total disability. It is further found and held as a finding of fact that the claimant has sustained a twenty percent (20%) permanent partial disability of the right upper extremity.

It is further found as a finding of fact that the room charges submitted by St. Francis Hospital of Grand Island, Nebraska, for October 2, 3, 9, 10, 16, 17, 23, 24, 30, 31, and November 6 and 7, 1971, in the amount of $480 are not fair and reasonable.

WHEREFORE, it is ordered that the defendants pay the claimant forty-six (46) weeks permanent partial disability at fifty-nine dollars ($59) a week. It is further ordered that the defendants pay to the claimant a healing period of twenty-seven and six-tenths (27.6) weeks at the rate of sixty-one dollars ($61) per week, less credit for those payments previously made.

It is further ordered that the demand of St. Francis Hospital, Grand Island, Nebraska, for the payment of four hundred and eighty dollars ($480) for room charges October 2, 3, 9, 10, 16, 17, 23, 24, 30, 3l, and November 6 and 7, 1971, be disallowed.

It is further ordered that the responsibility for providing reasonable medical care is incumbent upon the defendants, and that any dispute that may arise as to the payment of such bills is to be borne by the defendants. It is further ordered that the defendants assume the responsibility for the settlement or payment of any portion of the four hundred and eighty dollars ($480) allegedly due the St. Francis Hospital in Grand Island, Nebraska. It is further ordered that the claimant be held harmless by the defendants concerning

the charges of the St. Francis Hospital of Grand Island, Nebraska, incurred during the months of October and November, 1971.

The defendants are further ordered to pay the costs of these proceedings.

Signed and filed this 17 day of July, 1973, at the office of the Iowa Industrial Commissioner at Des Moines.

HELMUT MUELLER
Deputy Industrial Commissioner

No Appeal

Helen Whitmer, Claimant,

vs.

International Paper Company, Employer, self-insured, Defendant.

Review - Reopening Decision

Condon & Roberson, Attorneys at Law, 610 - 9th Street, DeWitt, Iowa 52742, For Claimant.

Mr. Ralph D. Sauer, Attorney at Law, 609 Putnam Building, Davenport, Iowa 52801, For Defendant.

This is a proceeding in Review-Reopening brought by the claimant, Helen Whitmer, against her self-insured employer, International Paper Company, to recover benefits on account of an injury occurring on October 12, 1972. The case came on for hearing before the undersigned Deputy Industrial Commissioner as arbitrator on February 4, 1974, at the courthouse of Clinton County in Clinton, Iowa, at 9:30 A.M. The case was fully submitted by both parties on this date.

The claimant is married, age 36, and has no children. After graduating from high school, Claimant worked for approximately two months at First Trust and Savings in Davenport, Iowa. She next worked for four months as a waitress at the Blackhawk Hotel in Davenport. Her next employment started in 1964 when she began working for Defendant as an inspector of food cartons. She has continued in that capacity until the present time.

At approximately 10:15 A.M. on October 12, 1972, at Defendant's plant, a flourescent light fixture fell and struck Claimant on the back of the neck. She was taken by ambulance to the emergency room at Jane Lamb Hospital where she was treated by Frank B. Rogers, M.D., a general surgeon.

Dr. Rogers treated Claimant for a cervical spine fracture and a severe laceration of the left side of her face. In his report of July 10, 1973, Dr. Rogers indicated subjective complaints of occasional tiredness and discomfort by Claimant but noted no limitation of motion or range of motion in her neck. He further noted a scar extending from the angle of her jaw to the corner of her mouth on the left side and a scar over her upper lip on the left side. At this time, Dr. Rogers suggested that the residual cosmetic defect should be evaluated in approximately one year as to any need for cosmetically revising the scar to improve its appearance.

On October 30, 1973, Claimant was examined by Richard L. Kreiter, M.D., an orthopedic surgeon. The only abnormalities noted by Dr. Kreiter on examination were:

/. Tenderness at the base of the cervical spine in the midline.
2. Slight tenderness along the vertebral border of both scapulae.
3. Lateral bending and rotation without any comment of pain was approximately 80% normal.

X-rays revealed some calcification in the longitudinal ligaments anteriorly with a suggestion of the old chip fracture at the superior aspect of C-3. He noted a normal cervical lordosis.

Dr. Kreiter's impressions were that the avulsion fracture of the anterior cervical body was healed and that the discomfort was caused by fatigue pain running from the base of the cervical spine to the medial borders of both scapulae. He estimated her permanent physical impairment and loss of physical function to be 5% of the whole body. He added that a truer evaluation would be possible after the institution of an appropriate rehabilitation program.

Concerning her condition at the time of the hearing, Claimant testified that her neck bothers her off and on and that she believes the scarring has psychologically affected her. Claimant's present duties at Defendant's plant are the same as she was performing at the time of the injury. She stated that she is able to perform her job in a workmanlike manner.

Thomas J. Donahue, personnel manager for Defendant, testified on behalf of Defendant. He indicated that Claimant was a good and loyal employee who has received maximum pay increases since her employment began in 1964.

The first issue to be determined in this matter is whether any permanent partial disability compensation is due to Claimant as a result of the injury to her neck on October 12, 1972.

The burden is upon the claimant to establish by

a preponderance of the evidence a causal connection between her injury and subsequent disability. The question of causal connection is essentially within the domain of expert testimony. **Bradshaw v. Iowa Methodist Hospital,** 251 Iowa 375, 101 N.W. 2d 167.

The testimony of Claimant as to her present problems with her neck plus the testimony of Dr. Kreiter as to the residual problems in her neck sustained Claimant's burden of proof as to permanent partial disability as a result of the injury of October 12, 1972.

Under the provisions of §85.34(2) (u), Code of Iowa, Claimant's disability is to the body as a whole and must be evaluated industrially and not merely functionally. **Daily v. Pooley Lumber Company,** 233 Iowa 758, 10 N.W. 2d 569. In determining industrial disability, consideration may be given to the injured employee's age, education, qualifications, experience and his inability because of the injury to engage in employment for which he is fitted. **Olson v. Goodyear Service Stores,** 255 Iowa 1112, 125 N.W. 2d 251. It is the reduction of earning capacity, not merely functional disability, which must be determined. **Barton v. Nevada Poultry Co.,** 253 Iowa 285, 110 N.W. 2d 660.

Dr. Kreiter estimated Claimant's functional disability to the body as a whole to be 5%. Claimant's work history indicated that she has performed physical labor during most of her working years. The testimony of Claimant and Dr. Rogers indicated some restrictions in the performance of her duties for Defendant. The evidence offered by Claimant sustained her burden of proof that she suffered a 5% permanent partial disability to the body as a whole. Claimant while she was off work was paid 13 3/7 weeks of temporary disability compensation at the rate of $68 per week. No evidence was introduced relating to any additional temporary disability or healing period compensation.

The next issue to be considered is whether Claimant is entitled to disability compensation for permanent disfigurement of the head and face as a result of the accident of October 12, 1972.

Section 85.34(2) (t), Code of Iowa, provides that permanent partial disability shall be paid:

> "For permanent disfigurement of the face or head which shall **impair the future usefulness or earnings of the employee in his occupation at the time of receiving the injury.** Weekly compensation, for such a period as may be determined by the industrial commissioner according to the severity of the disfigurement, but not to exceed one hundred fifty weeks...." (Emphasis supplied.)

Claimant's facial scars were observed by the undersigned at the hearing. The only testimony by Claimant as to how the scars affected her employment was that she believes she does experience some anxieties as a result of the scarring. Testimony by Claimant and by Donahue indicated that she is presently performing her job as inspector as she did prior to the injury and that she does not work with the general public. Since no other evidence was offered by Claimant on this issue, she has not sustained her burden of proof that the permanent disfigurement resulting from the injury impaired her future usefulness and earnings in her occupation at the time of receiving the injury.

WHEREFORE, it is found that Claimant suffered a neck injury arising out of and in the course of her employment with Defendant on October 12, 1972, which resulted in a five percent (5%) permanent partial disability to Claimant's body as a whole at the rate of sixty-three dollars ($63).

THEREFORE, Defendant is ordered to pay Claimant twenty-five (25) weeks of permanent partial disability compensation at the rate of sixty-three dollars ($63) per week.

Costs of the hearing are taxed to Defendant.

Interest on the award pursuant to §85.30, Code of Iowa, is to accrue from the date of this decision.

Signed and filed this 14 day of February, 1974.

DENNIS L. HANSSEN
Deputy Industrial Commissioner

No Appeal

Charles R. Wilson, Claimant,

vs.

Henry Fosenburg, Jr., Employer,
and

Grinnell Mutual Reinsurance Co., Insurance Carrier, Defendants.

Review Decision

Mr. Gene W. Glenn, Attorney at Law, 112-A East Second St., Ottumwa, Iowa 52501, For Claimant.

Mr. Thomas M. Walter, Attorney at Law, 129 West Fourth St., Ottumwa, Iowa 52501, For Defendants.

This is a proceeding brought by the employer, Henry Fosenburg, Jr., and his insurance carrier,

Grinnell Mutual Reinsurance Co., seeking a Review of an Arbitration Decision wherein the claimant, Charles R. Wilson, was awarded benefits under the Iowa Workmen's Compensation Act on account of injuries he sustained on April 16, 1971. On September 25, 1972, the case came on for Review hearing before the Industrial Commissioner at his offices in Des Moines, Iowa. The case was presented on the transcript of the evidence at the Arbitration proceeding, plus the briefs and arguments of counsel.

The facts are not substantially in dispute. Claimant was hired by the defendant employer to tend a landfill area operated by defendant employer. Claimant worked from seven a.m. to six or seven p.m. six days a week. For this, he was paid $25.00 per week. He was also granted exclusive salvage rights from which he gained an additional $25.00 per week. Claimant generally took an hour for lunch. He would go to his home for lunch, which was approximately one mile from the site of the landfill. Claimant provided his own transportation to and from work in the morning, at lunchtime and in the evening. This was many times in the form of a tractor owned by his father and himself. The tractor was equipped with a trailer, which the claimant used to remove salvage from the landfill. Occasionally, Claimant's father would assist in removing salvage with his pickup truck.

On April 16, 1971, the claimant, around the noon hour, drove his tractor home for lunch. There is a dispute in the evidence as to whether or not the trailer was attached to the tractor and loaded with salvage which the claimant was taking home with him at that time. On his return to the landfill after lunch, Claimant was involved in a no contact motor vehicle accident when he swerved to avoid an oncoming vehicle, upsetting his tractor and pinning himself under the tractor.

Two issues are argued by the parties. They are the employment status of the claimant at the time of his injury and if he is an employee, did his injury arise in the course of his employment.

Assuming, without deciding, that the claimant was an employee, consideration will be given to the "in the course of" issue first. "In the course of employment" has been defined as "within the period of the employment, at a place where the employee reasonably may be in the performance of his duties or engaged in doing something incidental thereto". It relates to the time, place and circumstances of the accident. **Golay v. Keister Lumber Co.,** 175 N.W. 2d 385, and cases cited therein.

"As to employees having fixed hours and placed work, injuries occurring on the premises while they are going to and from work before or after working hours or at lunchtime are compensable, but if the injury occurs off the premises, it is not compensable, subject to several exceptions.***" 1 Larson, Law of Workmen's Compensation 195, §15.00(1965).

In this case, the injury occurred off the employer's premises and the job which the claimant had with the defendant employer was one which generally must be performed on the premises of the landfill. Although it may be argued that the removal of salvage from the landfill was an integral part of the employer's business, even if claimant's contention is accepted that he had taken a load of salvage home with him when he went to lunch, that load was discharged before returning to the landfill after lunch. At the time he was returning to the landfill after lunch, he was in no different situation than he would have been if he were going to work in the morning, having taken home a load of salvage the night before. At the time of the incident causing Claimant's injury, he was performing no service to his employer. If there was any dual purpose involved in the claimant's trip home at lunchtime, it had ceased prior to his return to work after lunch. There is also no evidence showing that Claimant's travel to and from work was subject to any special hazards incident to the route which could cause it to be considered a part of his employment because of the special hazard. No other situations are found in the evidence to justify any exception to the general rule regarding off premises injuries while going to and coming from work.

Because of the finding that Claimant's injury did not arise in the course of his employment, it is not necessary to determine his employment status at the time of his injury.

THEREFORE, the Arbitration Decision is hereby reversed.

It is held and found as finding of fact:

That Claimant did not sustain an injury arising out of and in the course of his employment with the defendant, Henry Fosenburg, Jr., on April 16, 1971.

WHEREFORE, recovery must be and is hereby denied to the claimant. Each party is to pay the expense of producing their own witnesses. Defendants are to pay the cost of the shorthand reporter at the Arbitration hearing.

Signed and filed this 8 day of November, 1972.

ROBERT C. LANDESS
Industrial Commissioner

Appealed to District Court. Reversed and Remanded, Dismissed.

TOPICAL INDEX
OF SELECTED REVIEW AND REVIEW-REOPENING CASES