State of Iowa

1976

ROBERT D. RAY
Governor

THIRTY-SECOND BIENNIAL REPORT OF THE

Industrial Commissioner

For the Period Ending June 30, 1976
and
REPORT OF DECISIONS
ON SELECTED CASES

ROBERT C. LANDESS
Industrial Commissioner

Published by
STATE OF IOWA
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Joseph M. Bauer	Deputy Industrial Commissioner
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Leonard C. Ewald	Rehabilitation Counselor
Sara Johnson	Law Clerk
Dr. Daniel W. Coughlan	Medical Counsel
Deanne Nail	Secretary to the Commissioner
Ruth L. McLaughlin	Office Manager
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Jill Read	Records Clerk
Kim Roush	Records Clerk

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

Dear Governor Ray:

In accordance with Iowa Code Section 86.9, the Thirty-second Biennial Report of the Iowa Industrial Commissioner is submitted covering the periods of July 1, 1974 and ending June 30, 1976.

Contained in this report are our recommendations including a planning summary, summary of receipts and disbursements, statistical data on litigated and non-litigated injuries and a brief outline of the Iowa Workers' Compensation Act.

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

Respectfully submitted,

ROBERT C. LANDESS
Industrial Commissioner

SUMMARY OF THE IOWA WORKERS' COMPENSATION ACT AS REVISED JULY 1, 1976

This brief summary of the Iowa Workers' Compensation Act has been prepared by the Office of the Iowa Industrial Commissioner as an aid to the citizens of Iowa. Reference is made to Chapters 85, 85A, 86 and 87, Code of Iowa, for specific provisions of the Act.

The Workers' Compensation Act requires an employer or its insurance carrier to furnish medical and hospital services to employees sustaining personal injuries or occupational diseases arising out of and in the course of the employment, and to pay them, or their dependents in case of death, weekly compensation for disability.

Until January 1, 1977 the Act is applicable to agricultural workers if at the time of injury such worker is employed by an employer (a) whose total cash payments to one or more such persons amounted to $2500 during the preceding calendar year, or (b) who employs at least one person regularly. However, agricultural employers need not consider wages paid to or the employment of family members or exchange labor in determining whether or not they meet the mandatory requirements of $2500 cash payroll in the previous calendar year or the employment of at least one person regularly for thirteen consecutive weeks.

After January 1, 1977 the Act is applicable to agricultural workers if employed by an employer engaged in agriculture pursuits whose total cash payroll amounted to $1000 or more during the preceding calendar year. Wages paid to or work performed by the following are not taken into consideration nor are they covered: (1) the spouse of the employer and parents, brothers, sisters, children and stepchildren of either the employer or the spouse of the employer; (2) any person engaged in agriculture as a farm operator or spouse of such farm operator or parents, brothers, sisters, children and stepchildren of either such farm operator or spouse of such other farm operator or parents, brothers, sisters, children and stepchildren of either such other farm operator or spouse for the mutual benefit of any or all such persons; and (3) the president, vice president, secretary, treasurer, of a family farm corporation and their spouses and parents, brothers, sisters, children and stepchildren of such officers and their spouses who are employed by such corporation, the primary purpose of which, although not necessarily the stated purpose, is farming or ownership of agricultural land, and while such officer or person related to the officer is engaged in agricultural pursuits or any operation immediately connected therewith whether on or off the premises of the employer.

The Act is also applicable to casual employees if such employees earn $200 or more during the thirteen consecutive weeks prior to the injury from such employer for whom employed at the time of the injury and to employees engaged in and around a private dwelling if (a) such employee earns $200 or more during the thirteen consecutive weeks prior to the injury from such employer for whom employed at the time of the injury, and (b) provided such employee is not a regular member of the household.

An employer may assume liability for compensation for those excluded under the Act by purchase of valid workers' compensation insurance specifically including a classification for such excluded employees unless the employee is subject to a rule of liability or method of compensation established by the Congress of the United States.

Report of Injury: An employee who is injured should promptly notify the employer, or a person in charge, of such injury. The employer should at once refer the worker to a competent doctor.

The employer should then make a report to his insurance company. If the employee's disability extends beyond seven days, or results in a permanent disability, the employer must file the report with the Industrial Commissioner, State Capitol Complex, 610 Des Moines Street, Des Moines, Iowa 50319.

A supply of blank forms for these reports, as well as others, may be obtained from the commissioner. Medical reports are secured from the physicians by the insurance company or employer.

The employer must also report to the State Bureau of Labor at Des Moines, Iowa, when such accident results in either death of the employee or such bodily injury as will or probably may prevent him from returning to work within two days thereafter.

Medical and Hospital Benefits: The employer is required to furnish medical, surgical, dental, osteopathic, chiropractic, podiatrial, physical rehabilitation, nursing, ambulance, hospital services and supplies, crutches, and one set of permanent prosthetic devices and reasonably necessary transportation expenses incurred for such services. The total for these services is unlimited. The choice of care is in the first instance with the employer. The injured employee cannot recover for unauthorized health care. In the case of emergency, the employee may choose the care provided the employer or his agent cannot be reached immediately. If the employee has reason to be dissatisfied with the care offered, he may request the employer to provide him with other care, or the choice of a number of alternate sources. If the employer and employee cannot agree upon alternate care the employee may request that the commissioner allow other care.

Any employee, employer or insurance carrier making or defending a claim for benefits agrees to the release of all information to which they may have access, concerning the employee's physical or mental condition relative to the claim and waives any privileges for the release of such information. Any institution or person releasing such information to a party or their attorney shall not be liable criminally or for civil damages by reason of the release of such information. If release of information is refused, the party requesting such information may apply to the Industrial Commissioner for relief.

Compensation: Compensation benefits are payable each week beginning on the 15th day after the injury. Payments may be made directly to an injured minor employee. Payments are made by the employer or his insurance carrier and not the Iowa Industrial Commissioner.

Temporary Disability: No compensation is payable during the first week of incapacity. If the employee is disabled longer than the 4th, 5th, or 6th week, an additional ⅓ week is allowed on each of these weeks respectively. Temporary disability compensation is paid during the period of disability.

Death: If injury causes death, compensation is payable to the widow or widower or dependents as follows: (a) to widow or widower for life or until remarriage, provided that upon remarriage, two years' benefits shall be paid to the widow or widower in a lump sum if there are no children entitled to the benefits; (b) to a child under age 18 and to age 25 if actually dependent; (c) to any child physically or mentally incapacitated from earning for duration of incapacity from earnings; and (d) to all other dependents for duration of incapacity from earnings as defined in the Act. If the employee leaves no widow or widower or dependents, the only allowance in addition to the medical and hospital benefits is the statutory burial allowance of $1000.

Permanent Partial Disability and Healing Period: The Act provides for two types of permanent partial disability for two distinct types of injuries, i.e., a permanent partial disability for injuries to certain statutorily designated members or parts of the body, and a permanent partial disability for injuries to the body other than those statutorily designated in the Act. Compensation for a statutorily designated injury is based upon a functional loss to the member or part of the body.

The following are examples of statutorily designated members or parts of the body and the maximum number of weeks permanent partial disability compensation is payable.

	Number of Weeks		Number of Weeks
Loss of thumb	60	Loss of great toe	40
Loss of first finger	35	Loss of any other toe	15
Loss of second finger	30	Loss of foot	150
Loss of third finger	25	Loss of leg	220
Loss of fourth finger	20	Loss of eye	140
Loss of hand	190	Loss of hearing in one ear	50
Loss of arm	250	Loss of hearing in both ears	175

Compensation for an injury that does not fall within the statutorily designated members or parts of the body is based upon industrial disability and not mere functional disability. In determining industrial disability, consideration may be given to the age, education, training, and employment qualifications of the employee, as well as his loss of earnings. Examples of injuries where industrial disability would be applicable are back and head injuries. Compensation is paid during the number of weeks in relation to five hundred weeks as the industrial disability bears to the body of the injured employee as a whole.

The employer is also required to pay the employee for a healing period in those cases wherein the employee has sustained a permanent partial disability. Healing period payments are provided until the employee has returned to work or medical evidence establishes that recuperation from the injury has been accomplished, whichever comes first.

Permanent Total Disability: Compensation is payable during the period of disability.

Basis of Compensation: The base used for computing compensation shall be the employee's average weekly spendable earnings. Spendable weekly earnings is defined as that amount remaining after deduction of payroll taxes from gross weekly earnings.

For death, healing period, temporary disability, and permanent total benefits, the rate of compensation is 80% of the employee's weekly spendable earnings, but shall not exceed 100% of the average weekly wage of Iowa's covered workers as determined by the Iowa Employment Security Commission. The maximum will be $174 for injuries occurring after July 1, 1976.

For permanent partial disability benefits, the rate is 80% of the employee's weekly spendable earnings, but shall not exceed 92% of the average weekly wage of Iowa's covered workers as determined by the Iowa Employment Security Commission. The maximum will be $160 for injuries occurring after July 1, 1976. The Employment Security Commission determined the average weekly wage to be $173.50 in 1975.

Rehabilitation: An employee who has sustained an injury resulting in permanent partial or permanent total disability for which compensation is payable, and who cannot return to gainful employment because of such disability, shall upon application to and approval by the Industrial Commissioner be entitled to a $20 weekly payment from the employer, in addition to any other benefit payments, during each full week in which the employee is actively participating in a vocational rehabilitation program recognized by the

state board for vocational education. The Industrial Commissioner's approval of such application for payment may be given only after a careful evaluation of available facts, and after consultation with the employer or the employer's representative. Such additional benefit payment shall be paid for a period not to exceed thirteen consecutive weeks, except that the Industrial Commissioner may extend the period of payment not to exceed an additional thirteen weeks if the circumstances indicate that a continuation of training will in fact accomplish rehabilitation.

Commutation and Lump Sum Payment: As a general rule, compensation payments are made periodically. Future payments may be commuted to a present worth lump sum only (1) when the period during which compensation is payable can be definitely determined; (2) when the Industrial Commissioner has filed his written approval; and (3) when commutation is shown to be for the best interest of the employee or when periodical payments will entail undue expense, hardship, or inconvenience upon the employer.

In addition, if the person seeking the commutation is (a) a widow or widower, or (b) a permanently and totally disabled employee, or (c) a dependent as defined in the Act, the future payments which may be commuted shall not exceed the number of weeks indicated by probability tables designated by the Iowa Industrial Commissioner for death and remarriage.

A commutation and lump sum payment discharges the employer from all further liability and entitles the employer to a release.

Settlements: Statutory authority is provided to the Industrial Commissioner to approve settlement agreements in a contested case, if a bona fide dispute exists as to liability and no memorandum of agreement has been filed. Upon approval by the Industrial Commissioner, the settlement bars further action under the Workers' Compensation Law for that injury.

Waivers: An employee with a physical defect which increases the risk of injury may, with the approval of the Industrial Commissioner, agree to waive compensation for injuries which may occur directly or indirectly because of the defect.

Medical and Attorney Fees: The fees of attorneys and physicians for services under the compensation law are subject to the approval of the Industrial Commissioner.

Second Injury Fund: An employee who has suffered loss or loss of use of an eye, leg, arm, hand, or foot prior to an industrial accident which causes the loss or loss of use of another such member may be entitled to compensation from the Second Injury Fund. Applications for such benefits may be obtained from the office of the Industrial Commissioner.

Administration: The Workers' Compensation Law is administered by the Iowa Industrial Commissioner. When compensation is payable, a memorandum of agreement must be submitted to the commissioner for his approval. After completion of payments, a report of the amounts paid must be filed with the commissioner.

If an agreement is not reached, either the employee or employer may request an arbitration hearing to determine whether the employee is entitled to benefits, or the amount thereof. This filing must be made within two years from the date of injury causing such death or disability for which benefits are claimed. If an arbitration award has been made or weekly compensation paid, an employee may seek additional benefits by filing for a review-reopening of his case within three years after the date of the last payment of weekly benefits (not medical payments). No statute of limitations is applicable to medical and hospital services where an arbitration award has been made or where weekly benefits have been paid.

There are appeal procedures for the aggrieved party in each instance. Hearings are held in the courthouse in any county in the judicial district where the injury occurred, and it is recommended that all parties be represented by a lawyer.

The worker, if requested by the employer, shall submit himself to all reasonable medical examinations by physicians at the expense of the employer. In case of permanent disability the worker may, if dissatisfied with the permanent disability rating, apply to the commissioner for an examination by a doctor of his choice at the employer's expense including reasonable and necessary transportation expense.

Voluntary Maintenance Payments: Under appropriate conditions voluntary maintenance payments may be made for a specified period during investigation of a claim without an admission of liability. Appropriate forms must be filed with the Industrial Commissioner.

For further information in regard to workers' compensation, write or telephone the Iowa Industrial Commissioner's office, State Capitol Complex, 610 Des Moines Street, Des Moines, Iowa 50319. The office is open for personal inquiries from 8 a.m. to 4:30 p.m. Phone (515) 281-5934.

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 workers' compensation law.

Although workers' compensation laws have been in existence in Iowa since 1914, the last three years have produced such fundamental and sweeping changes in substance and procedure as to constitute a completely new program.

Prior to July 1, 1973 the maximum value of a workers' compensation claim for permanent total disability was $31,500.00 plus medical expenses. Today that same claim for a thirty-year-old worker could total $396,372.00 plus lifetime medical expenses. Permanent total for a twenty-year-old worker could total $480,414.00 plus lifetime medical expenses.

Prior to July 1, 1973 the maximum amount of compensation available to a surviving spouse and dependents was $18,900.00. Presently, a surviving spouse receives benefits for life or until remarriage in which case dependent children take over the benefits until age eighteen or up to age twenty-five if enrolled in an accredited educational institution. This type of a claim also normally runs into the 100 thousands of dollars.

Prior to July 1, 1973 the loss of a leg had a maximum recovery of $20,760.00. Now the same injury would be worth at least $56,080.00. Presently the loss of one foot, one hand or one eye normally receives as much as a quadriplegic prior to July 1, 1973.

The broadening of benefits (as illustrated), the broadening of coverage (to agricultural and domestic employees) and the revamping of procedures (pursuant to the Iowa Administrative Procedure Act) has had an unsettling effect upon employees, employers, insurance carriers and lawyers involved in workers' compensation. This has also caused a significant change in the office of the industrial commissioner because of the alteration and increase in the workload.

SERVICES PROVIDED

The Iowa Industrial Commissioner is a multi-facet agency with overall responsibility for the Iowa Workers' Compensation Act as set out in Iowa Code Chapters 85, 85A, 86, 87 and applicable portions of 17A. The industrial commissioner's function embraces all aspects of the compensation claim from first report of injury through intraagency appeals of contested case decisions. The commissioner further encompasses corollary issues of rehabilitation, employer record keeping, compensation insurance coverage and many others. For planning purposes, these services can be arbitrarily divided into three individual programs: rehabilitation, judicial and compliance administration. A more complete description of these programs and functions performed therein follows.

PLANNING PROCESS

The industrial commissioner's current planning is congruent with the program budgeting concepts developed by the Comptroller's Office. Briefly the planning process involves:

1. Establishing agency objectives to be accomplished prior to July 1, 1982.
2. Establishing program objectives for accomplishment prior to July 1, 1979.
3. Developing and establishing program performance measurements consistent with the program objectives stated.
4. Periodic evaluation of results and feedback as a basis for:
   a. Corrective action to accomplish stated objectives or
   b. Revision of goals where indicated.

It is felt the above process will best lead to coordinated efforts in achieving performance of those functions delegated to the Iowa Industrial Commissioner.

AGENCY OBJECTIVES

The industrial commissioner has adopted the following goals for accomplishment prior to July 1, 1982:

1. Achieve substantial compliance with the provisions of the Workers' Compensation Act.
2. Improve quasi-judicial system to provide timely resolution of disputes which arise under the Iowa Workers' Compensation Act.
3. Promote and assist in the development and coordination of physical and vocational rehabilitation programs for injured employees.
4. Develop and implement data processing and micro-film systems to efficiently handle information flow and record keeping.
5. Develop and implement statistical information systems as a basis for management and decision

making.
6. Develop and implement statistical information systems to provide information to other governmental units and private users.
7. Separate judicial and administrative functions to insure impartial judicial decisions.
8. Improve the intra-agency appeal process to provide timely resolution of appeals.

The above goals will remain subject to amendment, addition and deletion as necessary to accommodate changes in the industrial commissioner's environment and/or the Workers' Compensation Act. Additionally, it is considered vital to maintain flexibility in the commissioner's approach to problems posed by workers' compensation.

REHABILITATION

The industrial commissioner first became involved in the rehabilitation process for the industrially disabled in November, 1967, when a social worker was added to the staff. Between 1967 and 1974, the industrial commissioner's rehabilitation efforts were directed toward counseling and advising injured employees as the limited time and resources permitted. In 1974 the social worker left the Industrial commissioner's Office and was replaced by a rehabilitation counselor. This marked the beginning of a shift in the emphasis of the commissioner's rehabilitation program and the adoption of a new set of goals and objectives. It is the commissioner's current belief that rehabilitation efforts should be directed toward (1) coordinating the efforts of other interested individuals in their attempts to provide physical and vocational rehabilitation (2) promoting rehabilitation as a necessary and viable process in returning the injured employees to work as well as (3) providing services of rehabilitation specialists to act as resource consultants in the area of rehabilitation.

A number of barriers exist in successful rehabilitation programs in Iowa. Included are:
1. Lack of training and expertise within the claim industry as concerned with rehabilitation programs.
2. Attitude barriers in certain sectors of the medical profession.
3. A lack of rehabilitation facilities geared to returning the industrially disabled to employment.
4. Confidentiality requirements of federal rules placed upon the vocational counselors employed by the Department of Public Instruction.
5. Lack of statistical and other evidence to show the true economic value of returning the industrially disabled to employment through well planned and executed rehabilitation programs.

To approach the above, the industrial commissioner has adopted the following objectives to be accomplished prior to July 1, 1979.
1. Encourage the development of physical rehabilitation resources with goals of:
   a. Ten full-service rehabilitation centers.
   b. Physical rehabilitation resources available within fifty miles of each Iowan, i.e., medically supervised physical rehabilitation.
2. Encourage and assist in the development of specific written rehabilitation procedures in programs within the claim industry with a goal of 50% operational programs prior to July 1, 1979.
3. Develop and implement data processing, micro-film and statistical information systems to adequately handle information flow, provide information for management decision making and provide statistical information to other users.
4. Develop and implement a program to publish and distribute materials on rehabilitation problems, procedures, and issues relative to the Worker's Compensation Act and to promote positive attitudes on the effects and benefits of rehabilitation of injured employees.
5. Provide services of rehabilitation specialists to the claim industry, medical profession and other interested parties in establishing rehabilitation programs as well as handling individual case problems in rehabilitation.

The above goals represent a large step for the industrial commissioner and are dependent upon securing adequate resources and manpower to supplement the single rehabilitation counselor currently employed by the industrial commissioner. Although the objectives are ambitious, it is felt the above represents minimum achievement necessary to maintain viability of rehabilitation as a function of workers' compensation. Accomplishment of these objectives would represent a first step down the long road of successful rehabilitation of the industrially disabled to insure that these individuals will have opportunity to continue to use their talents to the fullest extent possible, so they may remain active participants as useful citizens of this State.

JUDICIAL PROGRAM

The basic function of the judicial program is the resolution of all disputes under the Workers' Compensation Act through formal hearing process and written decisions. Decisions of the deputies are appealable de novo to the industrial commissioner. The industrial commissioner's finding of facts are conclusive in appeal to the district court system. The program is currently staffed by four deputy commissioners and three clerk-typist III's. In addition, a major portion of the industrial commissioner's

time as well as that of his secretary is devoted to the intra-agency review process. Due to lack o manpower in the compliance administration program, however, the deputies must spend a portion o their time involved in this function, to the detriment of the judicial program. Due to the aforementione expansion of workers' compensation, the staff is rapidly becoming inadequate to meet the demand placed upon the judicial program. Among the reasons are':

1. Increased filings in disputed arbitration and review-reopening cases as indicated below:

	7-1-69/70	7-1-73/74	7-1-75/7
No. of filings	416	519	711

As can be seen, the filings for fiscal 1975/76 represent 170% of the filings for fiscal 1969/70.

2. Due to complexities in cases filed, as well as more stringent standards in rendering decisions, the average length of the deputies' decisions is increasing. Comparing examples of decisions rendered during January to July, 1970 with the same period in 1976 shows a 40% increase in the average length of a decison.
3. On July 1, 1977 the waiting period for the workers' compensation benefits will be reduced from seven to three days. In due course of events, this can be expected to proportionately increase the disputes and number of cases filed.
4. Expansion in non-litigated areas of workers' compensation claims increases the workload in the judicial program due to the aforementioned shortage of manpower in the compliance administration program. Requirements of the Iowa Administrative Procedure Act effective July 1, 1975 as well as the desire for impartiality in decisions dictates a reduction of the deputies' involvement in non-litigated matters. To date, however, this has not been possible.
5. Prior to the Iowa Administrative Procedure Act, the commissioner reviewed only arbitration decisions with review-reopening decisions being appealed directly to district court. The Iowa Administrative Procedure Act, however, also provides for appeal of review-reopening decisions to the commissioner which has, and can be expected to continue to have, the effect of drastically increasing the number of intra-agency appeals to the commissioner.

The judicial program further suffers from the lack of statistical capacity to measure performance as well as produce needed statistical information.

The industrial commissioner is limited by Code Section 86.2 to a maximum of four deputy industrial commissioners. In order to respond to the need of the judicial program, it would appear necessary to relieve the commissioner and deputies to the extent possible to concentrate their efforts and activities on hearing cases and rendering the required decisions.

In response to the above, the following goals are adopted for completion prior to July 1, 1979.

1. Develop and implement judicial administration unit to accept overall responsibility for performance of quasijudicial functions.
2. Develop and implement data processing and micro-film system to efficiently handle information flow and record keeping.
3. Develop and implement statistical information systems as a base for management decision making and to provide information to other governmental units and private users.
4. Expand present pre-trial program with goal of pre-trials in 80% of the cases to be heard.
5. Develop and implement informal conference program to provide semi-formal forum for resolution of disputes and information gathering.
6. Provide court reporter services to record and prepare transcripts of hearings.
7. Provide adequate legal research and drafting capability to the industrial commissioner to handle increased workload in the review process.
8. Develop and implement performance standards for hearing as well as appeal processes.

As with the rehabilitaion program, these goals are ambitious but necessary to allow the industrial commissioner to achieve the overall goal of providing timely resolutions of disputes which arise under the Iowa Workers' Compensation Act.

COMPLIANCE ADMINISTRATION PROGRAM

The basic functions of the compliance administration program are:

1. Monitor the performance of the claim industry.
2. Assure that all sectors of the industry comply with the provisions of the Workers' Compensation Act
3. Review all workers' compensation rates and benefits paid to determine accuracy.
4. Act as an information source for employees, employers and other segments of the general public who have an interest in workers' compensation.
5. Monitor claim practices of the claim industry to assure that compensation claims are properly and adequately handled.

The industrial commissioner's compliance administration program has been staffed by five clerk-typist III's with part-time assistance of the assistant industrial commissioner and deputy commissioners as required. On July 1, 1976 an insurance program specialist and one additional clerk-typist III were added to this program. During 1975 this unit handled approximately 20,000 filings of which approximately 17,000 were compensable injuries. Of this number, roughly 86% or 14,620 of these compensable injuries supported a rate less than the maximum allowable. In each of these cases, recomputation of the applicable rate was necessary. Additionally, reports of benefits paid on all compensable injuries were recomputed for accuracy. Corrections of accuracy in rates were sought in each case where errors were discovered. It is the feeling of the industrial commissioner, based mainly on experience of surrounding states, that this unit should have received approximately 26,000 compensable claims. The estimated 9,000 injuries not reported represent noncompliance with the provisions of the Workers' Compensation Act. Efforts are being made to increase filings made. We have a goal of achieving filings at the rate of 20,000 compensable claims annually by July 1, 1977. If achieved, the workload of the compliance administration unit will increase accordingly.

Effective July 1, 1977 a waiting period for workers' compensation benefits will be reduced from seven to three days. It is estimated this will increase the number of compensable claims by 30% to 35%. Based upon current compliance with filing requirements, it would appear we could expect 26,500 filings of compensable claims annually thereafter.

In addition, one of the maximum limitations on compensation benefits will be increased from 100% to 133% of the State average weekly wage effective July 1, 1977. Assuming 92% of the compensable claims will be under maximum rate, this would mean recomputation of rates in approximately 24,000 of these cases plus the rate computation of benefits paid in each case.

The industrial commissioner currently lacks data processing and statistical capability to efficiently handle work flow and to identify problem areas within the system.

The compliance administration program also feels the need for micro-film capabilities to more efficiently handle and store information being generated.

Additionally, the compliance administration program should take over the majority of non-litigated case problems to relieve the deputy commissioners to perform their proper function of hearing cases and to reduce their involvement in non-litigated matters as previously indicated.

Since compliance with the Act also deals with substantive matters in the processing of individual claims, it appears the compliance administration program does need to engage in a more complete review of individual case activity to insure compliance.

It is felt the chart below currently reflects the "state of the art" in claim industry performance. Particular attention is called to the first compensation payment section as timely payment of compensation benefits is one of the most critical measures of any viable workers' compensation system. As the chart will reflect, 65% of the injured employees do not receive compensation benefits within the time frame established by Code Section 85.32. This fact alone should raise a cry of alarm among all the citizens directly or indirectly affected by the Workers' Compensation Act. Further deficiencies in performance and compliance are readily available in the chart below.

WORKERS' COMPENSATION PERFORMANCE (1)

		Requirement	% of Total Completed Within				
			15 days	30	60	90	over 90
Injury to	Filing of First Report	9 days (2)	35	66	86.2	92.7	100
Injury to	First Comp. Payment	15 days	35	67	85	92	100
Injury to	Payment Memo	30 days after 1st pymt.		53	83	91	100
Injury to	Filing of Final Receipt	When pymt. complete	17	52	74	88	100
Time off work			31	63	86	89	100

(1). Based on study of Iowa Industrial Commissioner 1975. All figures are estimates.
(2). Code Section 86.11 provides for report of injury within two days of injuries resulting in incapacity of seven days, permanent injury or death. Nine days contemplates a situation wherein employer is not aware of length of incapacity the first seven days. Requirements revised effective July 1, 1976.

In response to the above, the industrial commissioner adopts the following objectives for accomplishment prior to July 1, 1979:

1. Develop and implement micro-film system and data processing system to efficiently handle information flow and record keeping.
2. Develop and implement statistical information system as a base for:
   a. Compliance measurement.
   b. Monitoring performance in individual units within the claim industry.

c. Management decision making.
3. Improve system of individual case review by checking compliance with the terms of Workers' Compensation Act in each individual case.
4. Publish and distribute information on the problems and procedures involved in the handling of the workers' compensation claims.
5. Reduce deputy involvement in administrative compliance by 50%.
6. Develop and implement claim auditing unit to perform field investigations in compliance with the Act.
7. Develop and implement a system of formal compliance proceedings where necessary.
8. Develop and implement a program of informal compliance to provide an informal forum for the resolution of problems involved in workers' compensation.
9. Achieve performance in the following areas of:
   a. First Report of Injury—60% within 11 days of injury.
   b. First benefit payment—50% within 11 days of injury.
   c. Filing of Form 3—75% within 30 days of first voluntary payment.
   d. Filing of Form 4—60% within 30 days of first payment.
   e. Filing of Form 5—60% within 30 days of last payment.

The above will be difficult to achieve even if the commissioner is allowed the total appropriation requested. To maintain a viable workers' compensation system, however, it appears every effort should be made to obtain the above goals.

In human affairs all achievements require the expenditure of resources. Workers' compensation is no exception as the goals and objectives outlined herein cannot be achieved without proper allocation of resources to the workers' compensation program. The allocation decisions made in response to the budget request will have a direct impact on the industrial commissioner's ability to carry out the planning contained herein.

BUDGET RECAP
1977-79 BIENNIUM
IOWA INDUSTRIAL COMMISSIONER

Program	Est. Expenditures 7/1/76 to 7/1/77	Employees (man year)	Budget Request 7/1/77 to 7/1/78	Employees (man year)	Budget Request 7/1/78 to 7/1/79	Employees (man year)
Rehabilitation	21,631	1.50	101,915	4.60	115,440	6.60
Judicial	147,328	9.75	344,533	17.35	351,014	18.35
Compliance Administration	115,648	9.30	334,227	14.10	300,932	16.10
Total	328,253	20.55	780,675	36.05	767,386	41.05

STATISTICAL DATA

INJURY REPORTS RECEIVED FOR BIENNIAL PERIOD

July 1, 1974 to June 30, 1975 (Includes 135 fatal reports)	17,392
July 1, 1975 to June 30, 1976 (Includes 117 fatal reports)	17,567

MEMORANDUMS OF AGREEMENT RECEIVED FOR BIENNIAL PERIOD

July 1, 1974 to June 30, 1975	16,335
July 1, 1975 to June 30, 1976	16,191

ARBITRATIONS

July 1, 1974 to June 30, 1975

Cases carried over from previous year	245	
Arbitration petitions filed	340	
Arbitrations dismissed		51
Arbitration decisions		59
Arbitrations settled		181
Arbitrations carried over to July 1, 1975*		294
	585	585

July 1, 1975 to June 30, 1976

Cases carried over from previous year	294	
Arbitration petitions filed	329	
Arbitrations dismissed		56
Arbitration decisions		99
Arbitrations settled		202
Arbitrations carried over to July 1, 1976*		266
	623	623

REOPENINGS

July 1, 1974 to June 30, 1975

Cases carried over from previous year	182	
Reopenings filed	305	
Reopenings dismissed		43
Reopening decisions		68
Reopenings settled		148
Reopenings carried over to July 1, 1975*		228
	487	487

July 1, 1975 to June 30, 1976

Cases carried over from previous year	228	
Reopenings filed	329	
Reopenings dismissed		62
Reopening decisions		109
Reopenings settled		167
Reopenings carried over to July 1, 1976*		219
	557	557

*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 1974 - 1975		July 1 1975 - 1976	
Cases carried over from previous year	25		33	
Review petitions filed	44		65	
Review decisions filed		23		22
Reviews settled		1		5
Reviews dismissed		12		13
Reviews carried over*		33		58
	69	69	98	98
Review cases appealed to District Court		11		12
Review Reopenings appealed to District Court		25		20
Cases appealed to Supreme Court		2		1

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

SUMMARY OF RECEIPTS AND DISBURSEMENTS

July 1, 1974 to June 30, 1975

	Appropriation and/or Receipts	Disbursements	Balance June 30, 1975
SALARIES, GENERAL OFFICE AND MAINTENANCE — Sch. 1	$218,468.54	$217,677.73	$ 790.81
DEPT. OF TRANSPORTATION Highway Commission — Sch. 2	163,614.95	145,349.53	$18,265.42
STATE EMPLOYEES — Sch. 3	451,034.60	451,034.60	
PEACE OFFICERS — Sch. 4	3,319.34	3,319.34	
	$836,437.43	$817,381.20	$19,056.23

SECOND INJURY FUND

	Appropriation and/or Receipts	Disbursements	Balance June 30, 1975
Balance July 1, 1974	$34,194.51		
Interest on Investments	2,490.44		
Death Assessments	5,300.00		
Paid to Claimants		$10,658.30	
Balance Carried Forward			$31,326.65

Schedule 1
Salaries, General Office and Maintenance

	Appropriation and/or Receipts	Disbursements	Balance June 30, 1975
Appropriation	$218,468.54		
Salaries		$169,409.79	
Social Security (state's share)		8,996.42	
Retirement (state's share)		4,812.34	
Hospital Benefits (state's share)		2,373.84	
Life Insurance (state's share)		540.00	
Travel		6,606.31	
General Office		15,837.81	
Printing		5,513.45	
Telephone		3,230.95	
Equipment		356.82	
Balance Reverted to General Revenue			$790.81
	$218,468.54	$217,677.73	$790.81

Schedule 2
Department of Transportation
(Highway Commission)

Transfer from Primary Road Fund	$150,000.00		
Outstanding Warrants & Cancellations	769.44		
Refunds	378.84		
Third Party Settlements	12,466.67		
Death Claims		$ 9,591.14	
Disability Claims		63,749.88	
Medical Claims		72,008.51	
Balance Carried Forward			$18,265.42*
	$163,614.95	$145,349.53	$18,265.42

*Transferred to Primary Road Fund

Schedule 3
Claims for State Employees under Section 85.58

Third Party Settlements	$ 3,637.69	
Refunds	626.24	
Outstanding Warrants	32.07	
Warrant Cancellations	9,205.16	
Warrant Corrections	46.41	
Death Claims		$ 17,327.50
Disability Claims		192,573.80
Medical Claims		254,680.87
	$13,547.57	$464,582.17
		$451,034.60

Schedule 4
Claims for Peace Officers Under Section 85.62

Claims	$3,319.34

SUMMARY OF RECEIPTS AND DISBURSEMENTS

July 1, 1975 to June 30, 1976

	Appropriation and/or Receipts	Disbursements	Balance June 30, 1976
SALARIES, GENERAL OFFICE AND MAINTENANCE — Sch. 1	$ 278,864.84	$ 274,949.13	$3,915.71
DEPT. OF TRANSPORTATION Highway Commission — Sch. 2	155,661.79	155,661.72	.07
STATE EMPLOYEES — Sch. 3	575,630.00	575,630.00	
PEACE OFFICERS — Sch. 4	2,194.68	2,194.68	
	$1,012,351.31	$1,008,435.53	$3,915.78

SECOND INJURY FUND

	Appropriation and/or Receipts	Disbursements	Balance June 30, 1976
Balance July 1, 1975	$31,326.65		
Interest on Investments	2,151.39		
Death Assessments	8,400.00		
Paid to Claimants		$11,299.89	
Balance Carried Forward			$30,578.15

Schedule 1
Salaries, General Office and Maintenance

	Appropriation and/or Receipts	Disbursements	Balance June 30, 1976
Appropriation	$278,864.84		
Salaries		$205,355.38	
Social Security (state's share)		10,775.98	
Retirement (state's share)		6,941.27	
Hospital Benefits (state's share)		2,991.40	
Life Insurance (state's share)		588.00	
Disability Insurance (state's share)		1,237.60	
Travel		8,067.14	
General Office		17,875.75	
Printing		4,783.99	
Telephone		4,236.32	
Hearing Expense		16.25	
Equipment		11,604.41	
Repairs and Alterations		475.64	
Balance Reverted to General Revenue			$3,915.71
	$278,864.84	$274,949.13	$3,915.71

Schedule 2
Department of Transportation
(Highway Commission)

Transfer from Primary Road Fund	$150,000.00		
Outstanding Warrants & Cancellations	2,023.56		
Refunds	1,083.00		
Third Party Settlement	2,555.23		
Death Claims		$ 6,342.50	
Disability Claims		64,591.68	
Medical Claims		84,727.54	
Balance Carried Forward			$ .07*
	$155,661.79	$155,661.72	$ .07

*Transferred to Primary Road Fund

Schedule 3
Claims for State Employees under Section 85.58

Third Party Settlements	$25,693.56	
Refunds	1,785.12	
Outstanding Warrants	69.30	
Warrant Cancellations	9,014.95	
Warrant Corrections	153.43	
Death Claims		$ 51,432.00
Disability Claims		239,381.42
Medical Claims		321,532.94
	$36,716.36	$612,346.36
		$575,630.00

Schedule 4
Claims for Peace Officers Under Section 85.62

Claims	$2,194.68

REVIEW DECISIONS

Amadeo, James V., v. Artistic Building Maintenance and Aetna Casualty and Surety Company

Barker, James W., v. Richeson Rental

Brim, Patricia A., v. Franklin Manufacturing Co. Div. of White Consolidated Industries and Travelers Insurance Co.

Connet, Robert C., as conservator for Edwin Albert Kray v. Farmers Mutual Cooperative Creamery Associates and Iowa National Mutual Insurance Co.

Courtney, Joan M., surviving spouse of David L. Courtney, v. Dale's Towing Service and IMT Insurance Co.

Fasano, Joseph A., v. Northwestern Bell Telephone, Self-Insured

Feuring, Elmer, v. Farmers Hybrid Companies, Inc. and Travelers Insurance Co.

Fredericksen, Lori, Widow, David N. Fredericksen, Deceased v. Northwest Iowa Masonry, Inc. and Hawkeye-Security Insurance Co.

Givhan, Vornese, v. Chamberlin Manufacturing Corporation, Self-Insured

Halstead, Daniel, Jr. v. Johnson's Texaco and Travelers Insurance Co.

Hanson, Kent D., v. Rock Island Motor Transit Company, Self-Insured

Hensley, Donald W., v. Massey-Ferguson, Inc. and Sentry Insurance

Holbert, Frank H., v. Townsend Engineering Company and Hawkeye-Security Insurance Co.

Hopkins, Robert George, v. Ford Implement Plant of Ford Motor Co., Self-Insured

Jacobsen, Stephen L., v. Iowa Paint Manufacturing Company and Atlantic Mutual Insurance Co.

Kilburn, Arlinda, v. Goodwill Industries of Southeast Iowa and Employers Mutual Casualty Co.

Kobliska, Louis J., v. John Deere Waterloo Tractor Works, Self-Insured

Larrew, Steven John, v. Turner Furniture Manufacturing Company and The Western Insurance Co.

Lindeman, Harold, v. Orkin Exterminating Company, Inc. and Continental Casualty Co.

McCall, George, Deceased, Vernon Monroe, Executor of the Estate, v. R.E. and Winifred Draper and Edna D. Lawrence, d/b/a Draper Farms

Mastin, Roseline, v. Mid-Central Plastics, Inc. and Insurance Company of North America

Montgomery, Maxine Pierce, v. Iowa Ordnance Plant-Mason & Hanger and Employers Insurance of Wausau

Nelson, Arnold, v. Wilson Motor Company and Universal Underwriters Insurance Co.

Owen, Carolyn J., surviving spouse of Edward C. Owen, Deceased, v. Owen Construction Co., Inc. and Employers Mutual Casualty Co.

Polk, Edward J., v. Cedar Valley Corporation and Employers Mutual Casualty Co.

Polson, Judith Ann, v. Meredith Publishing Company and Aetna Casualty and Surety Company

Reiland, Raymond M., v. Palco, Inc. and State Auto and Casualty Underwriters

Rhoades, Denny, v. City of Fort Dodge and Maryland Casualty Company and State of Iowa

Rogers, Stephen L., v. Acri Wholesale Grocery Company and Aetna Casualty and Surety Co.

Rowan, Janice, v. Aluminum Company of America, Self-Insured

Scharf, William E., v. Hewitt Masonry and Hawkeye-Security Insurance Co.

Smith, Floyd D., v. Shivvers Enterprises, Inc. and Bituminous Casualty Co.

Smith, H. Raymond, v. Walnut Grove Products and Maryland Casualty Co.

Sondag, Leo, v. Ferris Hardware and Grain Dealers Mutual Insurance Co.

Speed, Jerry W., v. AMF, Inc. and Hartford Accident and Indemnity

Strub, Dean E., v. William R. Weinrich and Great West Casualty Co.

Sutcliffe, Irvin W., v. Clyde Black & Son, Inc. and Travelers Insurance Co.

Troendle, Elmer M., v. Penick and Ford, Ltd., and Fireman's Fund American Insurance Cos.

Wilson, Donald K., v. Palco, Inc. and State Auto and Casualty Underwriters

Wolff, Leo, v. Hygrade Food Products and American Mutual Insurance Co.

Wood, Donald W., v. Massey-Ferguson, Inc. and Sentry Insurance

Wood, Ida Fay, surviving spouse of Neldon Lavelle Wood, Deceased, v. Cummings and Co., Inc. and Great American Insurance Co.

Leo Wolff, Claimant,

vs.

Hygrade Food Products, Employer,
and
American Mutual Insurance Co., Insurance Carrier,
Defendants.

Review Decision

Mr. Phil Redenbaugh, Attorney at Law, 606 Ontario Street, Storm Lake, Iowa 50588, For the Claimant.

Mr. Paul W. Deck, Attorney at Law, 222 Davidson Building, Sioux City, Iowa 51101, For the Defendants.

This is a proceeding brought by Defendants, Hygrade Food Products, Employer, and American Mutual Insurance Co., Insurance Carrier, pursuant to Code Section 86.24 for Review of an Arbitration Decision wherein Leo Wolff, Claimant, was awarded workmen's compensation benefits. The case was submitted on the transcript of the evidence presented at the Arbitration proceeding and the oral arguments of counsel.

Leo Wolff, Claimant, was 60 years old and had never graduated from high school. He had worked for Hygrade Food Products Corp., Defendant, since 1955. Employees of Defendant have lockers in a locker room located at the plant. They are required to keep certain equipment on the premises. They are also required to be in their respective work areas at five minutes before 7:00 a.m. At about 6:55 a.m. on February 5, 1971, Claimant slipped and fell on the locker room floor. There were no witnesses to this incident, as the other workers were in their work areas by that time. Claimant fell on his left side on his hip and ribs. He had the wind knocked out of him and testified he could not move his left leg when he tried to get up. He managed to turn over and crawl to a bench. He sat there until he could stand, finally got on his feet, walked along the wall, and proceeded to the plant office and first aid center, where he reported the fall to Marvin Hunt. Claimant testified that mainly his hip and side hurt, and that he had pain in his back

Claimant was taken to Dr. James A. Cornish, M.D., who examined Claimant and found he had no broken ribs, although he did not x-ray Claimant. Claimant returned to work the next day in pain. He returned to Dr. Cornish on February 8, 1971, complaining of left leg and hip pain and pain in his lower back. Claimant testified that he previously had never missed work because of back problems. He testified that the pain in his leg and back continued after February, 1971, even though he kept working.

On January 15, 1972, Claimant testified that the pain in his left leg was so bad that he practically crawled home after work. That night he experienced severe cramps in his left leg and was taken to the hospital by ambulance. Claimant testified that he did not have any traumas to his body in the eleven month interim. On January 20, 1972, Claimant was transferred to a Sioux City hospital where he underwent surgery on his back on January 31, 1972. He was released on February 17, 1972, and returned to work on October 23, 1972. He asked for and received light work.

Currently, Claimant has problems sleeping at night due to cramps. The front of the skin of his left leg is often numb. Claimant testified that his problems began on February 5, 1971, and that his left hip and back never bothered him before that date.

Claimant testified to an injury he received in 1967 while operating a fork lift at Defendant's plant. He could not stop the lift in time, as there was ice on the ground, and he backed into the truck he was unloading. He was pinned between the fork lift and the truck on his right side in the hip area. He testified he did not have any problem with his back after this incident.

Elizabeth Wolff, Claimant's spouse, testified that her husband did not complain of back pain prior to February 5, 1971, but complained quite a few times after that date. She accompanied Claimant to the Sioux City Hospital, where she said Claimant was incoherent and irrational. She told doctors there about the fork lift incident, but testified she was not given the chance to tell them about the February 5, 1971 incident. She could not recall any prior injuries Claimant suffered, except for the fall and fork lift incidents.

Joseph A. Fitzpatrick was Defendant's payroll supervisor. He testified that the procedure used at the plant was for an injured employee to report to the first aid room where an official entry of the injury is made on a chart. His records confirm that Claimant was absent from work from January 17, 1972, through October 22, 1972. He referred to a record which stated that Claimant fell in a locker room and hurt his back and ribs on February 5, 1971. Further, he testified to other company records which indicate that Claimant suffered a sacroiliac strain when he slipped while lifting boxes on December 13, 1965. Those records also indicate that Claimant was absent from work one day in 1963 for low back pain and ten days in 1967 for contusion - hip and pelvis. Claimant testified he cannot recall the 1963 and 1965 incidents.

Dr. James Cornish testified that Claimant told him of the falling incident when he examined him on February 5, 1971. Claimant complained of chest pain. Dr. Cornish's records do not indicate back complaints at this time. On February 8, 1971, Claimant was again examined. X-rays were taken and medication prescribed. On January 3, 1972, and January 11, 1972, Claimant complained to Dr. Cornish of hip pain. More medical was prescribed. On January 16, 1972, Dr. Cornish had Claimant admitted to a hospital and subsequently transferred to a Sioux City hospital.

Dr. Cornish treated Claimant for his 1965 back strain and for the fork lift incident. Responding to a hypothetical, he testified that trauma to Claimant's back is the cause of his problems and that there was a certain amount of trauma connected with the February 5, 1971 incident. He testified that, as the pelvis is part of the back, Claimant's injury to his pelvis in the fork lift incident could be considered a back complaint. After considering Claimant's medical history, Dr. Cornish testified that it would be impossible to state the effect, by degrees, of any of the traumas which have occurred to Claimant.

Dr. William M. Krigsten, M. D., an orthopedic surgeon, examined Claimant in Sioux City on January 24, 1972. He testified that Claimant told him about

the fork lift incident. Claimant was diagnosed as having a ruptured disc at the fourth lumbar level and possibly some patholic(sic) at the fifth lumbar level. Surgery was performed on January 31, 1972. Dr. Krigsten last examined Claimant on December 5, 1972, at which time he felt Claimant to have a 5% impairment of the body as a whole.

Based upon the history obtained and the examination, Dr. Krigsten opined that Claimant's disc injury was probably caused by the fork lift incident. However, in response to a hypothetical question which included the February 5, 1971 fall and the fact that Claimant first experienced pain following this fall, Dr. Krigsten testified that he could not definitely say that the February 5, 1971 incident caused the problems, but he admitted that it was possible.

The burden rests upon Claimant to establish that his injury arose out of the course of his employment. **McClure v. Union et al Counties.** 188 N.W. 2d 283 (Iowa 1971). Claimant may sustain his burden by the use of circumstantial evidence, as long as such evidence is governed by the rules which ordinarily apply to that class of evidence. **Haverly v. Union Constr. Co.,**236 Iowa 278 (1945). In order to establish a proposition by circumstantial evidence, the evidence must be such as to make the claimant's theory reasonably probable and not merely possible, and more probable than any other theory based on the evidence, but the evidence need not exclude every other possible theory. **Jennings v. Farmers Mutual Ins. Assn.**, 260 Iowa 279 (1907).

It is reasonably probable that the February 5, 1971 incident caused Claimant's disability. Although there were no witnesses to this incident, there is no reason to doubt that it did, in fact, occur. Dr. Cornish testified that there was no doubt in his mind that Claimant experienced a certain amount of trauma as a result of this incident. Further, he testified that trauma to the lower back is the only cause of protruding intervertebral discs. Claimant testified that he had no back pain prior to February 5, 1971 and that, subsequently, he experienced such pain. He testified that he received no traumas between February 5, 1971 and January 16, 1972. His wife could recall no such incidents during that period.

Dr. Krigsten testified that one would have to say that the fall caused the herniated disc, assuming Claimant was perfectly all right before the fall and experienced symptoms of a ruptured disc afterwards. Dr. Krigsten felt he did not have enough information to determine whether or not Claimant's February 5, 1971 incident caused his back condition. His opinion that the fork lift incident was the cause was expressed without knowledge of the February 5, 1971 incident. An opinion of an expert based upon an incomplete history is not binding upon the commissioner, but must be weighed together with the other disclosed facts and circumstances. **Bodish v Fischer, Inc.,** 257 Iowa 516(1965). Because the history Dr. Krigsten took of Claimant was incomplete, his opinion that the fork lift incident was the cause must be disregarded. However, his opinion that it was possible that the February 5, 1971 incident aggravated a low back condition must be considered.

Considering all the evidence, it is felt that it is reasonably probable that the February 5, 1971 incident was the event precipitating Claimant's herniated disc. Such a theory is more than merely possible.

Further, such a theory is more probable than any other theory based on the evidence. It makes no difference whether the February 5, 1971 incident was the sole cause of the herniated disc or whether the incident aggravated a pre-existing condition. Injuries resulting from both types of situations are compensable. **Musselman v. Central Telephone Co.,** 261 Iowa 352 (1967). To be non-compensable, Claimants injury would have had to have been caused by some event other than the February 5, 1971 incident. Such a theory, although possible, is less probable than the theory that the February 5, 1971 incident caused the herniated disc or at least aggravated a pre-existing condition.

Thus, Claimant has fulfilled the requisites necessary to carry his burden of proof by a preponderance of the evidence.

Claimant's injury is to the body as a whole and therefore his loss is industrial rather than functional disability. In determining industrial disability, consideration must be given to Claimant's age, education, qualifications, experience and his inability, because of injury, to engage in employment for which he is fitted. **Olson v. Goodyear Service Stores,** 255 Iowa 112 (1963). Claimant was 60 years old and lacked a high school diploma. Dr. Krigsten felt Claimant to have a five percent functional impairment of the body as a whole. He would be surprised that a man of Claimant's age and condition would be able to do lifting of over a hundred pounds. Consequently, it is felt that Claimant has industrial disability greater than his functional disability.

It was stipulated that the maximum compensation rate in effect in February, 1971, would apply.

THEREFORE, the Arbitration Decision is affirmed. It is found and held as fact that:

Claimant incurred an injury arising out of and in the course of his employment for Defendent.

Such injury resulted in a ten percent (10%) industrial disability of the body as a whole.

The following bills are fair and reasonable and necessitated by the February 5, 1971 incident:

St. Joseph Mercy Hospital	$2,470.90
Dr. William Krigsten	575.00
Dr. J. A. Cornish	69.23
National Limb and Brace	92.70
Dr. George Spellman	246.00
Dr. Carroll Brown	482.00
Hughes-Nelson Ambulance	20.00
Buena Vista County Hospital	250.10

WHEREFORE, it is ordered that Defendents pay Claimant fifty (50) weeks permanent partial disability at the rate of fifty-nine ($59) per week. It is further ordered that Defendants pay thirty (30) weeks healing period at the rate of sixty-four dollars ($64) per week, payments commencing with the date of injury, accrued payments to be made in a lump sum together with statutory interest. It is further ordered that Defendants pay Claimant's medical expenses. It is further ordered that Defendants pay Claimant the following mileage expenses not

awarded in the Arbitration Decision, and incurred by him in traveling to his doctors:

Six trips to Dr. Krigsten of 140 miles each at ten cents a mile	$84.00
One trip to Dr. Brown of 140 miles at ten cents a mile	$14.00
	$98.00

It is further ordered that Defendants pay the cost of the Arbitration proceedings, including the cost of the shorthand reporter, and the cost of the transcription of the deposition of Drs. Krigsten and Cornish.

Signed and filed this 23rd day of August, 1974.

ROBERT C. LANDESS
Industrial Commissioner

Appealed to District Court; Affirmed

Joseph A. Fasano, Claimant

vs.

Northwestern Bell Telephone Co., Self-Insured Employer, Defendant.

Review Decision

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

Mr. David Sather, Attorney at Law, Northwestern Bell Telephone Co., 9th and High Street, Des Moines, Iowa 50309, For the Defendant.

This is a proceeding brought by Joseph A. Fasano, Claimant, pursuant to Code Section 86.24 of the Workmen's Compensation Law, against Northwestern Bell Telephone Co., Defendant, for Review of an Arbitration Decision wherein Claimant was denied workmen's compensation benefits. The case was presented on the transcript of the evidence presented at the Arbitration proceeding, plus additional evidence presented on behalf of the claimant consisting of the depositions of Drs. Marshall Flapan and William DeGravelles, and the live testimony of Anthony Dominic and the claimant, along with the oral arguments of counsel.

Joseph A. Fasano, Claimant, was 22 years old and a high school graduate. He has served with the Air Guard. In April, 1970, he was hired by Northwestern Bell Telephone Co., Defendant. He began work in the storeroom where he loaded and unloaded trucks, answered the telephone, and loaded vans to take orders to local installers. His work consisted of heavy lifting. He testified to having no back problems prior to April, 1970, as he had passed various physicals to be admitted to the Air Guard. No back problems appeared in his employment physical in April, 1970. He worked in the storeroom for one and one-half years, during which time he experienced much back discomfort.

In February, 1971, Claimant testified he was lifting boxes and unloading them from a van when he heard a pop in his back. Evidence was introduced to indicate the weights of various items which Claimant would be involved in lifting, but it was not specified what was being lifted at the time of this incident. He testified that he could not straighten up. He told his foreman. He was taken to Iowa Methodist Hospital that afternoon and was examined by Dr. James E. Kelsey, M.D. Claimant testified that Dr. Kelsey could find no reflexes on his left side.

Dr. Kelsey testified that he didn't carefully examine Claimant. However, he observed that Claimant had injured his right shoulder. Dr. Kelsey referred Claimant to Dr. William deGravelles, M.D. Dr. Kelsey testified to a report of Dr. deGravelles, which stated that x-rays taken of Claimant's right shoulder and ribs were normal. Further, Dr. Kelsey testified that Dr. deGravelles' impression was that Claimant had muscle strain in his right scapula. No x-rays were taken of Claimant's lower back at that time.

Dr. Kelsey described Dr. deGravelles as being careful in his examinations, and felt that if Claimant had any back problem, Dr. deGravelles would have picked it up and would have certainly taken x-rays of Claimant's back. He testified that at no place in Dr. deGravelles' report is there any mention of low back difficulty, trouble with pain in his legs, or weakness in his legs. Dr. Kelsey testified that the only abnormality Dr. deGravelles found was a difficulty in eliciting a right knee jerk. In Dr. deGravelles' report of February 17, 1971, Dr. Kelsey testified that Dr. deGravelles stated that Claimant felt perfectly well and had no complaints of his right shoulder. Dr. Kelsey had no opinion of the cause of Claimant's condition which was subsequently treated by surgery.

Dr. deGravelles confirmed that, on February 12, 1971, when he first examined Claimant, his impression was that Claimant had muscle strain in his right scapula area. Claimant's reflexes on his left side were normal to Dr. deGravelles. He found no abnormality of Claimant's lower back. He has no record of Claimant complaining of any area of his back except the right scapula area. He testified that a bony overgrowth in Claimant's spinal canal is unrelated to his finding of a muscle strain.

Dr. deGravelles began treating Claimant with heat packs and back massages. These treatments continued for one week. He examined Claimant on February 17, 1971, and found he had no soreness in his right posterior shoulder area. Muscle tests of Claimant's right upper extremity showed normal strength and no pain giving resistance to the shoulder muscles. He noted at that time that Claimant had recovered and was discharged. Dr. deGravelles placed no restrictions on Claimant.

Claimant was placed on light duty for one week at work during the time he was treated by Dr. deGravelles, after which he resumed his regular duties. Claimant testified that his back continued to be weak. He enlisted the aid of fellow workers whenever he needed to do any heavy lifting.

A Northwestern Bell form was filled out. Claimant did not believe he filled it out. The form states that Claimant felt something in his back like a pulled muscle while lifting up on a ladder. Further, it states

that Claimant had the same problem when he worked for a business which made cement figurines during his summers in high school. Claimant testified that the work there was not strenuous and that his back problem was probably tired muscles.

In October, 1971, Claimant was promoted to the position of installer repairman. His new duties consisted of loading his truck with telephones which had been ordered and installing them in homes and businesses. Claimant occasionally had to climb telephone poles. The new job involved less heavy lifting, but about the same amount of bending.

Claimant testified that his back bothered him when he climbed telephone poles. He testified that his back pain worsened so that by Summer, 1972, he had difficulty performing his job. He testified to be suffering from back and leg pains and cramps. At the Review hearing, Claimant revealed that, during Summer, 1972, while he was up a pole, he fell but caught himself on the ground wire. Claimant related this incident to the beginning of the pain he experienced as an installer. Claimant worked as an installer until his last day of work for Defendant on November 6, 1972.

On November 1, 1972, Claimant went to Dr. Marshall Flapan, M.D., an orthopedic surgeon. Dr. Flapan took Claimant's history. Claimant did not relate any antecedent trauma to Dr. Flapan. Claimant complained of mild back pain. Most of his pain was confined to the posterior aspect of the left thigh. Claimant indicated numbness in the instep of his left foot, which tended to bother him after prolonged sitting. Claimant told Dr. Flapan in November, 1972, that his symptoms did not interfere with his job too much. Claimant was unable to bend over because of a pulling type sensation in the back, but he denied weakness of his lower extremities. Claimant related no further problems with his back to Dr. Flapan.

Dr. Flapan's examination revealed that Claimant's back motion was fairly good, although forward motion was limited because of thigh pain. Claimant's reflexes were equal in both knees, but his left ankle jerk was slightly less than his right. The examination revealed no tenderness over the spinous process, but a marked tenderness over the course of the sciatic nerve. X-rays failed to show any bony abnormality of the lumbosacral spine and right femur. Dr. Flapan's diagnosis was that Claimant suffered from some type of sciatic neuropathy. He recommended hospitalization and further tests.

Dr. Alfredo Socarras, a neurologist, was consulted. He performed an electromyogram which failed to disclose any abnormality. On November 16, 1972, a lumbar myelogram was performed. It was interpreted by Dr. Flapan as showing a disc defect at the L-3 or L-4 level. Dr. Flapan testified that such a defect was consistent with Claimant's symptoms, and also consistent with the negative electromyogram results

Surgery was performed on November 22, 1972, and defects at the L-3 and L-4 levels were found. No disc defect was found. Rather, the problem was diagnosed as a facet syndrome, which is due to an overgrowth of bone in the spinal canal. There was a constriction of the nerve in this area. Dr. Flapan attributed this constriction to the facet. The operation decompressed the spinal canal by removing the overlying bone and offending hard tissue which was compressing the nerve.

Claimant's progress since the operation has been slow but steady. He recovered from one small setback. Dr. Flapan opined that Claimant will be limited from performing heavy manual labor or from occupations requiring him to be on his feet. He testified that he felt Claimant had a 25% impairment to his back.

Dr. Flapan could not say with any degree of medical certainty whether the facet syndrome had any connection with Claimant's work. He thought the facet could have been of longstanding duration, existing prior to Claimant's employment with Bell Telepone. He testified that Claimant's duties may have aggravated Claimant's pre-existing condition. He personally knows of no one who has been able to perform heavy work after they have this condition. Dr. Flapan suspected that Claimant had cancer, but this was ruled out after the operation. He admitted that he really doesn't know the cause of the growth. It could have grown regardless of Claimant's occupation. It may have been "built in" to Claimant, but that work may have aggravated the symptoms. However, Dr. Flapan attributed no correlation between the February, 1971 pulled muscle and his facet.

Anthony M. Dominic, a licensed physical therapist, began treating Claimant in January, 1974. He initially rated Claimant's trunk flexion as poor and found his trunk lateral flexion ability to be below normal ranges. He testified that Claimant has improved in the past six months. His opinion is that Claimant currently has a 25%to 35% disability. He doubted that Claimant would improve and felt that he probably will get worse should he fail to maintain his program.

Dominic testified that Claimant would probably become a paraplegic should he attempt heavy lifting, and will have that risk permanently in the future.

Compensation can be awarded only when there is a direct causal connection between the employment and an injury. **Musselman v. Central Telephone Co.,** 261 Iowa 532(1967). The burden rests upon Claimant to establish this by a preponderance of the evidence. **McClure v. Union et al Counties,** 188 N.W. 2d 283 (Iowa 1971), **Musselman v. Central Telephone Co.**, supra. Questions of causal connection are essentially within the domain of expert medical testimony. **Bradshaw v. Iowa Methodist Hospital**, 251 Iowa 375.

Dr. Flapan was repeatedly asked his opinion as to the cause of Claimant's facet syndrome. He could not say with any medical certainty whether

it was connected with Claimant's work. He admitted that Claimant's work may have aggravated a pre-existing condition, but he could not state that Claimant's condition was caused by the type of work he did. Although he felt it possible that Claimant's employment may have caused him to become more aware of his symptoms, he testified that the facet syndrome could have been caused by most anything.

Dr. Flapan appeared to connect Claimant's employment with the facet syndrome at several points during his testimony, but admitted that he was relying upon Claimant's statements to him in which Claimant himself linked his work with his injury.

> "Q. ...but basically your reason for indicating it arose out of his employment is because Mr. Fasano indicated that it began to bother—it bothered him after he started working for Northwestern Bell?
>
> "A. Right. ...."

Previously, Dr. Flapan had testified:

> "Q. ...You would not state from a medical standpoint that the facet syndrome was caused by the employment?
>
> "A. No, I could not, with any medical certainty, say that."

Dr. Kelsey also refused to venture an opinion as to the cause of Claimant's back condition.

An award of compensation may not be based upon mere possibility. **Boswell v. Kearns Garden Chapel Funeral Home**, 227 Iowa 344(1939). As it is speculation whether Claimant's facet syndrome was caused by his employment, Claimant has failed to sustain his burden of proof.

WHEREFORE, the Arbitration decision is hereby affirmed. It is found and held as fact that any disability Claimant may have did not arise out of and in the course of his employment.

THEREFORE, recovery must be and is hereby denied to Claimant. Each party shall pay the costs of producing their own witnesses. Defendants shall pay the cost of the attendance of the shorthand reporter at the Arbitration and Review proceedings, including cost of transcribing evidentiary depositions, but excluding the costs of transcription of the Arbitration and Review proceedings which are taxed to the claimant.

Signed and filed this 22nd day of August, 1974.

ROBERT C. LANDESS
Industrial Commissioner

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

.....

Jerry W. Speed. Claimant

vs.

AMF, Inc., Employer,
and
Hartford Accident and Indemnity, Insurance Carrier,
Defendants.

Review Ruling

Mr. David Ellingson, Attorney at Law, 803 Fleming Building, Des Moines, Iowa 50309, 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 AMF, Inc., Employer, and Hartford Accident and Indemnity, Insurance Carrier, pursuant to Code Section 86.24, for Review of a July 17, 1974 Order and a July 24, 1974 Ruling. The matters were presented for Review on the notes taken by the Deputy Commissioner, evidence presented at the Review hearing, and the oral arguments of counsel.

On October 29, 1973, Jerry Speed, Claimant, filed an Application for Arbitration, alleging that he incurred an injury on October 17, 1973, while employed by AMF, Inc. Defendants filed an Answer on November 7, 1973. On November 6, 1973, Defendants' attorney sent a letter to Hartford Accident and Indemnity, requesting that they interview persons who had witnessed the incident. The statements of Jerry Weich, a co-employee, and Philip Van Blaricum, Claimant's supervisor while he worked at AMF, Inc., were taken on November 14, 1973.

On May 6, 1974, Claimant filed interrogatories to be answered by Defendants. Interrogatory No. 6 requests that Defendants state the names of persons having knowledge of the facts of the October 17, 1973 incident. Answers to these Interrogatories have not been filed with this office. Apparently, they were received by Claimant, however, some time in July, 1974.

On July 9, 1974, Claimant filed a Request for Production of Documents, requesting, among other things, that Defendants produce for inspection statements taken by them concerning the October 17, 1973 incident. On July 17, 1974, Claimant filed a Request for an Order for Defendants to appear at the Office of the Industrial Commissioner and to bring with them all files and investigative materials pertaining to Claimant's claim. The purpose of this Order was to allow the Commissioner to inspect the files and determine which materials, if any, should be made available to Claimant, pursuant to his Request for Production of Documents. Defendants did so appear, but the record fails to disclose whether or not they fully complied with the Order. Defendants filed a Petition for Review of this Order on July 26, 1974.

On July 24, 1974, a Ruling was filed, ordering the production of the statement of Van Blaricum, which was in the possession of the defendants, but denying the requested production of the Weich statement. A Petition for Review of this Ruling was filed by Defendants on July 26, 1974. Claimant requested an early hearing date and Defendants acquiesced.

Because of the request for an early hearing date, neither party had sufficient time to give the other a five day notice of any intention to present additional evidence at the Review hearing, as required by Code Section 86.24. A letter dated November 6, 1973, from Defendants' attorney to the Hartford Accident and Indemnity, was stipulated as admissible into evidence by both parties at the Review hearing, and accepted in such manner. Defendants proposed a stipulation which would show that the statements taken on November 14, 1973, were taken as a result of the November 6 letter. Claimant refused to concur, whereupon Defendants requested to produce a witness who could so testify. Claimant then asked that he be allowed to testify also. As the parties could not mutually agree to waive the notice requirements, the record was closed.

At the Review hearing it appeared that any issues regarding the Order of July 17, 1974 were largely moot, as Defendants had appeared for the conference with the documents, although perhaps incomplete, pursuant to that Order. As neither party chose to pursue the Petition for Review of that Order, such Petition is dismissed.

The July 24, 1974 Ruling was apparently as a result of the conference held pursuant to the July 17 Order. Defendants contend that the statements of Weich and Van Blaricum are not discoverable as they are attorney work product. I.R.C.P. 122(c) orders courts to protect against the disclosure of mental impressions, conclusions, opinions, or legal theories of an attorney. The statements of Weich and Van Blaricum fit none of these categories and, consequently, are not an attorney's work product.

I.R.C.P. 122(c) says that a party may obtain material which is within the general scope of discovery and has been prepared in anticipation of litigation. Since both statements were taken after the filing of the Application for Arbitration and the Answer, it appears that they were taken in anticipation of litigation. The issues had been joined and the matter had moved beyond the stage of routine investigation.

The statements, however, may be obtained by the opposing party only upon a showing by that party that he has a substantial need for the material in preparing his case, and he is unable to obtain the substantial equivalent of the material by other means without undue hardship.

Claimant did not propound interrogatories inquiring into the names of known witnesses until May 6, 1974. Claimant contends that he only recently learned that Weich and Van Blaricum possessed knowledge of the incident. However, timely investigation into the incident by Claimant should have uncovered these two witnesses, and would have allowed Claimant to obtain their statements himself. Both Van Blaricum and Weich were readily available to Claimant for the purpose of an interview. The reason for the reluctance of Claimant or his attorney to presently contact Van Blaricum is unclear and unconvincing. The explanation that he was once Claimant's supervisor is insufficient.

Mere lapse of time between the October 17, 1973 incident and the present does not necessarily mean that the substantial equivalent of the statements in Defendant's possession cannot be currently obtained by Claimant. It has not been shown that the memories of either Weich or Van Blaricum have faded such that it is imperative that Defendants produce their statements.

WHEREFORE, the Petition for Review of the July 17, 1974 Order is hereby dismissed. The Ruling of July 24, 1974 is hereby modified.

THEREFORE, Claimant's Request for Production of Documents is hereby denied as to the statements of both Weich and Van Blaricum.

Signed and filed this 13 day of August, 1974.

ROBERT C. LANDESS
Industrial Commissioner

No Appeal

Robert George Hopkins, Claimant,

vs.

Ford Implement Plant of Ford Motor Co., Self-Insured Employer, Defendant.

Order to Dismiss

Mr. Arthur C. Hedberg, Jr., Attorney at Law, 840 5th Avenue, Des Moines, Iowa 50309, For the Claimant.

Mr. William J. Koehn, Attorney at Law, 400 Empire Building, Des Moines, Iowa 50309, For the Defendant.

Robert G. Hopkins, Claimant, filed an Application for Arbitration on July 24, 1972, alleging that he sustained an injury arising out of and in the course of his employment by Ford Implement Plant, Defendant. An Arbitration hearing was held on March 16, 1973, and continued to April 2, 1973. The record was completed on September 5, 1973.

On January 21, 1974, the Arbitration Decision in this matter was filed. The Decision denied the relief Claimant sought in his Application for Arbitration on the ground that Claimant failed to establish the necessary causal connection between an incident arising out of and in the course of his employment and his ensuing disability. On February

1, 1974, Claimant filed a Petition for Review of Arbitration Decision. On April 11, 1974, Defendant filed a Motion to Dismiss for the reason that Claimant failed to timely file his Petition for Review. Claimant filed a resistance to Defendant's Motion, alleging it had not been timely filed as provided by R.C.P. 85A.

After the Review hearing, a short time was requested and granted for the purpose of the filing of briefs. Defendants filed such a brief on July 1, 1974. As of the date of this Order, Claimant has not filed a brief.

Code Section 86.24 says that the party aggrieved by an Arbitration Decision may petition for review of that decision within ten days after the decision is filed with the industrial commissioner. **Barlow v. Midwest Roofing**, 249 Iowa 1358 (1958) held that it was proper for the industrial commissioner to dismiss a petition for review not filed within ten days after the filing of the Arbitration Decision. The Court conceded "that the commissioner himself cannot extend or diminish his jurisdiction to act under this law." **Barlow v. Midwest Roofing**, supra.

In computing time, the first day shall be excluded and the last day included. Code Section 4.1, subsection 23. By this method of computation, the tenth day after the filing of the Arbitration Decision was January 31, 1974. Thus, Claimant's Petition for Review was not filed within ten days, as directed by Code Section 86.24. The jurisdiction of the Industrial Commissioner may not be expanded to accommodate such late filing.

The issue of whether Defendants timely filed their Motion to Dismiss is immaterial, since jurisdiction is lost by the passage of ten days regardless of the filing of such Motion.

THEREFORE, Defendant's Motion to Dismiss is sustained.

IT IS HEREBY ORDERED that Claimant's Petition for Review be dismissed.

Signed and filed this 12th day of August, 1974.

ROBERT C. LANDESS
Industrial Commissioner

No Appeal

Roseline Mastin, Claimant

vs.

Mid-Central Plastics, Inc., Employer,
and
Insurance Company of North America, Insurance Carrier, Defendants.

Review Decision

Mr. Virgil Moore, Attorney at Law, 2454 S.W. 9th Street, Des Moines, Iowa 50315, 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 Roseline Mastin, Claimant, against her Employer, Mid-Central Plastics, Inc., and its Insurance Carrier, Insurance Company of North America, pursuant to Code Section 86.24, for Review of an Arbitration Decision wherein Claimant was denied disability benefits for an alleged back injury, and awarded temporary total disability benefits for burns to her fingertips, which were the result of an injury arising out of and in the course of her employment on or about November 29, 1971. The matter was submitted on the transcript of the evidence presented at the Arbitration proceeding, and the oral arguments of counsel.

Roseline Mastin, Claimant, was 52 years old. She has a 10th grade education, and has not been employed prior to this employment since her marriage 28 years ago. Previous to her marriage, she inspected trays of eyeglasses at American Optical Co. During her marriage, she was able to perform her duties around the house.

She began working for Mid-Central Plastics, Inc., Defendant, around November 1, 1971, as a general factory worker. At that time, she weighed 115 pounds. On November 29, 1971, her duties were to remove hot plastic parts out of a molding machine. The parts would either drop out of the machine onto a conveyor, where Claimant would catch them, or, if the parts stuck in the machine, Claimant would have to take them out. She then would put them in boxes and put the box on a conveyor. On this day, each full box weighed approximately ten pounds. Claimant was given gloves because the plastic parts were still hot when she handled them. The gloves were thin, ladies dress gloves and had holes in the fingers. She testified that she informed the foreman about the holes, but he ignored her. Subsequently, she put on another pair, but they had holes also.

On November 29, 1971, at 10:00 a.m., Claimant discovered that her hands were burned and plastic was sticking to her fingers. She testified she informed her foreman, Oscar Renfrow, but he just walked away. Renfrow claimed that Claimant did not say anything to him regarding any burns. She continued to work that day. Claimant testified that her hands were numb by the end of the day and, when she took off her gloves, her hands started to swell. She testified she told her foreman about her hands and he directed her to the company doctor, Dr. Roy William Overton, M.D. Renfrow denied having knowledge of Claimant's burns until the next morning. Renfrow terminated her employment at the end of the day.

Claimant went to the doctor's office, where her hands started hurting. She testified that she went after work on November 29, 1971, but Dr. Overton's records state that her first visit to him was November 30, 1971. Claimant testified that her fingers were swollen and that she had a blister on her arm.

Claimant testified that about four days previously, her back started hurting while working the conveyor.

She testified she told Renfrow that it was hard to lean over and that it bothered her back to lift the boxes and get parts off the conveyor. Again, Renfrow did not respond. Renfrow denied this incident. Claimant took aspirin, but the pain continued. When Claimant first saw Dr. Overton, she testified that she mentioned her back pain to him. Dr. Overton gave her three shots in the hip and arm, and bandaged her fingers. She returned to Dr. Overton the next day and one more time after that.

Claimant's fingers remained bandaged for about three months, after which her hands hurt when she touched things. She testified that her hands returned to normal about four months after November 29, 1971. Her weight dropped to 89 pounds.

Claimant testified that she currently has spasms in her lower back and is being treated for this by Dr. Sinesio Misol, M.D. Dr. Misol first saw Claimant on January 14, 1972. He took x-rays and prescribed a brace. Claimant has seen Dr. Misol on several occasions since then.

Claimant has not worked since November 29, 1971. She testified that she is unable to work because she can't sit long and can't lift because her back starts hurting. Claimant described her pain as continuing most of the day. The medication prescribed by Dr. Misol eases her pain somewhat. Claimant testified that she is no longer able to do washing and cleaning around the house, because of her back.

Claimant testified that she didn't miss work while employed by Mid-Central Plastics, and considered herself in good health during that time. She had not been involved in any strenuous activity away from work and had not had any falls which would have strained her back. During the week before November 29, 1971, she had not done any strenuous housework.

During the prior year, Claimant was treated by a Dr. Preston and a Dr. Bone, and was hospitalized by Dr. Preston.

Francis Mastin, Claimant's husband, testified that Claimant had always been able to perform her household tasks prior to November, 1971, and had never complained of either her hands or back. The first time he remembers her complaining of her back was around the time she burned her fingers at Mid-Central Plastics. He testified he removed her bandages on November 29, 1971, and observed her burned hands and fingers. Since her injury, he has noticed that Claimant has "slowed down" and has difficulty doing housework. He testified that his wife's primary complaints were about her mid-back to her beltline and some pain higher on her back.

Michael D. Mastin is Claimant's 28 year old son. He also observed Claimant's blistered hands. He testified that Claimant didn't complain of any back pain prior to her employment with Mid-Central Plastics, but after her employment she did complain. Also, he testified that she once was able to take care of her housewife duties without any problems, but now can do hardly any. She would try to do housecleaning, but would have to lie down after a while. Michael Mastin admitted that he does not live at home, but only observed Claimant when he visited. He also remembered Claimant being hospitalized at Iowa Lutheran Hospital in August, 1970, and from January to May, 1971.

Robert Henry Hatch, Jr. had been an inspector at Mid-Central Plastics and had moved up to plant manager. He was familiar with the types of machines in the plant. He had reviewed the jobs Claimant did at Mid-Central, and could find no jobs which required her to lift more than 30 pounds. He estimated that, on November 29, 1971, the box Claimant was filling and then having to carry three to four feet weighed less than ten pounds. He testified that the operators have a break every two hours, at which time they change boxes. He testified that the company made gloves available to the molding machine operators, although some chose to work bare handed. Mr. Hatch testified that the molten plastic, temperature 350° to 375°, flowed into the molding machine, was cooled by water flowing through the machine, and 15 seconds after it had flowed in, it was removed by the operator. He said that, although he doesn't know the exact temperature, they tried to cool the plastic to 100°. He admitted that the temperature could be higher and that fluctuations in temperatures occur.

The highest temperature he had seen on the mold's thermometer when the plastic was cooled was 150° to 155°, at which temperature the machine produced unsuitable parts. He testified he only checked machines producing unsuitable parts and wasn't sure whether the machine would perform satisfactorily when the plastic was cooled to 125°. Mr. Hatch supervised the shift immediately following Claimant's, and did not detect any difficulty with the machine Claimant operated.

Hatch had no knowledge of anyone burning their fingers on the particular job Claimant was working, although he had witnessed burned fingers on other jobs involving hot plastic. Renfrow also did not recall anyone receiving burns on the job Claimant was performing but he, too, recalls other employees receiving burns on other jobs involving plastic parts, although at a hotter temperature than the parts Claimant handled. Hatch testified that the worst burn he saw was a blister on an operator's thumb. He testified that burned fingers could be caused by a heating cylinder on the machine, but that the cylinder was situated such that a person would have to be trying to touch it, as it was protected by a heat shield. He admitted that one reason parts could stick in the mold was that the plastic was not sufficiently cooled. Mr. Hatch testified that in the summer of 1973, the plant was inspected by the federal government and that the government was satisfied with the way in which the molding machines were being operated.

Mrs. Clarissa McComas was the production secretary at Mid-Central. Her duties were to hire people, set up production cards from orders, and make insurance claims. She also handled on-the-job injuries. On October 26, 1971, she hired Claim-

ant. On November 30, 1971, she received Claimant's termination slip, but no written report of Claimant's injuries. Such a report would have been filled out by Claimant's foreman, Mr. Renfrow. She received a telephone call from Claimant that same morning, and Claimant indicated that her fingers were burned. The first time she learned of any back injury was on January 10, 1972, when she received a letter from the Mid-Central insurance carrier, describing Claimant's back complaints and stating that Claimant was alleging that they were job related. Mrs. McComas testified that Claimant did not specify any back problems on her application for employment on October 26, 1971.

Dr. Roy W. Overton testified that he first saw Claimant on November 30, 1971. Upon examination, he discovered that she had second degree burns on her fingertips, with blisters on each hand. He has no record of the palms of her hands or arms being affected. He dressed her burns and gave Claimant shots to prevent lockjaw. He next saw her on December 1, 1971, when she first complained of back pains in the dorsal spine area. He reported that she said she was lifting boxes over a conveyor and that this caused her back pain.

Claimant gave the doctor a history of 27 operations including a hysterectomy, cyst of the ovary, kidney abcess, skin tumor of the back, 14 abdominal operations, and assorted illnesses and allergies. Dr. Overton x-rayed Claimant's back and found osteoporosis of the dorsal spine, a disease which can be pain producing in and of itself. He described osteoporosis of the back as a disease seen primarily in females who have had their ovaries removed at an early age. The disease causes a loss of calcium in the bones and is usually more prominent in the spinal column. The pain may result from either fractures or compression of the vertebrae on various nerves and muscles. Dr. Overton diagnosed Claimant as having moderate to moderately severe osteoporosis. He found no fractures or compressions.

On December 16, 1971, Dr. Overton released Claimant regarding her fingers. He felt that she had no permanent residuals from her hands and that she was fully recovered. However, he continued to see her regarding her back until August 31, 1972, during which time she continued to complain about her back pain. He treated her with medication and a muscle relaxer.

Dr. Overton agreed with Dr. Misol's evaluation that Claimant had a 10% disability. He described her as essentially weak and that a person with her condition would be more susceptible to a back injury. He testified that a person with osteoporosis would take longer to recover from a muscle strain than a normal person and would be susceptible to reinjury. Dr. Overton testified that he would restrict Claimant from bending, lifting objects weighing more than 10 pounds, or repetitive motions where she might reinjure her back, and that he would have placed these same restrictions on Claimant on November 30, 1971.

Dr. Sinesio Misol, an orthopedic surgeon, first treated Claimant on January 14, 1972, when she told him of her burned hands and that her back difficulties had started in November, 1971. Dr. Overton referred Claimant to Dr. Misol. He found her to have normal motion of the spine. He examined her back x-rays and found nothing significant. He diagnosed her back pain as resulting from chronic muscle strain, and that the strain was related to lifting boxes off a conveyor belt, based upon what Claimant told him. He prescribed a back brace and a pain drug.

In April, 1972, the x-rays were repeated. Dr. Misol then felt the bone might be osteoporotic, although essentially normal for a woman of Claimant's age. He prescribed calcium and hormone tablets. He continued to see her until November 7, 1973. Claimant continued to complain of back pain throughout her treatment by Dr. Misol, although she reported that the medication lessened the pain somewhat.

In November, 1973, a Dr. Dubansky examined Claimant and reported to Dr. Misol that he could find no orthopedic cause for her symptoms.

Dr. Misol estimated that Claimant had a 10% impairment, based upon restrictions of motion and how much pain Claimant said she had when she did a particular task. He testified that she could probably be able to lift 5 pound objects over an eight hour period repeatedly. However, he conceded that is was possible that she could not. He testified that he would not consider the problem he diagnosed as an injury and that the symptoms Claimant exhibits usually continue only for a few weeks. However, in Claimant's case, he testified that her pain would continue indefinitely, even though there is no orthopedic cause for the pain. He testified that her pain was a central nervous system pain.

Claimant seeks compensation because of two separate problems -- her burned fingers and the trouble she claims she has with her back.

Claimant has the burden of proving that her injury was one arising out of and in the course of her employment. **McClure v. Union et al Counties**, 188 N.W. 2d 283 (Iowa 1971). Claimant's supervisor only checked machines which produced unsuitable parts. Since fluctuations can occur in the temperature of the parts at the point where they are released from their mold, it is felt that the temperature of the plastic parts was somewhat greater than 100°, but somewhat less than the temperature at which the parts would be unsuitable. Insufficient cooling can cause parts to stick in their molds. Consequently, it is not surprising that Claimant confirmed that some parts did stick to their molds. Thus, there is no reason to doubt Claimant's testimony that she discovered her fingers were burned at 10:00 a.m. on November 29, 1971, considering that Claimant's gloves had holes. It is unlikely the burns Dr. Overton discovered upon examination could come from a source other than the plastic Claimant found clinging to her fingers.

The discrepancy between Claimant's testimony and Dr. Overton's records regarding the date of her first visit may be attributed to a failure of Claimant's

memory. Renfrow's recollection that Claimant did not inform him of the holes in her gloves or her burns is consistent with Claimant's testimony that he walked away when she tried to inform him.

Thus, it is felt that Claimant has sustained her burden of proving her burns to her fingers arose out of and in the course of her employment.

Dr. Overton treated Claimant's burned fingers until December 16, 1971, at which time he felt, within a reasonable degree of medical certainty, she had no permanent residuals and that her fingers were well. Although Claimant testified that her hands were sensitive for months to come, and that she kept her hands bandaged, there is no medical evidence to indicate that she was prevented from returning to work on December 16, 1971.

Claimant has failed to sustain her burden of proof regarding her back problems. Both Drs. Overton and Misol agree that Claimant has a certain degree of osteoporosis of her spine. They both feel she has a 10% physical disability. However, there must be a causal connection between the employment and the injury before a disability may be compensated. **Musselman v. Central Telephone Co.**, 154 N.W. 2d 128 (Iowa 1967). The burden of proving this causal connection is upon Claimant. **McClure,** supra. Neither Dr. Misol nor Dr. Overton could testify within a reasonable degree of medical certainty that Claimant's job caused her disability. They could testify to both her present condition and her likely future limitations within a reasonable degree of medical certainty, but they could not provide the link between Claimant's employment and her back problems. Dr. Misol initially thought that Claimant's muscle strain was related to the use of those muscles lifting boxes off a conveyor belt, based upon what she told him. He testified that Claimant's injury could be caused by repeated movement.

The evidence must go farther than a showing of a possibility of a causal connection. **Boswell v. Kearns Garden Chapel Funeral Home**, 227 Iowa 344 (1939). Consequently, there is nothing in the record to support a finding that Claimant's back disability arose out of her employment.

THEREFORE, the Arbitration Decision is hereby affirmed.

It is found and held as findings of fact:

That Claimant suffered an injury in the form of burns to her fingers, arising out of and in the course of her employment by Defendant on November 29, 1971.

That such injury resulted in a temporary disability for three (3) weeks.

That Claimant has failed to prove that her back problems arose out of and in the course of her employment.

WHEREFORE, it is ordered that Defendants pay to Claimant two (2) weeks temporary total disability at the stipulated rate of sixty-four dollars ($64) per week, payment commencing with the date of injury, accrued payments to be paid in a lump sum, together with statutory interest. Further, it is ordered that Defendants pay the cost of this proceeding and the shorthand reporter at the Arbitration proceeding.

Signed and filed this 8 day of August, 1974.

ROBERT C. LANDESS
Industrial Commissioner

No Appeal

Stephen L. Rogers, Claimant,

vs.

Acri Wholesale Grocery Company, Employer, and

Aetna Casualty and Surety Company, Insurance Carrier, Defendants.

Review Decision

Mr. Stephen L. Rogers, 316 Hillside, Des Moines, Iowa 50315, Pro Se.

Mr. Frank T. Harrison, Attorney at Law, 510 Central Nat'l. Bank Bldg., Des Moines, Iowa 50309, For the Defendants.

This is a proceeding brought by Defendants, Acri Wholesale Grocery Co., Employer, and Aetna Casualty and Surety Co., Insurance Carrier, pursuant to Code Section 86.24 for Review of an Arbitration Decision whereby Stephen L. Rogers, Claimant, was awarded medical benefits for an injury alleged to have arisen out of and in the course of his emloyment on August 7, 1972. The matter was submitted on Review on the oral arguments of the parties and the record of the Arbitration proceeding.

Stephen L. Rogers, Claimant, was 23 years old and employed by Acri Wholesale Co., Defendant, as a warehouseman. His duty was to fill orders by obtaining cases of products from a freezer. Prior to working for Defendant, Claimant held a variety of jobs. On August 7, 1972, while Claimant was inside the freezer, he experienced a pain in his side. Claimant described this pain as a "catch" which would prevent him from breathing. Claimant fell to the floor, struck his head, and was knocked unconscious. There were no witnesses to this incident. Two fellow workers discovered Claimant and removed him from the freezer, after which Claimant regained consciousness. An ambulance was called and Claimant was taken to a hospital. Claimant testified that he was administered a series of tests at the hospital, but that no cause for his pain was determined. Claimant was diagnosed as having an eye injury. He testified that his injury is not permanent. He lost only four hours from work.

Claimant testified he has experienced similar pain on previous occasions while working in the freezer. He testified he neither experienced such pain before nor after his job of working in and about the freezer. Not all of these pains occurred in the freezer. Some occurred while he was entering into or exiting from the freezer. Claimant associated

the onset of pain with both physical activity and being in the proximity of the freezer.

Claimant testified that he has been treated for an ulcer.

An upper gastrointestinal x-ray was interpreted by a roentgenologist as presenting findings consistent with duodenitis. Chest and abdomen x-rays were interpreted by another roentgenologist as normal and no evidence of pathological change was exhibited by facial x-rays. An EKG was suggestive of inferior wall ischemia. The reports of two doctors, Dr. Robert L. Pettit, D.O. and Dr. Joseph Stork, D.O. fail to express an opinion as to the cause of Claimant's pain or whether it was work related.

Claimant's exhibits 1, 2, and 3, bills for medical and ambulance services rendered, were admitted into evidence. Defendants did not dispute that the amounts were fair and reasonable or that they were for services rendered in connection with Claimant's August 7, 1972 incident. Their objection is that the bills were not necessitated by an injury arising out of Claimant's employment.

To be compensable, an injury must occur in the course of employment and also arise out of it. **McClure v. Union et al Counties**, 188 N.W. 2d 283 (Iowa 1971). An injury arises out of employment if there is a causal connection between the work performed and the injury. **Musselman v. Central Tele. Co.**, 261 Iowa 352 (1967). The burden of proof rests upon the claimant. **McClure**, supra. A decision to award compensation may not be predicated upon conjecture, speculation or mere surmise. **Burt v. John Deere Waterloo Tractor Works**, 247 Iowa 691 (1956). There is no evidence in the record to establish by a preponderance that Claimant's side pain was caused by the conditions under which he worked or that his injury followed as a natural incident of his work. It is mere speculation whether the cold freezer caused the pain. Even though Claimant did not have these pains at times other than when he filled orders from the freezer, not all of his pains occurred when he was physically in the freezer. His duodenitis may have caused the pain. His ulcer may have caused it. Conditions yet undiagnosed may have caused it. There simply is not enough evidence in the record on the issue of causation upon which to base an award of compensation.

Code Section 85.27 says the employer, with notice or knowledge of injury, shall furnish reasonable medical services and supplies therefor. The Workmen's Compensation Act is in derogation of the common law. **Comingore v. Shenandoah Artificial Ice, Power, Heat and Light Co.**, 208 Iowa 430 (1929). The rights and remedies provided in Code Chapter 85 for an employee on account of injury shall be exclusive of all other rights and remedies of such employee. Code Section 85.20. Every employer, not specifically excepted by Code Chapter 85, shall provide, secure, and pay compensation for injuries sustained by an employee arising out of and in the course of the employment. Only when an employee sustains an injury arising out of and in the course of his employment does the employer have responsibilities to the employee under the Workmen's Compensation Law. The employer may have the responsibility to provide medical care to persons injured on his premises, but may not have the responsibility to ultimately bear the cost of such care. Since it has been determined that Claimant did not sustain an injury arising out of and in the course of his employment, then Defendants have no duty to pay for the medical bills he incurred.

WHEREFORE, the Arbitration Decision is hereby modified.

It is found and held as a finding of fact that Claimant did not sustain an injury arising out of and in the course of his employment. It is further held as a finding of law that an employer has no duty to pay for the ascertainment and diagnosis of the reason for Claimant's loss of consciousness when a claimant has not sustained an injury arising out of and in the course of his employment.

THEREFORE, compensation must be and is hereby denied to the Claimant.

Signed and filed the 2 day of August, 1974.

Robert C. Landess
Industrial Commissioner

No Appeal

Donald W. Wood, Claimant,

vs.

Massey-Ferguson, Inc., Employer,
and
Sentry Insurance, Insurance Carrier, Defendants.

Review Order

Mr. Martin R. Dunn, Attorney at Law, 427 Fleming Building, Des Moines, Iowa 50309, For the Claimant.

Mr. Harry W. Dahl, Attorney at Law, 5600 Grand Avenue, Des Moines, Iowa 50312, For the Defendants.

This is a Review of an Order filed on July 15, 1974, overruling Defendant's Special Appearance. Exactly two years after his alleged injury, Claimant filed an Application for Arbitration. Code Section 85.26 states that a proceeding for workmen's compensation must be commenced within two years from the date of the injury. In computing time, the first day is excluded and the last day included. Code Section 4.1 (23). Thus, the date of injury is excluded and the last day, two years subsequent to the date of injury, is included as being within the two year time limit prescribed by Code Section 85.26. As Claimant filed on that last day, he has timely filed his Application for Arbitration.

THEREFORE, the Order overruling Defendants' Special Appearance is affirmed.

WHEREFORE, it is ordered that Defendants answer Claimant's Application for Arbitration within fifteen (15) days.

Signed and filed this 1 day of August, 1974.

ROBERT C. LANDESS
Industrial Commissioner

Appealed to District Court; Dismissed

Neldon Lavelle Wood, Deceased,
Ida Fay Wood, Surviving Spouse, Claimant,

vs.

Cummings & Co., Inc., Employer,
and
Great American Insurance Co., Insurance Carrier,
Defendants.

Review Decision

Mr. Ralph V. Harman, Attorney at Law, 526 2nd Avenue, S.E., Cedar Rapids, Iowa 52406, 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 defendants, Cummings and Co., Inc., and its insurance carrier, Great American Insurance Co., pursuant to Code Section 86.24 of the Iowa Workmen's Compensation Act, for Review of an Arbitration Decision wherein the claimant, Ida Fay Wood, widow of the decedent, Neldon Lavelle Wood, was awarded workmen's compensation benefits for the death of her husband. The case was presented for Review on the transcript of the evidence presented at the Arbitration hearing and the written briefs and oral arguments of counsel.

Neldon Lavelle Wood, husband of Claimant, Ida Fay Wood, was killed when the plane in which he and four others were riding crashed about 20 miles West of the Cedar Rapids, Iowa, Airport in the early evening of January 3, 1973. Decedent was a salesman for Cummings and Co., builder of electrical advertising signs. He worked under Ernie Biddie and Bob Smith, who were located at the home office in Nashville. Decedent's duties were to call on national accounts in Cedar Rapids and outlying areas. He worked out of the Cedar Rapids office of Cummings & Co. James L. Hendricks was the general manager of the Cedar Rapids division.

Hendricks testified that Decedent told him on January 2, 1973, that he had a chance to go to Omaha, Nebraska the next day to see American Parts System, Inc., on business and that he could get a free airplane ride to Omaha on a private aircraft owned by Moramerica, Inc. Hendricks had not directed Decedent to go to Omaha, and was not aware that he would go to Lincoln, Nebraska, because, to his knowledge, Cummings & Co. had no accounts in Lincoln.

It was stipulated by the parties that Decedent made a telephone call to Ted Dennis, Regional Manager, American Parts System, Inc., regarding the selling of signs to American Parts and the setting up of an appointment for Decedent to see Dennis the next day. Dennis recalls that Decedent did not appear in his office on January 3, 1973, but does not recall whether Decedent did or did not call him on January 3, 1973. Hendricks called American Parts after January 3, to inquire whether Decedent had contacted them that day. A secretary responded that Decedent had called, but Hendricks was unable to definitely state that he had called American Parts on January 3, 1973. It was further stipulated, regarding two other Cummings & Co. accounts in Omaha, Richman Gordman and Dunn and Dunbar, that the people who would have received Decedent's telephone call didn't remember talking to him on January 3, 1973, but it was not stipulated that he did not call them.

Claimant testified to a conversation she had with her husband on January 2, 1973. She said he told her that he was going to Omaha on January 3, 1973, to visit American Parts System, and that he was to fly on an airplane owned by Moramerica Co., but he did not tell her that he planned on going to Lincoln. To her knowledge, Decedent did not have any business contacts in Lincoln and his work as bishop of their church would not take him there. She said that it was customary for Decedent to take business materials with him on business trips and on January 3, 1973, he took with him a briefcase and papers, tape recorder, camera, and calculator. These items were found at the crash site. Claimant had occasion to listen to the tape, but it did not reveal any of Decedent's January 3 activities.

Robert E. Roberts was a personal friend of the Wood family and had known Decedent for nine years through church. He had a conversation with Decedent on January 2, 1973, concerning Decedent's business plans for the next day. Roberts testified that Decedent had told him he was leaving January 3 for Omaha to call on prospects and clients and would fly on the Moramerica airplane. Decedent didn't indicate that he was going to Lincoln and, to Roberts' knowledge, Decedent had no church connections in Lincoln.

Rachel Lynn Wood, 14 year old daughter of Decedent, confirmed previous testimony by testifying that she was with her father on January 2 at Cummings & Co., and that her father made telephone calls on that day. Decedent told her that he was going to fly to Omaha the next day on business, and that the company he was going to see was American Parts, Inc.

Peter Brune was an employee of Iowa Security Company, a finance company. Moramerica was also a finance company which took second mortgages on property. Brune's company had a client who owned an apartment building in Lincoln, and who desired a second mortgage. Brune was to meet the Moramerica plane in Omaha, take three of the

Moramerica employees to see property in Omaha, and then drive to Lincoln to see the apartment building. The plane was scheduled to arrive between 9:00 and 10:00 a.m., but it was 45 minutes late. It was snowing heavily in Omaha, and roads were either barely passable or closed completely. The plan to drive to Lincoln was abandoned and it was decided to fly there instead. Brune said that Decedent got off the plane in Omaha and made a telephone call. Brune doesn't know how many calls Decedent made, but he was on the telephone a few minutes. Gary Larkin was also at the airport. He was to take one Moramerica employee, Mr. Hahn, to make some business visits in Omaha. Hahn got off the plane, Decedent and Brune got back on, and the plane took off for Lincoln one-half hour to 45 minutes after it landed.

While in Lincoln, Decedent and the pilot, Stradley, didn't go with the others to see the apartment building, and Brune doesn't know what they did in Lincoln. After viewing the building, Brune and the two Moramerica employees returned to the airport where they found Wood and the pilot. The group flew back to Omaha, Brune got off the plane, Hahn got on, and the plane left for Cedar Rapids between 4:00 and 5:00 p.m. The plane crashed 20 miles West of the Cedar Rapids Airport and all five passengers were killed.

After the accident, on January 15, 1973, Wade Douglas, who was in charge of the national sales people and who worked at the home office in Nashville, made out a travel and expense report in the presence of Hendricks and Roberts. Hendricks testified that the expenses did not include a trip to Lincoln. Roberts testified that he did not know whether the expense report covered the Lincoln trip. Subsequently, Claimant received a check for $82, reimbursing her for her husband's expenses.

To be compensable, an employee's injury must occur "in the course of" employment and also "arise out of it." **McClure v. Union, et al., Counties**, 188 N.W. 2d 283 (Iowa 1971). "In the course of" employment relates to the time, place, and circumstances of the injury. This requirement is fulfilled when the claimant shows that the injury occurred at a place where the employee reasonably may be performing his duties. **McClure**, supra.

As Decedent was a salesman, it is not doubted that he traveled to Omaha to call on prospective customers of his employer and that it was within his duty to do so. Even though Decedent never physically called upon Dennis of American Parts, it is reasonable to believe his failure to do so was due to the severe snowstorm in Omaha that day. When an employee travels away from his regular place of employment for the purpose of conducting his employer's business, an injury arising en route is considered arising in the course of his employment. **Marley v. Orval P. Johnson & Co.**, 215 Iowa 151 (1932).

Decedent's death did not occur on the leg of the journey between Omaha and Lincoln, and thus, it need not be decided whether he was "in the course of" his employment while in Lincoln or en route. Upon Decedent's return to Omaha, any deviation from the purpose of his trip ended and he resumed his employment. **Pohler v. T. W. Snow Constr. Co.**, 239 Iowa 1018 (1948). Any injury arising out of his employment incurred on the return trip to Cedar Rapids would be compensable. **Lamb v. Standard Oil**, 250 Iowa 911 (1959).

For an injury to be considered as "arising out of employment", the claimant must show "a causal connection between the conditions under which work was performed and the resulting injury, i.e., did an injury follow as a natural incident of the work?" **Musselman v. Central Telephone Co.**, 154 N.W. 2d128(Iowa 1967). It has been held that an injury occurring in an airplane accident arose out of and was in the course of employment. **Knipe v. Skelgas Co.**, 229 Iowa 740(1940). An airplane accident is a natural incident of the traveling which Decedent had to do to fulfill his duty to his employer. Thus, his injury arose out of his employment.

Globe Insurance Company insured the lives of passengers on the Moramerica airplane. Decedent's estate received $100,000 from Globe Insurance. Claimant, in her capacity of executrix of Decedent's estate, executed a Fiduciary Receipt on behalf of the estate when this money was received.

Defendants would be liable under the Workmen's Compensation Act for $19,900 should they be required to pay. They contend that they are allowed to set off against the $100,000 received by decedent's estate from Globe. Thus, they argue that they are not liable for compensation, as their total liability is less than the amount against which they claim setoff.

Defendants' argument centers around the construction of the Globe insurance policy and the Fiduciary Receipt. They argue that the Fiduciary Receipt is a release, discharging Globe Insurance Company, and its insured, Moramerica Co., from further liability for the death of Decedent. Claimant, they concede, has not released any right under the Workmen's Compensation Act and, consequently, she may pursue Cummings and Company, or its insurer, Great American Insurance Co., for workmen's compensation. However, the setoff to which Defendants claim they are entitled would discharge their liability to pay compensation.

Defendants cite **Southern Surety Co., v. Chicago, St. P., M. & O. R. Co.**, 187 Iowa 357(1919), which presented a situation where an employee received an injury arising out of and in the course of his employment due to the negligence of a third party tortfeasor. In such a situation, the employee was held to have a common law cause of action against the tortfeasor for damages. Further, the case held that the Workmen's Compensation Act in no way limits the liability of the third party tortfeasor to the injured employee. The case states that, if the common law damages are received before a claim is made for workmem's compensation, then the employee is not entitled to compensation because, presumably, he has been made whole by the damages; that there is

one wrong when an employee is injured and he is not entitled to double compensation; that compensation has been paid, then the employer becomes subrogated to the rights of the employee as against the third party tortfeasor; and that in either situation, the employer is indemnified by the third party tortfeasor, either by the action of the employee against the third party or action by the employer against the third party by right of subrogation.

For support of their position, the defendants rely upon the insurance contract between Globe and Moramerica. Part III of that contract provides for voluntary settlements of claims. In consideration for such settlement, a full release of all claims against the company must be executed. The voluntary settlement provisions are in lieu of the action provided in Part II, concerning legal liability. The voluntary settlement does not satisfy any payments Moramerica may have to make under any Workmen's Compensation Acts. But as the decedent was not a Moramerica employee, this provision is immaterial.

As aids to construe the Fiduciary Receipt, Defendants used paragraphs 4 and 5 of Part III of the insurance contract. Paragraph 4 requires a full release as a prerequisite to a voluntary settlement and paragraph 5 says that the voluntary settlement shall become void if a suit is brought against the insured for damages. Since decedent's estate received the $100,000 it is argued that the Fiduciary Receipt was intended as a full release for all claims against Moramerica as a result of Decedent's death. Suit against Moramerica for the death of Decedent would void the settlement. As it doesn't appear that Claimant intends to sue Moramerica, then, Defendants contend, Claimant apparently intended to completely release Moramerica from further liability.

If the Fiduciary Receipt is a full release of all claims against Moramerica as a result of Decedent's death, Defendants argue that since Claimant has no rights to which Defendants may be subrogated, they, therefore, cannot recover from Moramerica or Globe for any payments for which they may be liable under the Workmen's Compensation Act. Thus, Defendants contend that they should be allowed a credit for any liability they have under the Workmen's Compensation Act as a setoff against the payments received, as Claimant is allowed to be compensated but once for the same injury or wrong.

On the other hand, the Claimant argues that the Receipt does not preclude her or anyone entitled to workmen's compensation from pursuing their workmen's compensation remedies. She points out that the Receipt states that all claims are discharged against Moramerica, "except claims for which Neldon Lavelle Wood's employer at the time of his death or any carrier, as their insurer, may be held liable under any Workmen's Compensation Law." Further, the claimant argues that, since the Receipt preserves the rights of **all** persons under the workmen's compensation laws, then Defendants' subrogation rights are also preserved. She concluded that this clause clearly entitles her to maintain an action for and recover workmen's compensation, and Defendants have no defense to her action for workmen's compensation by reason of the Receipt by the estate of $100,000.

Code Section 85.31 says that when death results from a compensable injury, the employer shall pay compensation to the employee's dependents. The statute does not contemplate the estate of the decedent being a dependent. The estate and the dependents are separate legal entities. The dependents have been granted, by statute, the right to compensation upon the death of the breadwinner. This right should not be allowed to be frustrated by a document signed by the representative of the estate. For example, suppose Lavelle Wood's surviving spouse was not the beneficiary of his estate, or suppose the liabilities of the estate were as great or greater than its assets. If the workmen's compensation carrier were allowed a setoff for amounts paid by a third party tortfeasor or his insurer to the estate, the surviving spouse would received nothing. On the other hand, workmen's compensation benefits would be exempt from such debts. Code 627.13.

This would be a different situation than the one presented in **Southern Surety Co.**, supra. There, the party entitled to receive compensation sued the third party tortfeasor and recovered damages. Workmen's compensation was denied on the theory that the judgment compensated the employee for his injury. The carrier was, in effect, allowed a setoff against the damages the employee received because the employee had been made whole. Here, there is a possibility that the dependents will not be made whole in spite of the voluntary settlement by Globe with the estate.

Even though the employer and workmen's compensation carrier are entitled to be subrogated to the rights of an injured employee and indemnified out of damages paid to the employee by the third party tortfeasor, the subrogation may not extend to the rights and assets of the employee's estate. Code Section 85.22 retains for the injured employee, or, in case of death his legal representative, his common law cause of action against the third party tortfeasor. Simultaneously, it allows the employee, his dependents, or the trustee of the dependents, a proceeding against the employer for compensation. The section does not specifically permit the estate to proceed against the employer for workmen's compensation, nor a dependent to proceed against the tortfeasor. The way in which the employer becomes subrogated to the payee's rights is by payment of compensation. But, as mentioned, it is not contemplated that the employer pay workmen's compensation to the estate.

The indemnification allowed to the employer by Code Section 85.22(1) pertains only when compensation has been paid to the employee, his dependent, or the dependent's trustee, and, the

employee, his dependent, or the dependent's trustee receives damages from the third party tortfeasor. Read literally, it does not appear to cover the situation where the estate of the employee receives the damages, instead of the employee, his dependent, or the dependent's trustee. Nor does Code Section 85.22(2) cover the situation where the employee has died. It provides that the employer shall be subrogated when the employee fails to bring action against the tort-feasor within 90 days. Nor do Code Sections 85.22(3) (4) and (6) contemplate the employee's death. Code Section 85.22(5) is definitional in purpose and says that any payment made to an injured employee, his guardian, parent, next friend, or legal representative, by any third party liable for the injury to the employee, shall be considered as paid as damages. In summary, it does not appear that Code Section 85.22 applies to the particular situation presented in this case.

Thus, Code Section 85.31 is relied upon. This section states when death results from the injury, the employer shall pay compensation to the dependents of the decedent employee.

THEREFORE, the Arbitration decision is hereby affirmed.

It is found and held as fact that:

Decedent's death arose out of and in the course of his employment.

That Claimant is the surviving spouse of Decedent and, by stipulation of the parties, is entitled to the maximum death and burial benefits allowable under the Workmen's Compensation Laws.

WHEREFORE, Defendants are ordered to pay Claimant three hundred(300) weeks of compensation at the rate of sixth-three dollars ($63) beginning with January 3, 1973, accrued payments to be made in a lump sum together with statutory interest. Further, Defendants are ordered to pay the burial allowance of one thousand dollars ($1,000). Defendants are further ordered to pay the cost of the Arbitration proceeding and of the shorthand reporter at the hearing.

Signed and filed this 1st day of August, 1974.

ROBERT C. LANDESS
Industrial Commissioner

Appealed to District Court; Affirmed

NOTE: The spelling of the names in the foregoing opinion were taken from the transcript of the evidence presented at the Arbitration proceeding.

Kent D. Hanson, Claimant

vs.

Rock Island Motor Transit Company,Self-Insured Employer, Defendant.

Review Decision

Mr. Robert F. Wilson, Attorney at Law, 227 Granby Building, Cedar Rapids, Iowa 52401, For the Claimant.

Mr. James D. Polson, Attorney at Law, 500 Bankers Trust Bldg., Des Moines, Iowa 50309, For the Defendant

This is a proceeding to review an Arbitration Decision brought by Kent D. Hanson, Claimant, pursuant to Code Section 86.24, against Rock Island Motor Transit Company, Employer and self-insurer. Claimant was denied compensation by the Arbitration Decision. This matter was presented on oral argument of counsel and the submission, by stipulation of the parties, of a transcription of a statement taken of Claimant on November 28, 1972. Both parties waived the notice requirement of Section 86.24, regarding the notice of additional evidence.

Kent D. Hanson, Claimant, was 57 years old and employed as a truck driver with Rock Island Motor Transit Company, Defendant. His duties consisted of delivering freight and loading and unloading trucks. He had no helper to assist him. Claimant testified that he was injured when he placed one end of a 350 to 375 pound rolled carpet on his shoulder and dragged the carpet from his truck to the garage of the house where he was making the delivery. He testified that he first felt a sharp, continuous pain that night. He went to Dr. Lawrence S. Siekerka, a Chiropractor, the following day.

Claimant stated on his Application for Arbitration that this incident occurred on October 26, 1972. He associates this day with his numbness on his left side which, he testified, began in October and had grown worse. At the Arbitration hearing, Claimant testified that the incident occurred on July 16, 1972. The Arbitration hearing was continued until August 15, 1973, at which time Claimant testified that the incident occurred on July 18, 1972.

Claimant testified that he reported his injury to his employer on October 26, 1972. Claimant testified that the pain in his upper back continued until that time. He missed a few days of work after July 18 until October 20, 1972, when he stayed home one week. Claimant testified that he had had not problem with his upper back and neck prior to July 18, and that he suffered no injuries to his upper back and neck between July 18 and October 30. He testified that he had injured his lower back in 1964, by slipping and falling, but that injury was unrelated to his current injury. The 1964 injury happened while Claimant was employed by Rock Island Motor Transit Company. Claimant was prescribed pain medication from a Dr. Basler and a Dr. Abbo. He also visited Dr. Siekerka. Claimant testified that the 1964 injury was pretty well cured, although he had been laid off occasionally. Claimant is certain that the July 18, 1972 incident caused the difficulties which culminated in his subsequent surgery. He testified that the reason he stopped working

was because his left side began to become numb and his left foot would "kind of stumble" on him. The pain continued and spread to his chest and back. On October 26, 1972, Claimant was examined by Dr. Abbo, and was admitted to Mercy Hospital on October 30, 1972. Claimant remained in the hospital for 26 days, during which time he was operated on by Dr. Herbert B. Locksley, M.D., a neurosurgeon. Dr. Bates was the anesthesiologist. A Dr. Netolicky also examined Claimant. Claimant testified that Dr. Locksley removed three discs in his upper back. He had been in Dr. Locksley's care until March 26, 1973, at which time he resumed his employment with Rock Island Motor Transit Company.

Claimant testified that he was unable to perform his lifting duties because of his injury. He had been employed practically all his life as a truck driver and unloader, but in May, 1973, he stopped working for Rock Island Motor Transit Company. His doctor, a Dr. Block, has advised him not to do any lifting. There is one route over which Rock Island Motor delivers which does not involve lifting-Des Moines to Cedar Rapids. Claimant said he tried the route once, but that his eyes bothered him too much while driving at night, although he feels that he could handle the route now because he hasn't had eye problems lately. The union picks the person who will drive this route by the seniority of the drivers. Although other drivers have more seniority than Claimant, the driver currently driving that route has less seniority. Claimant did not "bid" for that job even though, based upon what his doctors have told him, his neck injury would not disqualify him from driving. The union puts up all jobs once a year for "bids" from the drivers.

Frank H. Bain was employed by Rock Island Railroad and Rock Island Motor Transit Company in November, 1972, as a claims investigator. His duty was to investigate and settle claims. He took Claimant's statement before a Certified Shorthand Reporter on November 28, 1972, while Claimant was convalescing at home. Bain testified, and the transcript of that statement verifies, that Claimant related his 1964 back injury incident, but did not describe any other accident or injury. Bain denied telling Claimant at the conclusion of the taking of the statement that the company would begin paying workmen's compensation. However, Claimant's spouse, who was present while Bain took Claimant's statement, testified that she remembered that Bain told them they would received $67.00 or $68.00 per week, referring to workmen's compensation.

Bain was asked whether he remembered asking Claimant if the pain in the upper back was the thing that really put him in the hospital and whether he remembered Claimant's reply, "This is what caused me to go to the Doctor." Bain testified, "If its there, then it would be true." Bain was also asked if he remembered, while inquiring about the 1964 incident, asking Claimant, "You had no problem at that time with the upper part?", and whether he remembered Claimant's reply, "No, not at that time." Bain testified, "If it is there, it would be true."

Bain was a claims agent in 1964 when Claimant injured his lower back. He testified that he received a sketchy report of the injury, but merely filed it away and didn't report it to anyone. Claimant received no workmen's compensation for that injury.

William Spoenemann was a terminal manager for Rock Island Motor Transit Company. He was Claimant's supervisor. He testified that when an employee is injured, the employee must fill out a form. Claimant has filled out this form in the past, but failed to fill one out for his July, 1972 injury. Claimant confirmed that he failed to fill out this form for his July, 1972 injury.

Spoenemann testified that the terminal dispatcher received a call from Claimant at 4:15 a.m., when Claimant stated that he would not work that day because he wasn't feeling well. Spoenemann testified that he wasn't sure whether this call was received on Tuesday, July 18, 1972, or Wednesday, July 19, 1972.

Spoenemann's duties included recording the hours the drivers worked. He testified that he has no record of Claimant working from Friday, July 14, 1972, to July 24, 1972. Claimant testified that he wasn't sure, either, whether he worked the week of Monday, July 17, 1972, although he alleges he was injured at work on July 18, 1972.

Dr. Siekerka has treated Claimant periodically since 1964. In March, 1964, Claimant complained of pain in the intercostal(rib) area and the mid-dorsal(back) area. Claimant's next visit was August 18, 1964, when he complained of pain in the lower back, sacral-lumbar area, which was diagnosed as a sacral-lumbar articulation, causing Claimant's right leg to be one-half to three-fourths inches shorter than his left, which, in turn, caused pain. Claimant related the pain to his "slip and fall" accident and Dr. Siekerka testified that the fall was a causative factor.

Dr. Siekerka treated Claimant from 1964 to July 19, 1972. Claimant complained on June 16, 1967 and September 15, 1967, of an uncomfortable feeling in the mid-dorsal area. On October 5, 1970, Claimant complained of left leg discomfort and sacral-lumbar problems, similar to his 1964 complaints. Claimant visited Dr. Siekerka again on March 26, 1971, with the same sacral-lumbar and leg complaint, and again on December 8, 1971, with the sacral-lumbar complaint, but with no leg discomfort. Claimant at no time made compaints about any cervical pain. On July 19, 1972, Claimant complained of the same pain in the sacral-lumbar region, but made no other complaints. Dr. Siekerka treated Claimant as previously, with a pelvic adjustment. Dr. Siekerka testified that he urges his patients to return if they experience discomfort within three days to two weeks after treatment. Since Claimant's returns were spaced and over the years, Dr. Siekerka concluded that

Claimant had symptom free results from the treatment. Claimant did not return after July 19, 1972. He testified that he was unable to relate the pain Claimant experienced over the years to the 1964 incident and admitted it could have been caused from lifting heavy objects. He affirmed that he has never treated Claimant for any cervical injury, and any cervical injury would not be related to any treatment he gave to Claimant's sacral-lumbar area.

Dr. Locksley examined Claimant on November 6, 1972, and found weakness in both of Claimant's arms. A myelogram was performed and disc herniations were found at the C4 and C5 levels and the L4 level. Dr. Locksley's opinion was that cervical disc herniations caused pressure on the nerve roots to the arms and pressure on the spinal cord, resulting in numbness of the left side of Claimant's body and the hyperactive reflexes. Surgery was performed and the C4, C5, and C6 discs were removed. Claimant made a successful recovery. On March 14, 1973, Dr. Locksley felt that Claimant had made an essentially full recovery.

Dr. Locksley examined Claimant for, but never treated, his low back problem. He testified that Claimant's current symptoms, his arm pain and numbness of the left side of his body, had been of gradual onset and of about three months duration. These symptoms had no relation to his lower back problem.

Dr. Locksley felt that on March 19, 1973, Claimant could return to some kind of employment, although he recommended that Claimant not continue his present type of work. He felt that Claimant could drive a truck, but should not lift tons of weight over the course of a day, although he felt Claimant could do some lifting. If Claimant continued his present job, Dr. Locksley felt he would run a serious risk of incapacitating his lower back. He based his recommendations regarding future work upon Claimant's cervical disabilities, lumbar disabilities, and a heart murmur which was discovered.

Dr. Locksley testified that it was very likely Claimant's lumbar problem was caused by his work, although he could not relate it specifically to claimant's 1964 slip and fall incident. He testified that he was not surprised to find this back condition in a person who did Claimant's job for as long as Claimant had worked.

Dr. Locksley testified that the operation he performed would have no effect upon Claimant's lower back. He felt that the degenerative changes in the back reflect, in a large part, wear and tear and that the stresses in the spine are not equally distributed. He testified that there is a great predilection for people to get significant disc disease at certain levels of the spine, principally L4 and L5 and C5 and C6. Based upon his expert qualifications and experience, and within a reasonable degree of medical certainty, Dr. Locksley testified that Claimant's cervical disformation was due to his occupational injury. He also testified that Claimant's occupation was probably the principal factor contributing to his current lower back problem, and that it was unlikely that the 1964 incident was the main factor contributing to this problem. Claimant never told Dr. Locksley of his alleged July 18, 1972 incident.

Dr. George Perret, M.D., a neurosurgeon, examined Claimant on August 22, 1973. He took Claimant's history and examined Claimant. Claimant told him he developed pain in his right shoulder and neck after July 18, 1972, but that he was not presently experiencing pain. The neurological examination revealed that Claimant had a mild weakness of the left grip, and a mild loss of sensation in the tips of the left first and second fingers, but an otherwise neurologically normal examination. His neck and back were freely movable. The left Achilles reflex was diminished, though. The weak grip and loss of sensation related to Claimant's cervical problems while the Achilles reflex diminution related to the lower lumbar disorder.

Dr. Perret concluded, after examining the x-rays taken on November 4, 1972, that they showed spondylotic degenerative changes of C4, C5, and C6. He testified that spondylotic degeneration results from both gradual degeneration developing over several years and traumatic injury. He admitted that there was no way to tell which method of degeneration caused Claimant's cervical problems merely by examining x-rays, but concluded, after considering Claimant's history, that spondylotic degeneration was present on November 4, 1972. He testified that it was possible that the spondyliosis had been present for a long time and that something may have aggravated it. He testified that even a minor accident can produce symptoms which can then be relieved by correcting the spondyliosis, and that he believes that there must always be some event to trigger the symptoms.

Dr. Perret testified that, as of August 22, 1973, Claimant had a five percent disability, based upon his belief that his was a relatively minor disability and that Claimant's disability would not greatly impair his ability as a truck driver. However, Dr. Perret would not disagree with Dr. Locksley's recommendation that Claimant not continue the type of work he had been doing, although he continued to believe that Claimant was not greatly disabled.

Dr. Perret testified that Claimant gave him no history of cervical problems prior to July 18, 1972, although he stated that many people have cervical spondylosis and no symptoms. He diagnosed Claimant's lower back problem of November 9, 1972 as a disc rupture between L4 and L5, and his examination suggested that this condition continued. He admitted that he only examined a myelogram of Claimant's lumbar area and that a myelogram merely shows a defect in the spinal column, but not the nature of the defect.

The parties have stipulated that the following medical bills are fair and reasonable:

Mercy Hospital, Cedar Rapids, Ia.	$3,209.91
Dr. Fred Abbo	253.00
Dr. Netolicky	25.00

Dr. Locksley	1,170.00
Dr. Bates	208.00

In order to receive compensation, Claimant must prove by a preponderance of the evidence that his injury arose out of and was in the course of his employment. **Musselman v. Central Telephone Co.**, 261 Iowa 352 (1967). Preponderance of evidence means the greater weight of evidence, the evidence of superior influence or efficacy. **Bauer v. Reavell**, 219 Iowa 1212 (1935). Claimant has failed to carry his burden of proof.

Numerous contradictions in the evidence were not satisfactorily explained by Claimant. His original allegation that his injury occurred on October 26, 1972, may be excused due to his confusion regarding the Workmen's Compensation Law. However, it is odd that he changed the date of his injury a second time, finally settling on the date of July 18, 1972. Further, Defendant's terminal manager, William Spoenemann, testified that the company records indicate Claimant didn't work the week of July 18, 1972. Although it is preferred that those records be produced at the Arbitration hearing, his testimony at least creates an equipoise on the issue of whether Claimant worked that week. Also, Spoenemann testified, and Claimant confirmed, that Claimant has filled out Defendant's Personal Injury Report Form in the past when he had been injured on the job, but that he failed to fill one out for his July 18, 1972 incident. Nor did Claimant mention this incident to Frank Bain when he took Claimant's statement on November 28, 1972. Further, Dr. Siekerka testified that Claimant did not complain about pain in his cervical area on July 19, 1972, and was treated for lower back pain on that date. Dr. Locksley also testified that Claimant did not tell him of any July 18, 1972 incident. These inconsistencies are sufficient to cast doubt upon Claimant's allegation of a July 18, 1972 incident.

An expert medical witness' opinion may be rejected when it is based upon an incomplete history. **Musselman**, supra. Neither Dr. Locksley nor Dr. Siekerka had knowledge of Claimant's alleged July 18, 1972 incident and thus could render no opinions as to the causal relationship between such an incident and Claimant's subsequent cervical problems. Dr. Perret testified that he could not verify the occurrence of the alleged July 18, 1972 incident, based upon his own objective findings. In his diagnosis, he relied upon Claimant's own statements. Even though his diagnosis is consistent with such an incident, such consistency is not evidence of superior influence of efficacy over the evidence which tends to cast great doubt upon the veracity of Claimant's statements.

Unless knowledge of an injury is obtained by the employer within ninety days after the occurrence of the injury, no compensation shall be allowed. Code Section 85.23. The knowledge must be of the injury for which compensation is payable. **Mueller v. U.S. Gypsum Co.**, 203 Iowa 229 (1927). Claimant testified that he did not notify his employer before he went to Dr. Siekerka, but rather waited until October 26, 1972, when he went to the hospital. He testified that he called the afternoon dispatcher and told him when his injury happened, what he had done, and that he had pain. October 26, 1972 is more than ninety days from the date of the alleged July 18, 1972 incident. Thus, the requirements of Section 85.23 have not been fulfilled.

THEREFORE, the Arbitration Decision is hereby affirmed.

Claimant has failed to present sufficient facts to sustain his burden of proving that he sustained an injury arising out of and in the course of his employment.

Claimant has further failed to show that he gave timely notice as required by Section 85.23.

WHEREFORE, recovery must be and is hereby denied to the Claimant.

Costs of the Arbitration proceeding are taxed to the Defendant.

Signed and filed this 30 day of July, 1974.

ROBERT C. LANDESS
Industrial Commissioner

Appealed to District Court; Affirmed

Edward C. Owen, Deceased
Carolyn J. Owen, Surviving Spouse, Claimant,

vs.

Owen Construction Co., Inc., Employer,
and
Employers Mutual Casualty Co., Insurance Carrier,
Defendants.

Review Decision

Mr. Roger L. Ferris, Attorney at Law, 10th Flr., Hubbell Bldg., Des Moines, Iowa 50309, For the Claimant.

Mr. Leonard W. Grimsley, Workmen's Comp. Trustee, Shelby County Courthouse, Harlan, Iowa 51537, Trustee.

Mr. Frank T. Harrison, Attorney at Law, 510 Central Nat'l. Bank Bldg., Des Moines, Iowa 50309, For the Defendants.

This is a proceeding brought by Defendants, Owen Construction Company, Inc., and its insurance carrier, Employers Mutual Casualty Co., seeking a Review of an Arbitration Decision pursuant to Section 86.24 of the Iowa Workmen's Compensation Act, wherein Claimants, Carolyn J. Owen, spouse of Decedent, and Steven Owen, Scott Owen, and Shari Jo Owen, children of Decedent, were awarded compensation for the death of Edward C. Owen, Jr. Decedent was held to have died as a result of a motor vehicle collision and that at the time of his death he was in the course of his employment. The matter was submitted on Review upon the transcript of the Arbitration proceeding and the written

briefs and oral agruments of counsel.

Decedent, Edward C. Owen, Jr., was the President and Vice-President of the Owen Construction Company, a highway construction corporation, and owned 50 percent of its stock. The other 50 percent was owned by Edward C. Owen, Sr., Decedent's father. The business is located in Harlan, Iowa, at the home of Edward Owen, Sr. Decedent was killed at about 11:43 p.m., August 1, 1972, when the car which he was driving had an accident at the intersection of Highways 37 and 59, North of Harlan, Iowa.

On the morning of August 1, 1972, Decedent inspected a job site about four miles North of Kimballton, Iowa. Decedent subsequently met Edward Owen, Sr. in Kimballton and they proceeded to drive to Indianola, Iowa, in Decedent's pickup truck. His truck was owned by the company, but was occasionally used for personal, rather than business, purposes. The purpose of the Indianola trip was business — a pre-construction conference and submission of a bid for another job.

Shortly after 4:30 p.m., Decedent and his father left Indianola and drove to Armco Steel Company, 1704 East Euclid, Des Moines. They arrived shortly after 5:00 p.m., and left approximately 30 to 45 minutes later, after discussing an order they had placed with George Hall, Armco Manager, and picking up bolts. They headed North towards Interstates 35 and 80, stopped briefly at a filling station, and returned to Kimballton via Interstate 80 and Route 173. They arrived at about 7:30 p.m.

Robert Boldt testified that he was traveling South on Highway 71 at 6:30 p.m., when he saw Decedent's pickup traveling North, one mile North of the Intersection of Highway 71 and Highway F-24, a road which leads East from Irwin, Iowa. Boldt described the weather at that time as rainy. He testified that it was cloudy and that he was driving with his lights on, although he testified that it wasn't too dark to identify colors. Boldt said that he could identify the pickup as being Decedent's because Decedent's pickup had a bent grill and a broken headlight. However, Boldt was forced to admit that he neither specifically recognized Decedent in the pickup, nor specifically could recall that the truck he saw had a damaged grill or broken headlight. Boldt further admitted that if Decedent was in Des Moines between 5:45 p.m. and 6:00 p.m. that evening, then it probably would not be possible for Decedent to have been at that point on Highway 71 at 6:30 p.m. Also, Edward Owen, Sr. testified that he had redriven the route from Kimballton to Armco Company, for the purpose of timing the drive, and that the drive took 1 hour and 35 minutes.

Armco had a load of pipe to be delivered to an Owen's Company job site North of Kimballton near Fiscus, Iowa. It had been raining for four or five days, and it was unknown whether there was a suitable place where the pipe could be unloaded. Edward Owen, Sr. testified that on the day before August 1, he had observed the job site, that is was muddy, that the site was not passable with a pickup truck, and that it continued to rain between the time he left the job site and the time of the accident.

While they were in Kimballton, Decedent told his father that he was going to the job site to see if it was possible to park the pipe within a reasonable distance of the job.

Edward Owen, Sr. also left Kimballton at this time, and headed West toward Harlan on Highway 44. Both his and his son's company trucks had two-way radios and, shortly after departing, he radioed Decedent. Decedent said he was at the South end of the job site, a mile East of Fiscus, Iowa, and that he was going to check the North end a few miles away. He said he would then go to Irwin, Iowa, for supper, although Decedent's spouse testified that while Decedent was working at this job site, he normally came home for dinner. Edward Owen, Sr. testified that the nearest hard surfaced road leading to Harlan from the northern end of the job site was Highway F-24, which leads East from Irwin. The second nearest hard surface road leading to Harlan was Highway M-66, which leads North from Kimballton. Both routes were 25¼ miles from the North end of the job site to Harlan. Another hard surface road was actually closer to the North end of the job site than either F-24 or M-66, however, this road, F-32, did not head toward Harlan, but rather East, toward Audubon, Iowa.

During the radio conversation, Decedent said he would go to the company office in Harlan after dinner to pick up a set of plans. Decedent had his own key to the office, which was part of Edward Owen, Sr.'s home. Edward Owen, Sr. testified that he and Decedent would probably have had a conversation when Decedent arrived. He testified that he may have told an insurance investigator that Decedent said he would meet him in Harlan. Edward Owen, Sr. testified that, if Decedent had planned on discussing business with him he probably would have gotten there before 10:00 p.m., as Edward Owen, Sr. customarily went to bed at that time. Further, he testified that often Decedent would be in the office and he wouldn't know he was going to be there. Edward Owen, Sr. said he did not give it any more thought when Decedent failed to arrive.

Between 8:00 p.m. and 8:30 p.m., Decedent arrived at the J & R Lounge in Irwin, Iowa. He had at least one, but not more than three, beers before dinner. He was in the lounge at least one hour before eating a chicken dinner, had coffee with his meal, and left between 10:00 p.m. and 10:30 p.m. The dinner is of a type which takes 12 minutes to prepare. Rose Sondag, operator of the lounge, testified that the weather was very foggy that night, although she admitted to having no personal knowledge one would experience in driving a car that night. She testified that she had not known Decedent by name prior to the accident, but she had seen him before, and could identify him from a photograph. Shortly after August 1, 1972, she made statements to an insurance investigator, Gordon Mitchell, and to Decedent's spouse, to the effect that she couldn't say whether Decedent had eaten there that evening, that she was too busy to notice, and, in any event,

she was certain that he wasn't there after 10:00 p.m. However, Decedent's spouse testified that Sondag told her that she was worried about the Dram Shop Act at the time she made those statements. Further, Claimant testified that Sondag had subsequently made statements to her which were consistent with her testimony in court concerning Decedent's presence at the J & R Lounge.

It was stipulated that an ambulance was called to the intersection of Highways 59 and 37 at 11:48 p.m., and that the telephone call could not have occurred more than five minutes after the accident in which Decedent was killed.

A compensable injury, under the Workmen's Compensation Act, must be one arising out of and in the scope of employment. **McClure v. Union et al Counties**, 188 N.W. 2d 183 (Iowa 1971). 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. **McClure**, supra. An employee is within the scope of his employment when he performs some special service, errand, or duty incidental to his employment in the interest of his employer, and on his way home after performing such service, errand, or duty. **Pohler v. T.W. Snow Constr. Co.**, 239 Iowa 1018 (1948). Throughout the day of August 1, 1972, Decedent performed many services for his employer. He inspected a job site in the morning, drove to Indianola to bid a job, drove to Des Moines to discuss an order, and returned to Kimballton with bolts.

Upon his return to Kimballton, Decedent and Edward Owen, Sr. had conversations whereby Decedent expressed his intention to again travel to the job site, then eat dinner at Irwin, and finally proceed to the office to pick up plans for another job. Claimant contends that this evidence is not barred by Code Section 622.4, which prohibits a party to a proceeding, an interested person, a person from whom such party or persons derives property, and spouses of such party or persons from testifying to conversations they had with a person since deceased, as against the executor, administrator, heir at law, next of kin, assignee, legatee, devisee or survivor of the dead person. This section is directed toward the competency of a witness to testify, not toward the subject matter of the testimony. **Solbrach v. Fosselman**, 204 N.W. 2d 891 (Iowa 1973).

Three elements must exist in order for the testimony to be excluded under this section: (1) The matter must be in the nature of a personal transaction or communication with a person since deceased; (2) the witness must be a party to the suit, have an interest in the outcome of the suit, a spouse of either, or a person from whom a party or interested person derives property; and (3) the testimony must be against the executor, administrator, assignee, etc. of the Decedent. **O'Brien v. Biegger**, 233 Iowa 1179 (1943); **Shepard v. Pacific Mut. Life Ins. Co.**, 230 Iowa 1304 (1941).

The testimony given by Edward Owen, Sr. was to a communication with a person since deceased. However, Edward Owen, Sr. is not a party to this action nor the spouse of a party. Nor does a party or interested person derive property from him. Nor does he have an interest in the outcome of this suit, nor is he a spouse of such interested person. "The interest which disqualifies a witness must be present, certain and vested, and not uncertain, remote or contingent." **In re Estate of Willesen**, 251 Iowa 1363 (1960). Any interest Edward Owen, Sr. has because of his relationship to the claimant his daughter-in-law and grandchildren, or to the defendants, his corporation and its insurance carrier, is uncertain, remote, or contingent. He stands neither to financially gain or lose because of the outcome of this action. Thus, Edward Owen, Sr. is not a person whose testimony the statute contemplates excluding.

Further, his testimony was not offered against Decedent's executor, administrator, heir at law, next of kin, assignee, legatee, devisee or survivor. Only these people may involve the protection of Section 622.4. **O'Brien**, supra. "The test of competency is not whom the witness was for, but whom the witness was against." **O'Brien**, supra. Here, the testimony of Edward Owen, Sr. was offered against Decedent's employer and its insurance carrier. As such, they are not entitled to the protection of Section 622.4.

Consequently, Section 622.4 does not apply to Edward Owen, Sr.'s testimony. Thus, he was not incompetent to testify to the conversations he had with Decedent in the evening of August 1, 1972.

Nor is his testimony of those conversations excludable by reason of the hearsay rule. "There is a well established exception to the hearsay rule, where statements are made as to a design or plan." **Butler v. Butler**, 253 Iowa 1084 (1962). Citing 6 Wigmore on Evidence, 3d, Section 1725, the court said, "It has already been seen that the existence of a design or plan to do a specific act is relevant to show that the act was probably done as planned." Further, "To evidence that design or plan, the person's statements of his existing design or plan are admissable, (sic) under the general principle of the present exception."

Thus, the conversations Decedent had with Edward Owen, Sr. are admissible evidence of Decedent's intent to inspect the job site, eat supper, and subsequently pick up plans in Harlan.

It is mere speculation whether Decedent abandoned his intentions. Nothing in the record refutes Decedent's stated intention to inspect both ends of the Fiscus job site. Robert Boldt's testimony that he saw Decedent in a pickup truck at 6:30 p.m. is refuted by Edward Owen, Sr.'s testimony regarding the time of departure from Des Moines, and his computation of the time it took to drive to Kimballton. Further, Boldt never testified that he recognized Decedent as the driver of that truck, nor could he specifically recall the broken grill and the headlight. Consequently, considering the weather conditions, it is felt that Boldt was mistaken in his identification of Decedent. Thus, it is believed that Decedent did

inspect the job site.

Nor does the testimony of Rose Sondag refute his stated intentions. Rather, it confirms it. Her prior inconsistent statements to Claimant and Gordon Mitchell may be excused due to her fear of the Dram Shop Act. Testifying under oath, she placed Decedent at the J & R Lounge in Irwin from between 8:00 p.m. to 8:30 p.m. until his departure between 10:00 p.m. to 10:30 p.m. There appears to be no reason why Mrs. Sondag would fabricate a story about Decedent's presence in her lounge. Thus, there is no reason to doubt that the second leg of the journey Decedent intended was completed.

The roughly 90 minute gap between Decedent's departure from the J & R Lounge and his death remains a mystery. However, his whereabouts during that time is immaterial to the issue of whether he was in the course of his employment when he died. Again, there is nothing in the record to refute the evidence of Decedent's stated intention to proceed from Irwin to the office in Harlan. He had his own key to the office. Nothing indicates that it was mandatory for Decedent to see Edward Owen, Sr. upon his arrival at the office. And, since it is believed that Decedent had completed what he intended to do up until he left the J & R Lounge, there is no reason to doubt that he still had the intention to return to the office.

Decedent was serving his employer as fully in returning to the office following his inspection of the job site after his dinner as if he had returned without eating dinner. **Pohler**, supra. Decedent died on one of the most direct routes from the job site to Harlan. The fact that he stopped to eat along the way does not change the essential character of the trip from a special errand for his employer. Claimant may or may not have deviated from his employment while he ate. However, any deviation was ended when Decedent returned to one of the most direct routes from the job site to Harlan. **Crees v. Sheldahl Telephone co.**, 258 Iowa 292 (1965). He was then at a place where he reasonably would be while performing his duties. Thus, he died In the scope of his employment, and, therefore, his death is compensable.

THEREFORE, the Arbitration Decision is hereby affirmed.

It is found and held as findings of fact that:

Decedent's death arose out of and in the course of his employment for Owen Construction Company, Defendant, on August 1, 1972.

Claimants are entitled to weekly workmen's compensation benefits at the rate of sixty-three dollars ($63) per week for three hundred (300) weeks.

WHEREFORE, IT IS ORDERED THAT Defendants pay Decedent's surviving spouse, Carolyn J. Owen, thirty-one dollars and fifty cents ($31.50) per week for three hundred (300) weeks. Payments are to date from August 1, 1972, accrued together with statutory interest.

Defendants are further ordered to pay the Clerk of the District Court in and for Shelby County, for the benefit of Edward Steven Owen, Scott Allen Owen, and Shari Jo Owen, individually, ten dollars and fifty cents ($10.50) per week, total thirty-one dollars and fifty cents ($31.50) for three hundred (300) weeks, dating from August 1, 1972. Accrued payments are to be paid in a lump sum together with statutory interest.

It is further ordered that Defendants pay the burial award of one thousand dollars ($1,000). Further, it is ordered that the cost of these proceedings are taxed to Defendants, plus the cost of the shorthand reporter at the hearing.

Signed and filed this 25 day of July, 1974.

ROBERT C. LANDESS
Industrial Commissioner

No Appeal

Donald W. Hensley, Claimant,

vs.

Massey-Ferguson, Inc., Employer,
and
Sentry Insurance, Insurance Carrier, Defendants.

Order

This is a Review of an Order filed May 3, 1974, requiring Defendants to produce documents.

On March 18, 1974, Claimant filed a Motion to Produce Documents wherein he moved the Industrial Commissioner for an Order requiring Defendant to produce for inspection and copying all written records pertaining to Claimant's mental or physical condition which have been collected by the employer.

On March 25, 1974, Defendant filed a Resistance to Motion to Produce Documents. The Resistance stated:

1. There is no provision in the Code dealing with Workmen's Compensation or the Rules of Practice adopted by the Industrial Commissioner permitting Claimant access to Defendant's records.
2. The Rules of Civil Procedure do not apply to workmen's compensation cases, and these rules are the authority Claimant relies upon for relief.
3. The records Claimant seeks are Defendant's work product and thus not discoverable.
4. The records Claimant requested are privileged items, in the employer's control, are immaterial and are not susceptible to discovery.

Defendant cites **Iowa National Mutual Insurance Company, et al, v. Industrial Commissioner**, Polk County District Court Law No. 65138 (1955), which stated that the Iowa Rules of Civil Procedure do not apply in workmen's compensation cases. Defendant argues that, without a specific provision in the Workmen's Compensation Law or the Rules of Practice, the Commissioner is without authority to grant Claimant's relief.

It is the intent of the Workmen's Compensation Act to provide prompt payment to a covered employee who suffers an injury arising out of and in the course of his employment. **Blizek v. Eagle Signal**, 164 N.W. 2d 84 (Iowa 1969). To achieve that intent, the Act should be given a broad and liberal construction to comply with the spirit, as well as the letter, of the law. **Golay v. Keister Lumber Co.,** 175 N.W. 2d 385 (Iowa 1970); **Bergen v. Waterloo Register Co.**, 260 Iowa 833 (1967).

The purpose of the enactment of the Workmen's Compensation Act was to avoid litigation, lessen the expense thereof, and afford an efficient and speedy tribunal to determine and award compensation. **Shepard v. Carnation Milk Co.**, 220 Iowa 466 (1935). The legislature created such a tribunal to do rough justice — speedy, summary, informal, untechnical. **Cross v. Hermanson Bros.**, 235 Iowa 739 (1945). The law is for the benefit of the worker. **Prybyl v. Standard Elec. Co.**, 246 Iowa 333 (1955).

The Commissioner has the authority to do all things not inconsistent with the law in carrying out the provisions of the Workmen's Compensation Act according to their true intent and purpose. Code Section 86.8, subparagraph 5.

The Commissioner is directed to conduct such hearings and make such investigations and inquiries in such a manner as is best suited to ascertain and conserve the substantial rights of all parties thereto. Code Section 86.18:

> "It is clearly not the intention of the law that the provisions of the Workmen's Compensation Act should 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 (1934).
>
> "In the manner and method of making such inquiries, the commissioner is not to be hampered by formal or technical rules of procedure or of evidence, but may proceed in the manner which he believes best suited to develop the truth and thus to protect the substantial rights of the parties." **Renner v. Model L., C. & D. Co.**, 191 Iowa 1288 (1921).

It is believed that the manner best suited to develop the truth and to protect the rights of the parties in this case is to allow Claimant access to the medical records he seeks. It has been shown that there is ample authority in the Code and the case law to so allow, regardless of the provisions of the Rules of Civil Procedure.

Defendants alleged that the records Claimant seeks are privileged information and the work product of the employer. Defendants cite no authority for their allegations, nor do they argue them in their brief. It does not appear that Claimant's medical records are either privileged or otherwise nondiscoverable.

WHEREFORE, it is ordered that Defendants produce for inspecting and copying all written records pertaining to the mental or physical condition of Claimant which have been made or collected by the employer or its agents or employees.

Signed and filed this 24 day of July, 1974.

ROBERT C. LANDESS
Industrial Commissioner

No Appeal

Judith Ann Polson, Claimant,

vs.

Meredith Publishing Company, Employer,
and
Aetna Casualty and Surety Co., Insurance Carrier,
Defendants.

Order

On February 1, 1968, Judith Ann Polson, Claimant, allegedly suffered an injury arising out of and in the scope of her employment with Meredith Publishing Company, Defendant. A Memorandum of Agreement was filed on March 5, 1968. A subsequent Review-Reopening Decision, filed on December 31, 1968, awarded Claimant temporary disability benefits at the rate of forty-eight dollars ($48) per week for three weeks, Defendants being entitled to credit for payments already made. A second Review-Reopening Decision, filed on January 12, 1972, held that Claimant failed to sustain her burden of proving a change in condition between the date of the first Review-Reopening proceeding and the second. This decision was subsequently appealed to the Supreme Court. The matter is currently before a deputy commissioner on remand from the Supreme Court for the limited purpose of considering certain specific items of evidence. This proceeding is different from the subject matter of this order. This order is the product of a review of two orders entered by a deputy commissioner on July 12, 1972, and July 14, 1972, respectively.

On May 25, 1972, Claimant filed two applications:

1. An application for medical care, under Section 85.27, alleging that Defendants, by filing a Memorandum of Agreement, have admitted that Claimant's injuries arose out of and in the course of her employment. As medical and hospital care under Section 85.27 is unlimited in time and amount, Claimant prayed for additional medical care at the expense of Defendant.
2. An application for a medical examination, under Section 85.34, alleging that the evaluation of disability by Defendant's physician was too low and praying for reimbursement from Defendants for an examination conducted by a doctor of her own choice.

After a hearing, the Deputy Commissioner, on July 12, 1972, filed an Order. This Order:

1. Denied Claimant's application for a medical examination under Code Section 85.34.
2. Sustained Claimant's application for med-

ical care pursuant to Code Section 85.27.
3. Ordered that:
   a. Defendants give a list of three psychiatrists to Claimant, Claimant to choose one to conduct an examination.
   b. A hearing be held after this examination, the testimony at the hearing to be limited to medical testimony regarding the issue of causation between Claimant's current alleged injury and the February 1, 1968 incident.
4. Held as a point of law that the statutes of limitation do not apply to the benefits in Code Section 85.27.

On July 14, 1972, Claimant filed a Notice of Appeal of this order. Later on July 14, 1972, an Order Nunc Pro Tunc was filed. This order states that it is the finding of the undersigned Deputy Industrial Commissioner that the written order entered July 12, 1972, does not reflect the order actually made. Therefore, the July 14, 1972 Order Nunc Pro Tunc deleted all but paragraph one of the July 12, 1972 order and ordered that:

1. Claimant's application for a medical examination under Code Section 85.34 be overruled.
2. Claimant's application for medical care be sustained, in part.
3. Claimant is entitled to a medical exam at Defendant's expense.
4. Defendants submit the names of three psychiatrists to Claimant, who will pick one to conduct an examination.
5. Claimant provide Defendants with a copy of that psychiatrist's report.
6. Defendants have the right to require Claimant to submit to a further psychiatric examination.
7. A further hearing will be held on the necessity of further medical care under Code Section 85.27, such hearing to be limited to the issue of medical causation between the February 1, 1968 incident and Claimant's current alleged injury.

This order also held that there is no statute of limitations applicable to Code Section 85.27.

Section 85.34 provides:

> "Whenever an evaluation of permanent disability has been made by a physician retained by the employer, and the employee believes this evaluation to be too low, he shall have the right, upon application to the commissioner and at the same time delivery of a copy thereof to the employer, to be reimbursed by the employer the reasonable fee for a subsequent examination by a physician of his own choice, and such physician chosen by the employee shall have the right to confer with and obtain from the employer-retained physician sufficient history of the injury to make a proper examination."

No evaluation of permanent disability has been made by a physician retained by the employer, and Claimant has conceded that Section 85.34 does not apply to her case.

Code Section 85.27 provides that the employer shall provide reasonable medical care for the employee. It is Claimant's contention that the deputy commissioner lost jurisdiction to enter the Order Nunc Pro Tunc because of his previously filed appeal to the district court of the July 12, 1972 order. Claimant then contends that the July 12, 1972 order sustained her Application for Additional Medical Care in full. Further, she contends that the order to Defendants to make a list of psychiatrists available, Claimant to choose one to conduct an examination, was an additional remedy for Claimant, one which was not necessary for her to take.

It is not necessary to decide whether the deputy commissioner had the jurisdiction to enter the Order Nunc Pro Tunc. However, it should be noted that the district court held that that court did not have jurisdiction until the Commissioner ruled on the July 12, 1972 order.

Once an injury is found to occur in the course of employment and arise out of it, it becomes compensable. **McClure v. Union et al Counties**, 188 N.W. 2d 283 (Iowa 1971). It is only when there is a direct causal connection between the employment and the injury that compensation can be made. **Musselman v. Central Tele. Co.**, 154 N.W. 2d 128 (Iowa 1967). Once this causal connection is found, it becomes Defendants' duty to furnish reasonable medical, surgical and hospital services. **Sister Mary Benedict v. St. Mary's Corp.**, 255 Iowa 847 (1963). The burden of proving causation is on Claimant. **McClure**, supra.

At the time of the orders, the record was void of evidence linking Claimant's alleged condition and the February 1, 1968 incident. Although the July 12, 1972 Order states that "Claimant's application for medical care pursuant to Sec. 85.27, Code of Iowa, be and the same is hereby sustained", this sentence should not be read out of context with both the remainder of the Order and the state of the record when that Order was promulgated. The order of a medical examination and a continuance of this matter was for the purpose of allowing the parties to find and adduce such evidence. Had the July 12, 1972 Order sustained Claimant's Application for Medical Care in full, then the order of an examination and subsequent hearing would be surplusage. Construing the Order as a whole, and in such a manner as to give effect to each sentence, it is found that Claimant's Application for Medical Care is still pending, and that the deputy commissioner has retained jurisdiction to resolve the issue of causation.

On June 27, 1974, Defendants filed a Motion to Dismiss, alleging that Claimant's applications for medical care and an examination are barred by the three year statute of limitation contained in Code Section 86.34. That section pertains to a review of a compensation award, whereby the employer or employee must request that the award be reviewed within three years of the date of the last compensation payment. This section does not pertain to the ongoing duty of the employer, under Code

Section 85.27, to provide medical care to an employee adjudged injured arising out of and in the scope of his employment. Section 85.27 has no statute of limitations on medical care available to an injured Claimant if that care is causally related to an on the job injury which was initially covered by the Workmen's Compensation Law.

WHEREFORE, it is ordered that:

1. Claimant's application for a medical examination under Code Section 85.34 be overruled.
2. Defendant's Motion to Dismiss be overruled.
3. Claimant's Application for Medical Care be sustained, in part.
4. Defendants submit the names of three psychiatrists to Claimant, who will choose one to conduct an examination at Defendant's expense.
5. Claimant provide Defendant with a copy of that psychiatrist's report.
6. Defendants have the right to require Claimant to submit to a further psychiatric examination.
7. A further hearing will be held on the necessity of further medical care pursuant to Code Section 85.27.
8. This hearing will be limited to the issue of medical causation between Claimant's February 1, 1968 incident and her alleged current problems.

Signed and filed this 23 day of July, 1974.

ROBERT C. LANDESS
Industrial Commissioner

No Appeal

Arnold Nelson, Claimant,

vs.

Wilson Motor Company, Employer,
and
Universal Underwriters Insurance Company,
Insurance Carrier, Defendants.

Review Decision

Mr. Ronald E. Runge, Attorney at Law, 436 Davidson Building, Sioux City, Iowa 51101, For the Claimant.

Mr. William J. Rawlings, Attorney at Law, 273 Orpheum Elec. Bldg., Sioux City, Iowa 51101, For the Defendants.

This is a proceeding brought by Claimant, Arnold Nelson, seeking a Review under the provisions of Section 86.24 of the Iowa Workmen's Compensation Act, of an Arbitration Decision wherein the claimant was awarded temporary total disability benefits from his employer, Wilson Motor Company, and its insurance carrier, Universal Underwriters Insurance Company, on account of an alleged injury sustained September 16, 1971. The case was submitted on the transcript of the evidence presented in the Arbitration proceedings, and briefs and oral arguments of counsel. No additional evidence was presented at the Review proceeding.

Arnold Nelson, Claimant, was 47 years old and employed by Wilson Motor Company, Defendant, where he performed body and fender work on autos. Claimant reported for work at his employer's body shop at approximately 8:00 a.m., Friday, September 16, 1971. He performed his usual auto body work during the morning. After lunch, there was no other customer work to be performed. Claimant began to do body work on his own automobile. It was customary for employees to be allowed to work on their own automobiles when there were no other customers' cars requiring repairs. This work was done in a stall at the employer's place of business and with the employer's tools. This custom was approved by the employer.

The normal workday was 8:00 a.m. to 5:00 p.m., although Claimant could have apparently asked for and received permission from the foreman to leave the premises on Friday afternoon, if no other customer work was pending. Claimant normally worked forty hours per week. He worked on a commission basis, whereby he received 50 percent of the labor charges as wages. When work was done on a personal automobile, a bill was prepared the same as for any other customer, including parts and labor. The employee paid this bill, including the same labor rate charged other customers and then received back 50 percent of the labor rate as wages. This does not differ substantially from when an employee works on other customers' cars and receives 50 percent of the labor rate as wages, except that perhaps the employee might receive a discount on parts.

In the body shop, there was a leaking water faucet which caused the floor to be wet in the area where Claimant was working. While Claimant was using an ungrounded grinder on his own car, he received an electrical shock. Claimant stated he may have "blacked out" momentarily. He stated he recalls being on the floor and half sitting against the wall. He did not recall whether or not he hit the floor or nearest wall, which was about six or seven feet behind where he was working. There were no eyewitnesses to the actual incident.

Albert Jasman, a co-worker, testified that he "heard the grinder stop and hit the floor." He testified to hearing no other sounds. Jasman reached Claimant ten to fifteen seconds after the incident. He testified that he was not particularly alarmed by the sound of the falling grinder and did not stand up immediately. By the time he first saw him, Claimant was standing on the right side of his car towards the front of the fender, about five feet away from the nearest wall. Jasman testified that Claimant was "kind of stooped over, shoulder hunched up" and was holding his right arm. Claimant's only statement to Jasman was that he was "shocked off the grinder."

Following the incident on September 16, 1971,

Claimant went to a Dr. Hirsch. Claimant told Dr. Hirsch that he got an electrical shock from a grinder. Dr. Hirsch took his blood pressure and temperature and told Claimant to go home, lie down, and take it easy for a while. The next day, September 17, 1971, Claimant went to Dr. John S. Tracy, M.D., Dr. Hirsch's partner. Claimant complained of a headache and sore muscles. Dr. Tracy testified that he probably didn't ask Claimant which muscles were sore. Dr. Tracy took Claimant's blood pressure, looked in his eyes and ears, felt his grip, and tested his reflexes. No x-rays were taken. Dr. Tracy described the examination as superficial. He found no objective signs of disability and testified that Claimant's grip with his right hand was pretty good.

Dr. Tracy next saw Claimant on September 20, 1971, when Claimant complained of a weakness in his right arm. Dr. Tracy saw no evidence of weakness, although he can't remember performing any tests at that time. No x-rays were taken.

Claimant's next visit to Dr. Tracy was on September 22, 1971. Dr. Tracy recorded no history and has no record of either examining Claimant, performing tests, or taking x-rays. Dr. Tracy talked to Claimant, but can't recall what Claimant's complaints were. Dr. Tracy diagnosed no disability and recommended that Claimant return to work.

Claimant returned to Dr. Tracy on February 14, 1972, complaining of weakness in his right hand and numbness. Dr. Tracy testified that he examined Claimant, although he can't recall what, if any, tests were performed. Again, no x-rays were taken. Dr. Tracy found no evidence of disability, and, in his opinion, Claimant had none.

On March 7, 1972, Claimant saw Dr. Hirsch, who diagnosed weakness of right arm, but that the condition was stable. No x-rays were taken. Dr. Hirsch filled out and sent a form regarding Claimant to "Rehabilitation Education and Services." In that form, Claimant was diagnosed as having weakness in his right arm and abnormality in his muscles. This was linked, on the form, to the electrical shock of September, 1971. Also, under the heading "activities in which this individual will be limited and working conditions which he should avoid", the categories "lifting", "pushing", and "pulling" were checked by Dr. Hirsch.

Claimant first saw Dr. Horst G. Blume, M.D., a neurosurgeon, on October 5, 1971. He complained of pain in the right arm, headaches in the forehead region, and weakness of his right arm. Dr. Blume administered neurological tests with a squeezing device which indicated that Claimant's right arm was weaker than his left. Although Dr. Blume made no diagnosis, he had "an impression" there was weakness. Dr. Blume prescribed some vitamins and Bellergal Spacetabs. On January 7, 1972, Dr. Blume saw Claimant again. Claimant stated to Dr. Blume he had headaches in the back of the head radiating to the forehead. He also stated that for approximately the six previous weeks he suffered from blurred vision. Claimant reiterated his complaint of arm weakness and, following tests, Dr. Blume diagnosed a right arm strength of 70 percent to 80 percent of normal. Dr. Blume arranged for visual tests at St. Vincent Hospital, Sioux City, Iowa, and an electromyogram with a Dr. John Billion in Sioux Falls, South Dakota. The visual examination indicated practically normal visual field on both sides. The electromyogram to test muscle structure indicated no abnormality in the right arm, although Dr. Blume testified that sometimes even a patient with weakness can have a normal electromyogram. Dr. Blume also arranged for Claimant to be treated as an outpatient at St. Vincent Hospital.

Dr. Blume next saw Claimant on September 18, 1972. Claimant complained of blurred vision, weakness of the right arm, and headaches in the head-neck junction. This is the first indication of any cervical pain. Tests for arm weakness indicated a right are strength of 80 percent of normal. He began sonar dynator treatment. On October 10, Claimant saw Dr. Blume and complained of the same problems as he did on September 18, 1972. Dr. Blume ordered x-rays to be taken the following day. They revealed a possible fracture of the Vertebral body, C-6, and a calcified hematoma anterior to the lower cervical spine, indicating an injury caused by trauma had occurred at some time. Based on the results of the x-rays, Dr. Blume planned to perform a myelogram on Claimant within a few weeks.

Dr. Blume's diagnosis, based on a reasonable degree of medical certainty, was an injury to the lower cervical spine with a fracture of the vertebral body C-6, injury to the adjacent disc with nerve root irritation of the lower cervical nerve roots, and evidence of a calcified hematoma. He testified that, within a reasonable degree of medical certainty, the incident of September 16, 1971, is responsible for the injury to the neck and that Claimant sustained an electrical shock at that time. Dr. Blume was uncertain whether the electrical shock alone caused this injury or whether it was caused by the electrical shock and the subsequent fall against the wall. He concluded that, within reasonable medical certainty, there will be some permanent disability to the body as a whole.

Defendant argues that Claimant was not in the course of employment at the time of his injury, because he was working on his own automobile, and that he might have left the premises, after securing permission, for there was no other customers' work to be done. Claimant was providing an economic benefit to his employer, however, equal to that of doing body work on any customer's automobile. The company still received an increment of profit on the parts and retained 50 percent of the labor rate. The only difference was that Claimant had a lesser out-of-pocket expense, in that he received his normal commission for repairing his own car.

The employer acquiesced in the practice of employees working on personal vehicles and the claimant was available on the premises should a customer's automobile require repair. Addi-

tionally, Claimant did not violate any employer-employee regulations. For treatment of a strikingly similar situation where a gas station attendant was working on his own car when the hoist slipped, killing him, see **Chrisman v. Farmers Cooperative Association of Bradshaw**, 179 Nebraska 891, 140 N.W. 2d 809 (1966). See generally, **1 Larson, The Law of Workmen's Compensation**, §27.31(b) (1972).

No reason appears to doubt Claimant's testimony that the September 16, 1971 incident did, in fact, occur as he testified. The ten to fifteen seconds it took for Albert Jasman to respond to the sound of the dropping grinder would be sufficient time for Claimant to be thrown by a shock, regain his senses, stand up, and walk a few feet back to his car.

The problem remains in determining the nature and extent of Claimant's current injuries and linking them to the September 16, 1971 incident. Dr. Blume's diagnosis is based upon a reasonable degree of medical certainty and is not refuted in the record. Dr. Blume had examined Claimant four times before he made that diagnosis. Each time he took Claimant's history. He prescribed medication on October 5, 1971, and continued Claimant on the same medication on January 7, 1972. Dr. Blume prescribed sonar dynator treatment for Claimant's arm and arranged for Claimant to be an outpatient at St. Vincent Hospital in physical therapy. He also arranged for Claimant to be tested by a Dr. Billion and a Dr. Hoberg.

Claimant visited Dr. Tracy on four occasions. The examinations were "superficial", to use Dr. Tracy's terminology. Little history, if any, was ever taken. Dr. Tracy said he was never impressed with Claimant's complaints and thought Claimant was "faking it from the word 'go'." His prescription was that Claimant return to work. His diagnosis was that there was nothing wrong with Claimant. He apparently formed an opinion of Claimant early in their relationship and refused to deviate from that opinion, even in light of Claimant's repeated complaints.

When an expert's opinion is based upon incomplete history, it is not necessarily binding upon the Commissioner. **Musselman v. Central Telephone Co.**, 154 N.W. 2d 128 (Iowa 1967). The history taken by Dr. Tracy includes no reference to a cervical involvement, and no examination was made by him in that area. The testimony given by Dr. Blume, based upon a more complete examination and history, is more reliable and entitled to greater weight. It is interesting to note that Dr. Tracy's deposition was taken two days after that of Dr. Blume, and that he was never questioned regarding Dr. Blume's diagnoses and opinions, nor was he questioned with regard to the x-rays which were then available.

Further, Dr. Blume testified that, based upon a probability, the September 16, 1971 incident caused the described neck injury. There is no evidence to show that any other trauma caused the neck injuries. Claimant testified that he never received any injuries to his head, arm, or back prior to September 16, 1971, and that his arm problems began on that date. Considering Claimant's work record, it is felt that it is not within his character to malinger. There is no cause to doubt the veracity of his testimony and no evidence to the contrary was elicited. Thus, Claimant has established a prima facie case that his injury arose out of and was in the course of his employment.

Dr. Blume further testified that, within reasonable medical certainty, there will be some permanent disability to the body as a whole, but felt that the percentage should be determined by the Industrial Commissioner. When an injury is to the body as a whole, the Workmen's Compensation Act compensates industrial, not merely functional, disability. **Olson v. Goodyear**, 255 Iowa 1112 (1963). "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,** supra. Claimant testified that he is able to perform physical labor with his right arm for only an hour or two before he tires. In the past ten years, his work experience consisted of only driving a truck and performing body and fender work. He is a high school graduate who has taken one college course in mechanics. Since his injury, he has performed light work at an auto body shop in Sioux City beginning around Christmas time, 1971.

Although the claimant's entire extent of permanent disability cannot at this time be determined with a great degree of accuracy, it is apparent that some permanent disability has existed for a period of time and to some degree will continue even after satisfactory medical assistance is rendered to the claimant. The duty is with the defendants to proffer reasonable and necessary medical assistance to the claimant. Such assistance as has been rendered to this Claimant thus far has been lacking so far as the injury to Claimant's cervical area is concerned.

Medical care to treat the claimant's total injury as a result of the September 16, 1971 injury should be proffered by doctors of defendant's choice forthwith. In the interim period, it is determined that the claimant has sustained a 10 percent disability to the body as a whole. This percentage of disability can then be the subject of a later proceeding pursuant to Section 86.34 of the Workmen's Compensation Act, **if conditions warrant** after proper medical treatment has been completed for Claimant's total injury.

It was stipulated by the parties that if competent witnesses were called to testify, they would testify that the hospital bills at St. Vincent Hospital are reasonable charges. Those bills include one for $20 for a visual examination on February 1, 1972, and two bills for physical therapy in February, 1972, for $30 each. The total bill at St. Vincent Hospital is $80.

Dr. Blume testified that the fee for his services

to date was $195, and that the fee was fair and reasonable.

Dr. Tracy testified that his bill for treating Claimant was $54. However, $15 of that bill was paid by the Rehabilitation Service for a physical examination. This leaves as unpaid balance of $39.

THEREFORE, the Arbitration Decision is hereby reversed.

It is found and held as findings of fact:

That the claimant sustained a personal injury arising out of and in the course of his employment with Wilson Motor Company, Sioux City, Iowa, on September 16, 1971.

That this injury resulted in temporary headaches, blurred vision, and a cervical injury resulting in a weakened right arm.

That the injury has resulted in a permanent partial disability of ten percent(10%) of the body as a whole.

That the $20 bill at St. Vincent Hospital for a visual examination on February 1, 1972, and the $60 bill at St. Vincent Hospital for physical therapy in February, 1972, were necessitated by the September 16, 1971 incident.

That Dr. Blume's bill for $195 was necessitated by the September 16, 1971 incident.

WHEREFORE, it is ordered that the defendant, Wilson Motor Company, and its insurance carrier, Universal Underwriters Insurance Company, pay fifty (50) weeks permanent partial disability at the stipulated rate of sixty-four dollars($64.00) per week, plus a healing period of fifteen (15) weeks at the stipulated rate of fifty-nine dollars($59.00) per week, payments dating from September 16, 1971, accrued payments to be made in a lump sum together with statutory interest.

It is further ordered that Defendants pay the medical bills necessitated by the September 16, 1971 incident:

St. Vincent Hospital	$ 80.00
Dr. Tracy	39.00
Dr. Blume	195.00

Costs of this proceeding and the Arbitration proceeding are taxed to the defendants.

Signed and filed this 3 day of July, 1974.

ROBERT C. LANDESS
Industrial Commissioner

No Appeal

Robert C. Connet, as Conservator for Edwin Albert Kray, Claimant,

vs.

Farmers Mutual Cooperative Creamery Association, Employer,
and
Iowa National Mutual Insurance Company, Insurance Carrier, Defendants.

Review of Order

Mr. Robert F. Wilson and Mr. Larry P. Walshire, Attorneys at Law, 810 Dows Building, Cedar Rapids, Iowa 52401, 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, Farmers Mutual Cooperative Creamery Association and their insurance carrier, Iowa National Mutual Insurance Company, for review of an order overruling their motion to dismiss. Defendants' motion to dismiss was based on the grounds that the filing of the claim was barred by the period of limitations set out in section 85.26, Code of Iowa.

The claimant was injured in an auto accident on October 29, 1969. It has been alleged that the claimant incurred extensive personal injuries including brain damage from the accident. The district court, on August 3, 1973, entered an order and decree appointing Robert C. Connet Conservator of the property of Edwin Albert Kray. An application for arbitration before the Iowa Industrial Commissioner was filed on July 16, 1974, by Robert C. Connet on behalf of Edwin Albert Kray. The claimant is seeking compensation for personal injuries occurring on October 29, 1969, allegedly arising out of and in the course of his employment with Farmers Mutual Cooperative Creamery Association.

The claimant contends that for a person who is rendered mentally incompetent from a compensable injury, the two year period of limitations for filing an original proceeding under section 85.26 does not begin to run until that claimant becomes mentally competent or until a legal representative is appointed for him.

The defendants contend that on the face of the petition the period of limitations under section 85.26 has passed, thus they have filed a motion to dismiss based upon such period of limitation for Claimant's failure to state a claim upon which any relief may be granted, as provided by Iowa Rule of Civil Procedure 104(b).

The question determinable on review is whether the motion to dismiss is a proper vehicle to raise a period of limitations arising under section 85.26 of our Code. This entails a review of the Iowa Rules of Civil Procedure and section 85.26, Code.

In Iowa, the demurrer was abolished in 1943 by Iowa Rule of Civil Procedure 67. By Iowa Rule of Civil Procedure 101, any defense "which admits the facts of the adverse pleading but seeks to avoid their legal effect," must be specifically plead except as allowed by Iowa Rule of Civil Procedure 104. Iowa Rule of Civil Procedure 104(b) provides that a "(f)ailure to state a claim on which any relief can be granted may, be raised by the motion to dismiss...."

In **Pride v. Peterson**, 173 N.W. 2d 549, 554 (Iowa

1970), the court reviewed the raising of a period of limitations by a motion to dismiss:

> "We conclude the bar of limitations is primarily an affirmative defense to be specially asserted in a separate division of the responsive pleading to the claim for relief. Nevertheless, in a situation where it is obvious from the uncontroverted facts appearing on the face of the assailed pleading not only that the claim for relief may be barred but that it is necessarily so barred when the action is commenced, defense of limitations may properly be raised by motion to dismiss under the Iowa Rules of Civil Procedure. This is true whether the proceedings be at law or in equity."

The determination of whether the claimant's petition presents a situation which affords the appellant the option of raising the defense of limitations by motion to dismiss must be based upon matters alleged in the challenged pleadings. "...The Iowa rule is limited to those petitions which show on their face that the plaintiff is not entitled to 'any' relief." 21 Drake Law Review 447, 455 (1971-72).

The standard for sustaining a motion to dismiss under Iowa Rules of Civil Procedure 104(b) occurs where it appears to a certainty that a Claimant would not be entitled to any relief under any state of facts which could be proved in support of the claims asserted by him. **Liken v. Shaffer,** D.C. Iowa, 64 F. Supp. 432 (1946). **Van Camp v. McAfoos**, 156 N.W. 2d 878 (Iowa 1968). 21 Drake Law Review 447 (1972).

The Iowa Rule of Civil Procedure 104(b) is substantially identical to the Federal Rules of Civil Procedure 12(b) (6). The majority of cases under the Federal Rules of Civil Procedure have held that the defense of statute of limitations may be raised by motion to dismiss. **Pride v. Peterson,** supre. The sustaining of a motion to dismiss under the Federal Rules of Civil Procedure occurs where it appears beyond doubt that the claimant can prove no set of facts in support of his relief. **Conley v. Gibson,** 355 U.S. 41, 78 S. Ct. 99.

The purpose of the motion to dismiss is to raise an issue of law for the court's decision in advance of a trial on the merits. All well pleaded facts in the petition are admitted for the purpose of testing their legal sufficiency. **Sitzler v. Peck,** 162 N.W. 2d 449 (Iowa 1968). Such a motion is an affirmative assertion of the defense which serves notice that the defendant does not waive it, and that it would be a waste of time and effort contrary to the spirit of the Rules of Civil Procedure to require the defendant to prepare an answer if the case can be disposed of without further delay. **Pride v. Peterson,** supra.

The injury under consideration occurred October 29, 1969. The application for arbitration was filed July 16, 1974. On the face of the petition, over five years have passed since the occurrence of the injury and the filing of the claim for compensation.

Iowa Code Section 85.26 states, in part:

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

Unless the period of limitations did not begin to run from the date of injury, as the claimant contends, it appears the motion to dismiss is a proper vehicle to raise the period of limitations.

At what point in time did the period of limitations begin to run? A historical review of legislative enactments and cases pertaining to workmen's compensation coverage for the period of limitations for filing the original claim with the industrial commissioner is necessary to determine if the claimant has the right to proceed with his case for determining if an award is proper.

In **Secrest v. Galloway**, 239 Iowa 168, 170, 30 N.W. 2d 793, 795 (1948), the court stated:

> "Workmen's Compensation Acts are statutory and are, in various forms, in effect in many jurisdictions. However such acts are not uniform and vary in the several states, both as to content and rules of construction adopted by the courts. Appellees cite many authorities from various states as bearing upon their theory. Appellant could likewise cite authorities, equally as strong, tending toward his theory. + + + However, none of them is of particular benefit in determining this appeal as it is the Iowa act with which we are concerned, examined in light of its own wording, historical background and judicial interpretations of this court."

In construing a statute, it is important to consider in arriving at the intention of the legislature, the subject matter, effect, consequences, as well as the words in interpreting and construing it. **Overbeck v. Dillaber**, 165 N.W. 2d 795 (Iowa 1969).

In **Otis v. Parrott**, 233 Iowa 1039, 8 N.W. 2d 708 (1943), the court construed Section 1386 of 1939 Code of Iowa (Now Sec. 85.26). In the **Otis** case, the injury to the employee occurred on January 4, 1939. The employee died on July 21, 1939 from tuberculosis, which was connected with the injury received previously. The widow filed for arbitration with the industrial commissioner on February 5, 1941. The supreme court dismissed the proceedings, as barred by Section 1386 of the 1939 Code of Iowa (now Sec. 85.26). The court construed the statutory language of statutes of other states with section 1386 (85.26) under our Code. They cited, among others, the Wisconsin statute which which provides the right to proceed shall not "extend beyond six years from the date of the injury or death." Wisconsin Stat., 1943, section 102.17(4). The word "injury" under this type of statute is construed to mean a "compensable injury" or "knowledge of a latent injury" or, in general, a condition that first entitled a claimant to compensation. Under the Iowa Code, section 1386 (85.26) does not end with the word "injury". The beginning date for the limitation period is the "date

of injury causing such death or disability." By these latter words the legislature has designated the "injury" it means. It does not mean the resultant injury or the state of facts or conditions which entitle the claimant to compensation. It is the causal injury without reference to whether it is compensable or not. The causal injury occurred on January 4, 1939, and the period of limitations ran before the application for arbitration was filed with the industrial commissioner. When the legislature specifies that the causal injury will control, then the court is bound by the words of the statute. The language of this statute evidences an intention to set a definite limitation to the period within which proceedings may be commenced without reference to the exigencies which arise from a trivial injury that later causes a compensable injury. The statute relates not only to proceedings for compensation for death, but also to proceedings for compensation for disability. In each instance, it is the causal injury that is the starting date for the limitation period within which the proceedings may be maintained.

The case of **Secrest v. Galloway Company,** supra, defines the difference between a general limitations statute and a special limitations statute. Strictly speaking, a statute of limitation affects the remedy, not the right. A general limitation statute is defined to be the action of the state in determining that after the lapse of a specified time, a claim shall not be enforced in a judicial proceeding. In a special limitation statute qualifying a given right, time is made an essence of the right created, and the limitation is an inherent part of the statute or agreement out of which the right in question arises, so that there is no right of action whatever independent of limitations. A lapse of the statutory period operates, therefore, to extinguish the right altogether.

> "The Workmen's Compensation Law creates a right of action, but by Section 1386, it conditioned the enforcement of the right to 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 those 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,** 233 Iowa 1039, 1045-46, 8 N.W. 2d 708, 712 (1943).

Under the statement of **Otis v. Parrott,** supra, and in accord with other pronouncements of the court, the court in **Secrest v. Galloway Company,** supra, stated that Section 1386 (now 85.26) is a special statutory limitation rather than a general one.

Such cases as **Otis v. Parrott,** supra, **Secrest v. Galloway Company,** supra, and the language of Section 85.26 itself seem to require the period of limitations to begin at the happening of the causal injury whether compensable or not. If the application of arbitration is not filed within that two year time period, then the right to claim benefits is lost. Filing within the period of limitations is a condition precedent to having a claim heard for proper consideration.

The claimant relies on general principles of equity in extending the period of limitations for mental incompetents. He also relies heavily on the case of **Mousel v. Bituminous Material and Supply**, 169 N.W. 2d 763 (Iowa 1969), as support for his proposition that the period of limitations for the commencement of the original proceeding does not begin until the claimant becomes mentally competent or until a legal representative is appointed for him. In the **Mousel** case, the claimant was severely burned in 1958. He delayed in seeing a doctor until 1964 and learned of his skin malignancy in June, 1966. In September, 1966, the claimant filed an application for arbitration. The claimant contended that the period of limitations for commencement of proceedings did not begin to run until the claimant learned the nature of his disability. Claimant cited **Jacques v. Farmers Lumber Supply Company,** 242 Iowa 548, 47 N.W. 2d 236 (1951) as being on point. The court felt that **Jacques** was not on point because it involved a statutory interpretation of Section 85.23 and not 85.26 of our Code, which is presently in issue. The court felt that the **Jacques** case was not intended to overrule or modify **Otis v. Parrott,** supra, because the cases dealt with different issues. The court, in denying the claimant relief, specifically mentioned "that **Otis v. Parrott,** supra, has never been overruled." The court does indicate that the claimant did not exercise ordinary or reasonable care and that he should not be thus permitted to toll the period of limitations.

The reasonable man standard has not been used in workmen's compensation cases to determine if period of limitations is tolled. It is in conflict with prior statutory interpretations of Section 85.26, specifically **Otis v. Parrott**, supra. Volume 19, No. 2, Drake Law Review 402 (1970) concludes that in the **Mousel** case "because the proceeding was not commenced within two years from the date of injury, the time of the burns in 1958, it was barred."

We are concerned in the present case with a claimant which has apparently been mentally impaired from the date of injury. The application for arbitration was not filed within the period of limitations and that stands as a formidable reason for barring his claim. The policy, expediency, wisdom of a statute are legislative not judicial questions. If the legislature had wanted or intended to exempt persons under any disability of any sort from the force of the period of limitations in Code Section 85.26, they could have easily done so. Where no exception or exemption is found in the statute, no such exception or exemption exists. **Boyle v. Boyle,** 126 Iowa 167, 101 N.W. 748; **Collier v. Smaltz**, 149 Iowa 230, 128 N.W. 396; **Rohrig v. Whitney**, 234 Iowa 435, 12 N.W. 2d 866; **Tesdell v. Hanes**, 248 Iowa 742, 82 N.W. 2d 119. As stated in **Boyle v. Burt**, 179 N.W. 2d 513, 516 (Iowa 1970), "...no court, under the guise of construction, may extend, enlarge, or otherwise change the terms and meaning of a statute."

Claimant cites Iowa Rule of Civil Procedure 614.8 in support of extending the statute of limitations for the claimant in this matter. It should be noted that R.C.P. 614.8 which extends the period of limitations for mentally ill persons also extends the period for minors. The rule in substantially the same form was in effect at the time **Otis v. Parrott**, supra, was decided. The infancy of some of the claimants in the **Otis** case did not stop the application of the period of limitations. No reason exists to apply the rule to part of those persons listed in the rule and not the rest. If the disability of minority is not exempted, neither should the disability of mental incompetency be exempted.

On the face of the petition, the period of limitation under Iowa Code Section 85.26 has passed. The claimant, under the law in Iowa, is not entitled to any relief under any state of facts which could be proved in support of the claims asserted by him. We feel we are compelled to hold unless we resort to judicial legislation that the motion to dismiss be sustained.

WHEREFORE, the Deputy Commissioner's Order overruling Defendant's motion to dismiss is reversed.

It is hereby held that it appears on the face of the application for arbitration that the period of limitations under Iowa Code Section 85.26 has passed, thus making the motion to dismiss valid.

THEREFORE, Defendant's motion to dismiss Claimant's application for arbitration is sustained.

Signed and filed this 30 day of May, 1975.

ROBERT C. LANDESS
Industrial Commissioner

Appealed to District Court; Pending

Janice Rowan, Claimant,

vs.

Aluminum Company of America, Employer,
Self-Insured, Defendant.

Review Decision

Mr. Allan Hartsock, Attorney at Law, 1808 - 3rd Avenue, Rock Island, Illinois 61201, For the Claimant.

Mr. Charles Brooke, Attorney at Law, 717 Davenport Bank Bldg., Davenport, Iowa 52801, For the Defendant.

This is a proceeding brought by the claimant, Janice Rowan, pursuant to Section 86.24, Code of Iowa, seeking Review of an Arbitration Decision wherein Claimant was denied workmen's compensation benefits from her employer, Aluminum Company of America, for a back injury alleged to have been received arising out of and in the course of her employment on March 22, 1973.

The case for Review was presented on the transcript of evidence received at the Arbitration proceeding, the evidentiary depositions of Dr. Emil M. Stimac, Dr. Leo Miltner, Dr. William Reinwein, Dr. Dennis L. Miller, and the oral arguments of counsel. Additional evidence in the form of deposition of Raymond Berner was proferred, however, such deposition had been received prior to the rendering of the Arbitration Decision and was apparently considered by the deputy commissioner in his decision.

Janice Rowan, Claimant, had been employed by the defendant, Aluminum Company of America, since January 22, 1973, as a hand nailer. In this capacity, she would build boxes out of wood according to specifications found on blueprints and then move the boxes by hand to skids located a few feet away. The job required some bending and lifting. Claimant could lift the smaller items used in making the boxes, but received assistance when lifting larger material and when moving the larger boxes. Claimant testified she had no difficulty in performing her duties prior to March 22, 1973, and was working seven days a week on the 11:00 p.m. to 7:00 a.m. shift.

At approximately 5:30 a.m., on March 22, Claimant and her associate, Michael Portray, had just pushed a wagon load of material near their station in order to continue constructing boxes. Portray had left the area to talk to the foreman.

Raymond Berner was backing up a fork lift truck used to move the completed skids out of the area. While Claimant was bending over the wagon to pick up some material to take to her work bench, she was struck in the right buttock by this fork lift, "lunging" her forward and squeezing a portion of leg below the knee between the wagon and the back part of the fork lift. Claimant described the fork lift as "idling slow" when it came in contact with her body. As evidence of her injury, Claimant had a laceration on her leg at the point of impact with the wagon and a swelling on the right side of her right calf from the knee down to a few inches above the ankle which lasted about six weeks. She had no bruise on her right buttock.

Following the incident, Claimant was treated by the defendant's medical department and their plant physician, Dr. Stimac. Treatment consisted of application of an ice bag to Claimant's leg and wrapping the leg with an ace bandage. Dr. Stimac found no fracture to Claimant's leg. Claimant was restricted to light work for three or four days, and limited to a five day week. After the three or four days of light work, Claimant returned to her position as a hand nailer with her associate Portray. She continued working with Portray for approximately six weeks without experiencing any back pain.

After the six weeks, Claimant was transferred to another work table doing essentially the same work, but constructing bigger and heavier skids with an associate named Annie Stokes. It was following this transfer, around May 10, the Claimant experienced back pain, increased leg pain, and noticed her leg "started dragging". Claimant continued to work about three weeks at this station and then returned to Doctor Stimac with complaints of increased pain. Doctor Stimac suggested Claimant try using

her leg more and to remove the ace bandage from her leg. Dr. Stimac testified he saw the claimant on June 22 and noted complaints of pain in the right calf and discomfort in the tailbone area. He made an appointment for the claimant to see Dr. Miltner, an orthopedic physician.

Claimant was examined by Dr. Miltner on June 30. Dr. Miltner testified he found "no objective evidence of the things she complained of." Claimant was particularly distressed by the demeanor, examination and diagnosis of Dr. Miltner and reported the same to Dr. Stimac. As a result, Claimant sought independent examination by another orthopedic surgeon of her own choosing, as was suggested by Dr. Stimac.

On July 6, Claimant was examined by Dr. William Reinwein. Dr. Reinwein's examination produced findings that suggested the patient had a ruptured disc. Upon further examination and taking of a myelogram, which showed a herniated disc at the L-5, S-1 disc space, Dr. Reinwein performed a laminectomy on L-5, L-4 and L-5, S-1 portion of Claimant's back. Following the surgery, Claimant testified her leg no longer "dragged" but she continued to have some stiffness and weakness of the back. She has been under treatment by Dr. Reinwein since surgery and from time to time has received muscle relaxants by injection, diathermy and Methicolator treatments, as needed, for purpose of physical therapy.

Claimant sought to return to work at Alcoa on several occasions. At the request of Dr. Stimac, Claimant was examined by Dr. Dennis Miller for the purpose of determining the claimant's ability to return to work. Dr. Miller did not feel Claimant was capable of returning to work which required heavy lifting and suggested that a program of physical therapy could help her return to employment at a later date. Dr. Miller testified Claimant had a fifteen percent (15%) impairment of the spine, equivalent to ten percent (10%) impairment of the body as a whole.

The claimant has the burden of proving by a preponderance of evidence that injury sustained on March 22, 1973 at Alcoa plant is the cause of her disability which forms the basis of her complaint. **Lindahl v. L. O. Boggs**, 236 Iowa 296, 18 N.W. 2d 607, **Bodish v. Fischer, Inc.**, 257 Iowa 516, 133 N.W. 2d 867. The mere possibility that the claimant's injury caused her disability is not sufficient to establish the necessary causal connection. Claimant must establish a probability that her March 22, 1973 injury is the cause of her disability. **Burt v. John Deere Waterloo Tractor Works**, 247 Iowa 691, 73 N.W. 2d 732.

Establishing the causal connection is essentially within the domain of expert testimony. **Bradshaw v. Iowa Methodist Hospital**, 251 Iowa 375, 101 N.W. 2d 167. However, when the expert's opinion is based upon incomplete history, it is not necessarily binding on the commissioner. **Musselman v. Central Telephone Company**, 261 Iowa 352, 154 N.W. 2d 128. When the expert's opinion is based upon incomplete history, it must be weighed, together with other facts and circumstances, and ultimate conclusion is for the finder of fact. **Musselman v. Central Telephone Company**, supra.

Dr. Reinwein testified that his expert "opinion is absolutely based on the history." He further testified the history of the patient correlated "pretty well" with his opinion. While the opinions of experts in workmen's compensation cases need not be couched in definite, positive, or unequivocal language, **Sondag v. Ferris Hardware**, 220 N.W. 2d 903, the weight to be given an expert opinion is for the finder of fact. **Bodish v. Fischer**, supra.

It appears from Dr. Reinwein's testimony that his history is not correct, or at least incomplete. He states that Claimant "sustained a rather severe whiplash injury when she was unexpectedly hit by the truck from the back." None of the other observers or even the claimant ever spoke of a whiplash or any similar occurrence. In light of this inconsistency, Dr. Reinwein's opinion must be weighed, with the other facts and circumstances and also balanced with the other expert opinions of Dr. Miltner and Dr. Miller.

The claimant has failed to meet her burden of proving the March 22, 1973 injury is the cause of her claimed disability. Claimant's evidence doesn't establish the necessary preponderance, since even Claimant's expert medical testimony establishes that it would be "unusual" to find an achilles reflex measuring plus two if a herniated disc at L-5, S-1 existed. Dr. Miltner found a plus two achilles reflex measurement for Claimant on June 6, 1973, when he examined the claimant. Dr. Reinwein's later examination found no achilles present. Also the description of the incident given by the claimant, Portray, the claimant's associate, and Berner, the operator of the fork lift, refute the conclusion of Dr. Reinwein that the claimant received a severe whiplash.

In view of the expert medical testimony of Dr. Miltner and Dr. Miller that the claimant's disability was not caused by the incident on March 22, Dr. Reinwein's opinion as to causation must fall. It should be noted that no finding of fact is made as to what did cause the herniated disc, but whatever caused the disability, it was not the incident that occurred on March 22, 1973, at the defendant's plant.

THEREFORE, the decision of the deputy industrial commissioner is hereby affirmed.

Costs of the arbitration proceeding are taxed to the defendants. Each party shall bear their own costs in the review proceeding.

Signed and filed this 6 day of May, 1975.

ROBERT C. LANDESS
Industrial Commissioner

No Appeal

Leo Sondag, Claimant,

vs.

Ferris Hardware, Employer,
and

Grain Dealers Mutual Ins. Co., Insurance Carrier, Defendants.

Review Decision on Remand from Supreme Court

Mr. Michael Mundt, Attorney at Law, 203 North Main Street, Denison, Iowa 51442, For the Claimant.

Mr. Burns H. Davison II, Attorney at Law, 1040 Des Moines Building, Des Moines, Iowa 50309, For the Defendants.

This is a matter brought by the claimant, Leo Sondag, to recover benefits as a result of an injury alleged to have been received arising out of and in the course of his employment with Ferris Hardware on August 20, 1971. The original arbitration decision denied benefits. On review, the original arbitration decision was affirmed. On appeal to the district court, the original review decision was affirmed. On appeal to the supreme court, the district court decision was affirmed in part, reversed in part, and remanded to the industrial commissioner with instructions. The portion of the district court decision which appears to have been affirmed is the decision of the district court refusing to hold, on expert testimony alone, that Claimant as a matter of law proved his injury arose out of and in the course of his employment. The portion that was reversed was failure of the district court to remand to the commissioner for reconsideration of Dr. Louis Banitt's testimony, in light of a proper evidentiary rule or for supplemental decision showing the evidence relied on, standards applied and reasoning used in rejecting that testimony.

The supreme court concluded that this commissioner either rejected Dr. Banitt's opinion testimony through application of an erroneous rule of evidence or rejected it for reasons unassigned.

The evidentiary rule which the supreme court alleged this commissioner erroneously applied was requiring that expert opinion evidence have the quality of "certainty". That portion of Dr. Banitt's testimony which related to the use of the word "certainty" had to do with the doctor's negative response to a question regarding whether he could state with certainty that the fact of continuing activity insured an infarction and that had immediate rest been instituted, the infarction would not have occurred. It was not the intention of this commissioner to infer that expert opinion evidence required the quality of certainty. Neither was it the feeling of this commissioner that the opinion evidence of Dr. Banitt should be rejected.

The supreme court (citing cases from Tennessee and New Jersey) indicated that it should be judicially noticed that complete rest and immobilization are ordinarily prescribed for persons who are undergoing a heart attack. It was not previously known by this office that this prescription was of such common knowledge that it should be judicially noticed.

The supreme court further stated that it has long been legally recognized that damage caused by continuous exertions required by the employment after the onset of a heart attack is compensable, citing cases from the 29th and 30th Biennial Reports of the Iowa Industrial Commissioner. It should be noted that it has also been legally recognized that such is not always so, as indicated by the case of **Holman v. Iowa Beef Packers, Inc., et al**, immediately preceding the case of **Rogers v. Lake View Concrete Prod. Co., et al**, cited by the supreme court and contained in 29th Biennial Report Iowa Industrial Commissioner, p. 34.

The supreme court indicated that the evidence of Dr. Banitt "that claimant's continuing to work after the coronary onslaught would have aggravated the effect of the obstruction in the heart artery" was uncontroverted. While it was the thinking of this commissioner that the statement of Dr. Donald Soll that "this episode would have occurred regardless of the type of work" did, to some degree, controvert this opinion of Dr. Banitt, it is now found, based upon the directions on remand, that although the myocardial infarction would have, in fact, occurred in any event, that in this case the claimant's continuing to work after symptoms of the coronary onslaught did to some degree aggravate his condition.

It was the feeling of this commissioner, however, that the record did not support a finding that the work performed "more than slightly" or "materially" aggravated or accelerated a preexisting condition of Claimant's health. In the review decision, this commissioner quoted from the two prior Iowa Supreme Court cases as follows:

"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, 375; 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)

Claimant is not entitled to recover for the results of preexisting injury or disease, but only for an aggravation thereof which resulted in the disability found to exist. **Olson v. Goodyear Service Stores**, 255 Iowa 1112, 125 N.W. 2d 251. If a workman already has some disability and his disability is increased by a compensable injury, he is entitled to compensation to the extent of the increased disability. **DeShaw v. Energy Mfg. Co.**, 192 N.W. 2d 777.

There is not sufficient evidence in the record to make a finding as to the degree to which Claimant's continuing to work aggravated or worsened his condition.

THEREFORE, this case is remanded to the deputy commissioner with authority to take further evidence to determine whether or not Claimant's work more than slightly or materially aggravated his preexisting condition and if so, to what degree.

Signed and filed this 11 day of April, 1975.

ROBERT C. LANDESS
Industrial Commissioner

No Appeal

James V. Amadeo, Claimant,

vs.

Artistic Building Maintenance, Employer,
and
Aetna Casualty & Surety Co., Insurance Carrier,
Defendants.

Review Decision

Mr. Allan H. Rauch, Attorney at Law, 1420 East 14th Street, Des Moines, Iowa 50316, For the Claimant.

Mr. Frank T. Harrison, Attorney at Law, 510 Central Nat'l Bank Bldg., Des Moines, Iowa 50309, For the Defendants.

This is a proceeding brought by the claimant, James V. Amadeo, pursuant to Code Section 86.24 for Review of an Arbitration Decision wherein he was found to have been an independent contractor, thus excluded from coverage under the Iowa Workmen's Compensation Act, Code Section 85.61 (3) (b). The Review hearing was set for February 13, 1975, by agreement of counsel. Defendants appeared. No new evidence was presented, therefore, Review was on the record of the Arbitration proceeding.

The issue dealt with in the Arbitration Decision was whether the claimant was an employee or an independent contractor, at the time of the accident. The two areas of concern in regard to this issue are the elements required to be found when establishing an employer-employee relationship and the burdens of proof that are to be met by the respective parties involved.

The major elements in establishing an employer-employee relationship are found in the case of **Usgaard v. Silver Crest Golf Club**, 256 Iowa 453, 127 N.W. 2d 616 (1964). The major elements are as follows:

1. Employer's right to selection or to employ at will.
2. Responsibility for the 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 of for whose benefit the work is performed.

The court in **Usgaard**, supra, stated that additional overriding elements in determining if an employer-employee relationship exists are the intention of the parties who are creating the relationship, as well as the customary outlook taken by the community toward similar working relationships.

The applicable law in regard to the burdens of proof which must be met can be found in the case of **Nelson v. Cities Service Oil Co.**, 259 Iowa 1209, 146 N.W. 2d 261 (1967). The Supreme Court of Iowa in **Nelson**, supra, held that in order to prove an employer-employee relationship, the claimant must prove by a preponderance of the evidence that such relationship does exist. The claimant has the initial burden of proving the relationship prima facie. If the claimant is successful in such an attempt, the defendant then has two options. The burden of coming forth with the evidence is then upon the defendant if he chooses to try to negate the factual pattern presented by the claimant. The defendant, though, may allege an affirmative defense, such as an independent contractor status, which places upon the defendant the burden of proving by a preponderance of the evidence that the defense is valid and available. The elements which constitute the test as to whether an individual is an independent contractor can also be found in **Nelson,** supra. These elements 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.

The claimant testified that he was first employed by the defendant in 1967. While employed by the defendant, he performed various services including janitorial work and work on a "floor stripping" crew. In 1970, the claimant left his job with the defendant and began working for Ronnie Burton. The claimant stated that he was Burton's assistant in his window washing business.

The claimant worked for Burton less than a year, when upon his departure he started his own window washing business. The name of the claimant's business was "Jim's Window Service". The claimant worked out of the basement of his home and provided his own means of transportation. He negotiated and contracted for his own accounts and billed them on a monthly basis.

In 1971, Frank Scaglione, owner of the defendant-company, contacted the claimant requesting that he return to work for the defendant as a window

washer. The claimant accepted the offer and signed an employment contract which prevented the claimant from contracting to do work for other large building maintenance companies. The claimant, though, was allowed to continue servicing and billing his own accounts.

The arrangement created by the claimant and the defendant provided that the defendant would contract for the total maintenance of a building, including window washing. The defendant would then inform the claimant of the amount of money he would be paid to perform the window washing service on that building. Some tools and equipment were furnished to the claimant, including the safety belt which he was using when he was injured. The claimant's work would be checked by defendant's supervisors at regular intervals.

The agreement established by the claimant and the defendant provided that the claimant was to be paid for the services he rendered on a job-by-job basis; he did not receive an hourly wage. The amount that the claimant billed the defendant each month was predetermined, based on what buildings he had serviced during the applicable billing period. The claimant billed the defendant through his company, "Jim's Window Service". Those materials and supplies which were purchased through the defendants were deducted from the claimant's check. The defendant produced evidence in the form of tax returns which showed that they had not withheld any W-2 items from the claimant's checks, reporting him as a non-employee. Further, the claimant had the right to control the progress of his work, the defendants only inspecting the final work product.

Evidence was produced which was intended to elicit the customary community outlook taken in regard to similar working relationships. Those who testified in this respect were window washers, all of whom hold similar positions to that of the claimant with large building maintenance companies. These witnesses testified that they considered themselves to be self-employed.

Under the evidence presented, it is found that the claimant proved prima facie that an employer-employee relationship did exist. It is further found, though, that the defendant proved by a preponderance of the evidence that the claimant was an independent contractor, thus not entitled to compensation.

THEREFORE, the Arbitration Decision is hereby affirmed.

It is found and held as a finding of fact:

That on May 22, 1972, the claimant was not an employee of the defendant.

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

WHEREFORE, recovery must be and is hereby denied to the claimant. The defendant is ordered to pay the cost of the shorthand reporter at the Arbitration hearing.

Signed and filed this 26 day of March, 1975.

ROBERT C. LANDESS
Industrial Commissioner

Appealed to District Court; Pending

Maxine Pierce Montgomery, Claimant,

vs.

Iowa Ordnance Plant - Mason & Hanger, Employer, and

Employers Insurance of Wausau, Insurance Carrier, Defendants.

Review Decision

Mr. James C. Serkland, Attorney at Law, 228 North LaSalle Street, Chicago, Illinois 60601, For the Claimant.

Mr. R. R. Beckman, Attorney at Law, 604 F & M Bank Building, Burlington, Iowa 52601, For the Defendants.

This is a proceeding brought by the defendants, Iowa Ordnance Plant - Mason & Hanger, and its insurance carrier, Employers Insurance of Wausau, against the claimant, Maxine Pierce Montgomery, 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 found to have sustained an injury arising out of and in the course of her employment on May 30, 1972, resulting in a permanent partial disability of thirty-five percent (35%) of her body as a whole. The case came on for Review on the transcript of the Arbitration proceeding and the oral arguments of counsel.

The claimant commenced working for the defendant-employer as a production line worker in 1968. Her responsibilities consisted of removing redheads and boosters from a conveyor belt and packing them in boxes. Normally, 20 to 25 redheads, each weighing 1½ pounds, would be placed in a box. After filling a box with redheads, the claimant would move the box to a skid approximately five feet away. The boosters weighed 5 pounds apiece and were packed in boxes holding 10 each. When a box of boosters was filled, it was moved from the line a distance of approximately three feet, taped, and placed back on the production line. More redheads than boosters were normally handled by the claimant.

On May 30, 1972, the claimant was working the midnight to 8:00 a.m. shift at the defendant-employer's plant. Claimant testified that she felt fine prior to going to work and that she did not complain to anyone of feeling ill. The claimant further testified that production on this particular night was heavier than usual, as the redheads and boosters were placed closer together on the conveyor belt. In the claimant's estimation, she performed an hour and a half's work in the hour that she was there. She further stated that she fell behind in her work and that the temperature in the plant was very warm that evening.

At approximately 1:00 a.m., the claimant felt sharp

pains in her chest as she picked up a box of redheads to place it on a skid. She further noticed pain down her left arm and a tightness throughout her body. After informing her foreman of the pain, the claimant was taken to the plant hospital, which in actuality was a first aid station.

The claimant was seen by Jean M. Nelson, R.N., at the plant hospital at 1:28 a.m. Nelson noted complaints of nausea and pain in the claimant's upper right epigastric region. Nelson further took note of the fact that the claimant was pale and appeared to be in severe pain; that the claimant was perspiring and that her skin was cool to the touch. Nelson gave the claimant Darvon and called her daughter to take claimant to her own doctor. The claimant was then taken to the Community Memorial Hospital in Monmouth, Illinois, where she came under the care of Glenn Chamberlin, M.D., at approximately 4:30 a.m.

Dr. Chamberlin saw the claimant in the emergency room of Community Memorial Hospital on the morning of May 30, 1972. Upon examination of the claimant, he noted that she was pale and perspiring with indications of nausea and severe chest pain. The claimant's blood pressure at this time was 80/60. Electrocardiograms were taken on May 30, 1972 and May 31, 1972. Based upon his examinations of the claimant and the results of the electrocardiograms, Dr. Chamberlin diagnosed Claimant's condition as being due to an acute myocardial infarction.

The claimant was hospitalized approximately 21 days, five days of which were in the coronary care unit. Upon the claimant's release from the hospital, she remained under the care of Dr. Chamberlin and was treated with coronary dilator medication. The claimant was again hospitalized from June 16, 1973, until June 21, 1973. This hospitalization was caused by angina and duodenitis. Since the hospitalization in 1973, the claimant has remained under the care of Dr. Chamberlin and has received treatment consisting of a daily coronary dilator, nitroglycerin for angina, and a menopausal hormone.

Dr. Chamberlin testified as to the alleged causal connection between the claimant's myocardial infarction and her work. Dr. Chamberlin testified that the claimant suffers from coronary sclerosis and that this condition is not work related. He further testified that additional stress on the claimant's heart could bring about an occlusion. Dr. Chamberlin stated that it is his belief that in a work situation, the claimant's heart would beat at a rate faster than normal, and that in his opinion, the claimant's work on May 30, 1972 was the proximate cause of the myocardial infarction which she suffered.

In addition to the testimony of Jean Nelson, the defendants offered the testimony of Marjorie Walker, a fellow employee of the claimant, Cletus S. Paull, an observer for the U.S. Weather Bureau Recording Station in Burlington, Iowa, and Paul From, M.D., a specialist in internal medicine.

Marjorie Walker worked with the claimant at the defendant-employer's plant in Burlington, Iowa. Walker testified that she had talked with the claimant for a short time at a safety meeting prior to beginning work on May 30, 1972. She stated the claimant told her that she did not feel well, and that she should not have come to work that night. She further testified that production was no more than average on this particular evening.

In an affidavit presented to the commissioner, Paull stated the maximum and minimum temperatures and the rainfall readings in Burlington, Iowa, on May 29 and May 30, 1972. The facts reported were as follows:

May 29, 1972 - Maximum temperature 78°, minimum temperature 60°; rainfall 35/100 of an inch.

May 30, 1972 - Maximum temperature 64°, minimum temperature 50°; rainfall 2/100 of an inch.

At the request of the defendants, Dr. From examined the claimant on June 29, 1973. Dr. From gave the claimant a thorough physical examination, including numerous laboratory tests. Dr. From responded to two hypothetical questions. The first hypothetical, which was presented by the counsel for the defendants, assumed the facts that the claimant had suffered pains prior to going to work, that production was average and that the temperature was cool. In response to this question, Dr. From stated that, in his opinion, the claimant's myocardial infarction would have started prior to her going to work. On cross examination, however, he testified that under these circumstances, the work of the claimant would aggravate her condition.

On cross examination, the counsel for the claimant posed a second hypothetical to Dr. From. This hypothetic assumed the facts that the claimant had no pain prior to going to work, that the evening was warm and that the production was at a level greater than normal. Dr. From stated that, in his opinion, under these circumstances, the work of the claimant might be associated with the myocardial infarction which she suffered. Dr. From did not subject the claimant to a stress test, but did not feel that she was disabled as her physical examination was normal.

The claimant has the burden of proving the causal relationship between her injury of May 30, 1972 and the impairment to her health, on which she presently bases her claim. **Bodish v. Fischer, Inc.**, 257 Iowa 516, 133 N.W. 2d 867. The Supreme Court of Iowa, while holding that a mere possibility of a causal connection is not sufficient to support an award, has held that if a causal connection is not only possible but is fairly probable, an award will be sustained. **Nellis v. Quealy**, 237 Iowa 507 (1946). The incident or activity need not be the sole proximate cause if the injury is directly traceable to the incident or activity involved. **Langford v. Kellar Excavating & Grading, Inc.**, 191 N.W. 2d 667 (Iowa).

The Iowa Supreme Court has defined "personal injury" to be **any** impairment of one's health which results from his employment. **Almquist v. Shenandoah Nurseries, Inc.**, 218 Iowa 724, 254 N.W. 35. A

claimant is not entitled to compensation for results of a preexisting injury or disease, but the existence of this is not alone a defense to the subsequent injury suffered. If the claimant had a preexisting condition or disability which is aggravated, accelerated, worsened or "lighted up" so that it results in the disability found to exist, she is entitled to compensation to the extent of that resultant injury. **Yeager v. Firestone Tire & Rubber Co.**, 235 Iowa 369, 112 N.W. 2d 812.

The testimony of the claimant and Dr. Chamberlin sustained the claimant's burden of proof that on May 30, 1972, she suffered an injury that arose out of and in the course of her employment with the defendant-employer which resulted in a compensable disability. The claimant had a preexisting condition of coronary sclerosis which was aggravated and worsened by her work-related activities at the defendant-employer's plant on May 30, 1972. Although the testimony in regard to the commencement of the occlusion which led to the myocardial infarction was in dispute, both Drs. From and Chamberlin agreed that her work would aggravate her condition even if the occlusion began prior to her reporting to work.

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 must be given to the injured employee's age, education, qualifications, experience and her inability, due to her injury, to engage in that employment for which she is suited. **Olson v. Goodyear Service Stores**, 255 Iowa 1112, 125 N.W. 2d 251.

Applying the evidence of this case concerning the claimant's industrial disability to the guidelines educed in the case of **Olson v. Goodyear Service Stores**, supra, it is found that the claimant has sustained a thirty-five percent (35%) permanent partial disability to the body as a whole. Dr. Chamberlin declined to rate the claimant's functional disability and stated that the claimant would be unemployable if her subjective feelings of pain and weakness are accepted. Dr. From did not administer a stress test to the claimant, but believed that she was not disabled as her examination with him produced normal findings.

In regard to his treatment of the claimant, Dr. Chamberlin submitted a bill of $655, less the $110 paid by Equitable Insurance Company. The claimant submitted bills from Community Memorial Hospital for her two periods of hospitalization in the amounts as follows:

1972 - $2,121.62 1973 - $820.04

Dr. Chamberlin's testimony established that his bill and the bill for the claimant's 1972 hospitalization were fair, reasonable and necessary for the treatment of the myocardial infarction. Dr. Chamberlin's testimony failed to show that the claimant's hospitalization in 1973 was causally connected to her employment. The bill from Axline-Crawford Pharmacy for nitroglycerin was prescribed by Dr. Chamberlin and indicated by him to be necessary for the treatment of the claimant's condition.

WHEREFORE, the Arbitration Decision is hereby affirmed. It is found and held as findings of fact:

That the claimant sustained an injury arising out of and in the course of her employment on May 30, 1972.

That such injury resulted in permanent partial disability of thirty-five percent (35%) of the body as a whole.

That such injury is compensable at the rate of $59 per week.

That the claimant was incapacitated from working from May 30, 1972 to March 6, 1974, and is entitled to healing period compensation at the rate of $64 per week.

That the defendants should pay the medical bills of Dr. Chamberlin, Community Memorial Hospital for the 1972 hospitalization, and the drug bill for nitroglycerin from Axline-Crawford Pharmacy.

THEREFORE, it is ordered that the defendants pay the claimant one hundred seventy-five (175) weeks of permanent partial disability compensation at the rate of fifty-nine dollars ($59) per week. Defendants are further ordered to pay the claimant ninety-one and six-sevenths (91 6/7) weeks of healing period compensation at the rate of sixty-four dollars ($64) per week. Defendants are further ordered to pay the following medical bills:

Dr. Chamberlin	$655.00
Community Memorial Hospital	$2,121.62
Axline-Crawford Pharmacy	(nitroglycerin)

Defendants shall reimburse the claimant for any of the above bills paid by her and are entitled to credit for benefits paid pursuant to Section 85.38, Code of Iowa. Accrued payments are to be paid in a lump sum together with statutory interest. The costs of these proceedings are taxed to the defendants.

Signed and filed this 20 day of March, 1975.

ROBERT C. LANDESS
Industrial Commissioner

No Appeal

Raymond M. Reiland, Claimant,

vs.

Palco, Inc., Employer,
and
State Automobile and Casualty Underwriters,
Insurance Carrier, Defendants.

Amendment to Review Decision

Mr. G.A. Cady, Attorney at Law, 9 - 1st Street, S.W., Hampton, Iowa 50441, For the Claimant.

Mr. Roy W. Meadows, Attorney at Law, 1400 Central Nat'l. Bank Bldg., Des Moines, Iowa 50309, For the Defendants.

NOW, on this 26th day of March, 1975, the matter of defendants' Motion to Amend the Review Decision in this matter filed February 28, 1975, comes on for consideration of the inclusion of findings of fact

and conclusions of law regarding defendants' asserted defense that the claimant failed to give notice of his claimed injury, as provided in Section 85.23, Code of Iowa.

It is hereby held as finding of fact that Claimant's condition, which is the subject matter of this controversy, was not diagnosed by Dr. Schepers until on or about August 7, 1972; that no other doctor had previously diagnosed Claimant's toxic condition as being causally related to his employment and that Claimant's application for arbitration was filed on September 6, 1972.

It is hereby held as conclusion of law that Claimant gave notice as required by Section 85.23, Code, as notice was given within ninety days from the time the physician's diagnosis disclosed to the employee the nature of his disability. **Jacques v. Farmers Lumber & Supply Company**, 242 Iowa 548, 47 N.W. 2d 236.

Signed and filed this 26th day of March, 1975.

ROBERT C. LANDESS
Industrial Commissioner

Appealed to District Court; Dismissed

Raymond M. Reiland, Claimant,

vs.

Palco, Inc., Employer,
and
State Automobile and Casualty Underwriters, Insurance Carrier, Defendants.

Review Decision

Mr. G. A. Cady, Attorney at Law, 9 - 1st Street, S.W., Hampton, Iowa 50441, For the Claimant.

Mr. Roy W. Meadows, Attorney at Law, 1400 Central Nat'l. Bank Bldg., Des Moines, Iowa 50309, For the Defendants.

This is a proceeding brought by Palco, Inc., Employer, and State Automobile and Casualty Underwriters, Insurance Carrier, pursuant to Code Section 86.24 for Review of an Arbitration Decision wherein Raymond M. Reiland, Claimant, was awarded medical benefits and weekly compensation for permanent total disability. The case was presented on the transcripts of the evidence presented at the Arbitration proceeding and the evidence of several doctors presented at the Review. hearing.

Raymond Reiland, Claimant, was a forty-nine year old widower who had an eighth grade education. He worked on a farm all his life until 1970, when he began working for Palco, Inc., Defendant. Defendant is a small manufacturer of assorted farm equipment such as salt feeders, cattle corral gates, lot gates, and loading chutes. Defendant employs between twenty and thirty people. Although Defendant trained him to work at a machine, Claimant had occasion to assist Donald Wilson in Defendant Employer's paint room. Claimant testified he had never before worked in a place where paint thinners were used.

Donald Wilson, a co-employee, analogized the paint room to a double garage, approximately twenty-two feet by twenty-six feet, connected to the manufacturing building. One door led to the welding room and another, a garage-type door, led to the outside. The room was ventilated by a fan on the floor, which was not always operable, and by louvered openings in the walls. Wilson testified that the thermostat was set at 90°, so the paint would dry quickly.

Five gallon buckets, fifty-five gallon barrels, and two tanks filled with paint in which the manufactured products were dipped were located in the room. One dip tank was 6 to 8 inches high, 13½ to 14½ feet long, and 5½ to 6 feet wide and used for dipping long gates. Approximately fifty-five gallons of paint and twenty-five gallons of paint thinner were poured into this tank. The other tank was approximately a four foot cube and used to dip other manufactured items. Spray paint equipment was available in the room for items too large to fit in the dip tanks.

The paint was delivered to the plant in fifty-five gallon barrels. The thinner was delivered every two weeks by a truck which would pump the thinner into two fifty-five gallon barrels kept in the plant. Wilson testified that generally more thinner than paint was used in the paint room.

Paint and thinner were transferred to the dipping tanks by tipping the barrels, pouring the paint or thinner into five gallon cans, and then pouring the cans into the tanks. When the barrel was light enough to be lifted, it would be picked up by hand and the remaining paint or thinner poured into the tank. A trial and error method was used to achieve the optimal ratio of paint to thinner. The barrels of thinner were always sealed, except during the pouring process. Paint was transferred from the dip tanks to the receptacle used for the spray gun. Claimant helped with the pouring process. Each night, instead of emptying the dip tanks, the paint was covered with a layer of thinner to prevent scum from accumulating on the paint surface overnight. In the morning, this layer would be mixed in with the paint.

The air in the paint room was stagnant. Wilson complained of this, but nothing was done. Wilson testified that gloves were not always available. He testified that the masks were either in poor condition, lacked filters, or were not designed for use by a spray painter. Wilson testified that no precautions in the use of the thinner were given. He testified that the clean up procedure at the end of the day was to use the thinner to wash hands. Fumes rose from the dip tanks, which caused tears to come to his eyes and made his nose burn whenever he had to lean over the tanks.

Claimant's duties included cleaning the steel as it came into the plant and once again before it was painted. He would soak a rag in thinner and then wipe the metal. He usually did this job with his bare hands. Subsequently, Defendants installed

a tank in which the steel was dipped to be cleaned. However, Claimant testified that this method did not always work and that he had to resort to cleaning the metal by hand with the thinner. Claimant also performed miscellaneous cleaning jobs in the paint room. Although he did not do any spray painting, he would be present in the room while spray painting was in progress.

Claimant was laid off during the winter months of 1970-71. When he resumed work in March, 1971, he continued to spend part of his time in the paint room. He would work there sometimes three days in a row. He worked there the entire week prior to his hospitalization in September, 1971.

In September, 1971, Claimant experienced double vision and was unable to insert a dime in a vending machine. His foreman was notified and Claimant was driven home. Later that day, Claimant went to a Dr. Young, who called Veterans Hospital. Previously, Claimant had had no problems with his vision, but had experienced dizziness while in the paint room. This dizziness was relieved by a short break in fresh air. Claimant's feet had also begun to hurt him after he had stood on them all day. He testified that it was a burning sensation that appeared towards the end of the day. Claimant had lost weight before his hospitalization.

Claimant was hospitalized for approximately six weeks, during which time he began to feel better. He resumed working for Defendant early in November, 1971. He began working in the main part of the plant, but began to spend half time in in the paint room around Christmas, 1971. He continued to perform the same duties in the paint room as prior to his hospitalization.

In January or February, 1972, Claimant again began to experience dizziness. Again, a short break relieved the problem. Claimant testified that it was hard for him to work during this period, as he was weak. Claimant was laid off on March 8, 1972, and has not worked regularly since. He has returned to Veterans Hospital on several occasions. He has attempted manual labor on a farm, but has found the work too strenuous.

Claimant described his problems as of the time he testified. His hands would constantly become numb. He had had chest pains for approximately one year. He had no strength in his hands and was generally fatigued. His hands were thin and becoming progressively thinner. He was unable to straighten out his hands, whereas he could do this a year earlier.

Claimant admitted to a drinking problem and had attended a few "AA" meetings prior to September, 1971. He testified that he did not drink for a period after his hospitalization, although he currently drinks two to three shots of whiskey each day. Claimant further admitted that he had worked after having a drink, but the drink did not affect his work.

John Nikkel had been Defendant's plant manager since 1969. He testified that Defendant had purchased two chemicals used for paint thinner, Toluol and Xylol. Toluol was used during the winter, while Xylol was used in the summer. Both were used for spray and dip painting.

From Barton Solvents, Inc., Defendant purchased 1,377 galllons of Xylol between March 16, 1969, and September 8, 1972, and 1,121 gallons of Toluol between August 6, 1969, and May 24, 1972. From Vogel Paint and Wax Co., Defendant purchased 108 gallons of "D-100" solvent, a solvent similar to Xylol, on January 30, 1970; five gallons of #11 spray thinner on July 6, 1970; and 1,134 gallons of "V-100" thinner, another substance similar to Xylol, between March 6, 1970 and February 26, 1971.

Nikkel testified that Claimant worked very little in the paint room in September, 1971, but that he worked there frequently after his return from the hospital. He testified that Claimant became dizzy less frequently than Wilson. Nikkel attributed most of Claimant's problems to drinking. Nikkel terminated Claimant's employment partly because he felt that Claimant was unable to do a satisfactory job and partly because of his drinking.

Nikkel affirmed that the garage-type door to the paint room was open in the winter only when things were taken in and out of the room. Occasionally, it would be open a crack, but it was never left standing open. He testified that paint room employees were allowed to step outside in the fresh air. He testified that Claimant was cautioned about the effects of the paint and was told not to wash his hands in the thinner too often. He testified that an industrial hand cleaner was available at the plant, such that Claimant was not required to use the thinner to wash his hands. Further, he testified that gloves and masks were also available.

The portion of the Arbitration Decision which summarizes the medical evidence presented at the Arbitration hearing is incorporated into this Review Decision by reference, with the following changes:

Page	Line	Change
9	43	Strike "9/20/71". Insert "9/17/71"
11	12	Strike ".117". Insert "117"
14	11-12	Insert between lines 11 and 12 the following:

"6/21/72 LDH 210 Normal
6/21/72 CPK 36 Normal"

14	36	Strike "6/24/72". Insert "6/21/72"
15	47	After line 47, insert the following:

"7/24/72 Blood count:

White Cell	7.1
Red Cell	5.18
Hemoglobin	15.7
Hemocrit	48.7
Mean Corpuscular volume	94
Mean Corpuscular hemoglobin	29
Mean Corpuscular hemoglobin concentration"	31.6

16	9	Strike " 'O' ". Insert " 'Q' "
16	28	Strike "Dr. Dieby". Insert "Dr. Acebey"
21	26	Insert the words "spur on the" between the words "small" and "olecranon".

21 28 Insert the words "the lining of" between the words "off" and "the".

A brief summary of the conflict in the medical testimony is exemplified in the conclusions of Drs. Schepers and From.

Dr. Gerrit W.H. Schepers, M.D., interpreted laboratory tests performed on Claimant between September 16, 1971 and June 21, 1972, as indicating that Claimant had a continuing chronic hepatosis which was chemically induced and that toxic exposure after Claimant's September, 1971 hospitalization excited the irritable areas of his brain.

From tests performed on July 24, 1972 and August 7, 1972, Dr. Schepers diagnosed toxic hepatosis due to Toluol poisoning. Based upon tests performed in February and April, 1973, as well as previous tests, Dr. Schepers opined that Claimant is permanently disabled from manual labor as a result of exposure to Toluol or Xylol. Further, according to Dr. Schepers, because of damage to Claimant's ulnar nerve due to entrapment caused by the toxic poisoning, Claimant will have a set of "claw" hands within a few years.

Claimant was examined in May, 1973, by Dr. Paul From, M.D., at Defendant's request. He reviewed the series of tests performed on Claimant since September, 1971, and concluded that Claimant was suffering from entrapment neuropathy of the ulnar nerve, bilaterally due to a naturally occurring osteoarthritic spur formation and that the clinical data indicates no evidence to support Toluol or Xylol poisoning.

A review of the additional testimony presented at the Review proceeding follows:

Dr. Kyle T. De Yarman, M.D., a Veterans Hospital ward physician and internal medicine specialist, examined Claimant on September 14, 1971. Claimant told Dr. De Yarman of his weight loss and weakness. Dr. De Yarman initially felt Claimant's problems were due to epilepsy. He felt hepatitis or toxic poisoning could be present. Later, Dr. De Yarman felt emphysema or neuropathy were possibilities. He suspected liver dysfunction.

Lab tests were performed. They indicated a malfunctioning liver. Dr. De Yarman began treating Claimant as he would treat any other case of liver damage. Within two weeks, Claimant's lab tests results approached normal, according to Dr. De Yarman. Dr. De Yarman told Claimant he could return to work. Dr. De Yarman, who had had no special training in the field of toxicology, testified that nothing alerted him to any relationship between Claimant's problems and the paint thinner.

Dr. De Yarman chose not to disagree with a diagnosis made subsequently by Dr. Schepers, that Claimant was suffering from an exposure to chemical substances. Rather, he testified his findings were consistent with that diagnosis and he tended to concur with Dr. Schepers, even though Dr. De Yarman had no knowledge concerning toxic poisoning. He testified that chemicals could cause liver damage which in turn could affect other body parts.

Dr. De Yarman testified that, had he known that Claimant worked in a painting room, or that both Claimant and Wilson, who he subsequently examined, worked at the same place, his diagnosis would have been different. From what he has read, he felt that Claimant's symptoms were possibly consistent with Toluol poisoning. He also affirmed that an internist, when arriving at a diagnosis, must consider the entire composite of tests, rather than looking at each test in isolation.

Dr. D. Siroospour, M.D., a surgeon, performed surgery on Claimant's elbows on September 19, 1973, October 24, 1973, to relieve pressure on Claimant's ulnar nerves. It was Dr. Siroospour's opinion that this nerve had become "entrapped" in both elbows—either it had swollen such that it was too large to fit in the groove in the elbow through which it runs, or the groove itself had become smaller, due possibly to bony growths there. Dr. Siroospour found no bony growths, although he testified that the nature of the operation was such that he would not cut deep enough to find any. He did not rule out their presence, even though he felt around in the area and felt no abnormalities. Dr. Siroospour's post-operative report states that the left ulnar nerve was swollen, appearing like a neuroma.

Dr. Siroospour examined x-rays of Claimant's elbows and testified that, in his opinion, they indicated a bony growth in the area of the ulnar nerve. He testified that a bone spur in Claimant's left elbow was not in the course of this nerve, but he was not sure whether it caused the entrapment.

Dr. Siroospour testified that exposure to a toxic chemical could be one cause of a swelling nerve. This in turn would cause pressure to that nerve. He testified that he found the same condition in both elbows and in the same area of each elbow. He testified that such a finding is consistent with the diagnosis that a chemical substance has caused the nerve to swell.

Dr. Floyd Burgeson, M.D., testified that tests performed on February 7, 1973, revealed no liver damage.

Dr. Anthony P. Neptune, M.D., a specialist in physical medicine and rehabilitation, examined Claimant on October 12, 1971, regarding the pain in Claimant's feet. Claimant described this pain as shooting from the ankles to the toes and spreading along the soles of his feet. Claimant had complained of this pain for five weeks prior to October 12, 1971.

Dr. Neptune found a 33% reduction in the strength of Claimant's grip. The soles of Claimant's feet were tender. He found no ankle or toe joint problems. Sensation in Claimant's feet was well preserved, except for possible loss of sensation at times between the great toe and the second toes on each foot. Motor function was normal and tendon reflexes active. Nerve conduction velocity was found to be low normal. However, Claimant's evoked potentials were abnormal. Dr Neptune found that Claimant exhaled a normal amount of air, but at a slightly abnormal rate.

Dr. Neptune diagnosed an inflammation of the soles of Claimant's feet. He testified that a variety of things could cause this condition, but that it is usually caused by trauma or walking. He has never heard of toxins causing such a condition.

Dr. Neptune testified that the reduction in strength of Claimant's grip could indicate general muscular problems. He testified that the weak grip could be an early symptom of the condition which manifested itself in the ulnar nerve entrapment, even though Claimant had no arm complaints at that time. He admitted that it was possible for a nerve to be mildly diseased and still produce normal readings when tested. However, he testified that such an occurrence would be unusual.

William A. Valle, a physical therapist, gave Claimant sixteen treatments for his feet, after which Claimant reported his feet felt much better. Claimant was then discharged from Valle's care. Valle administered a grip test on October 19, 1973. He concluded that Claimant's grip strength was abnormally low, considering his occupation.

Dr. Paul Trier, M.D., chief of radiology at Veterans Hospital and board certified in radiology, examined x-rays taken of Claimant on July 24, 1972. He concluded that there were no abnormalities in the shape, size, or position of Claimant's heart. Dr. Trier testified that he would consider a small heart as normal. He found Claimant's lung fields clear and found no evidence that they had been attacked by paint or chemicals.

Dr. Trier opined that there were no significant changes in chest x-rays taken up to October 15, 1973. He attributed changes in the films to changes in x-ray technique in the interim or the possibility that Claimant had lost weight, although he admitted that other reasons could have caused the changes.

Dr. Trier interpreted a gastrointestinal x-ray taken on September 22, 1971 as normal.

Dr. Trier admitted that it was not unusual for two radiologists to come to different conclusions after reading the same x-ray. He testified that he has had no exposure to the areas of neurology or toxicology since medical school.

Dr. Ralph E. Hines, M.D., a doctor board certified in radiology, testified that Claimant's September 15, 1971 chest x-ray showed a heart on the lower limits of normal size. He saw no evidence of active disease. He retracted an earlier diagnosis of an emphysematous condition because later x-rays showed no change in the lung and emphysema is a condition which progressively worsens. He testified that a normal amount of blood vessels appeared in Claimant's lung area. He interpreted a chest x-ray taken on February 7, 1973, as presenting no change and no evidence of an emphysematous condition. Any differences in the films he attributed to changes in x-ray technique. He testified that such changes would also cause blood vessels at the periphery of Claimant's lungs to disappear.

Dr. Hines testified that Claimant's gallbladder x-ray was normal.

Dr. Hines testified that radiology is an inexact science. He felt that an oblique view of the chest is essential to determine heart size. Dr. Trier felt that such a view was necessary only when the two traditional views revealed an abnormality. The oblique view was never taken of Claimant. However, since Claimant's heart size remained constant throughout the period, Dr. Hines was of the opinion his heart had not deteriorated.

Dr. Hines admitted that he has no knowledge of what an exposure to Toluol would do to a person's chest, as he has had no training in the field of toxicology.

Dr. Woodrow W. Sands, M.D. has had special training in radiology and is board certified in radiology. He testified that chest x-rays taken on June 21, 1972 were normal. He testified that Claimant's heart size was normal and the circulatory system on the periphery of Claimant's lungs was intact. He testified that it was normal for the lung to appear more transradient at the periphery since there were no large blood vessels there. He felt that Claimant's somewhat flattened diaphragm was insignificant, and not abnormal in a person more than forty-five years of age.

Dr. Sands felt that the x-ray in question was not subject to two interpretations, and any disease Claimant should be determined to have would be a disease which would not appear on an x-ray. Dr. Sands, who is not familiar with Claimant, has no special training in toxicology and does not know the effects of Toluol on the body, although he does know that inhalants can cause lung irritation. Dr. Sands felt that heart size and shape can be assessed without the oblique x-ray view.

Dr. Mark Ravreby, M.D., is board certified in internal medicine and specializes in the reading of electrocardiograms(EKGs). He testified that Claimant's EKGs were normal. Changes between them were insignificant to Dr. Ravreby. He would not disagree with an opinion of Dr. David Gordon, M.D., that there was evidence of an old myocardial infarction, but Dr. Ravreby felt this was doubtful. Dr. Ravreby testified that Claimant's heart was functioning normally at the time the EKGs were administered. Claimant's heart rate varied from test to test, but Dr. Ravreby testified this rate was normally subject to variation.

Dr. Ravreby testified that he saw no evidence of deterioration of Claimant's heart from 1971 to 1973. Further, he testified that an EKG taken in 1964 was comparable to those taken in 1973.

Dr. Ravreby does not know Claimant. He has had one other case in which he had to do research in the effects of Toluol. He testified that there was no way to tell, by reading an EKG, whether any changes are due to Toluol. He testified that it was possible, but not probable, for the heart muscles to deteriorate and such deterioration not to appear on an EKG.

Dr. Schepers, M.D., was the Assistant Chief of Medicine at the Veterans Administration Hospital in Des Moines at the time of Claimant's hospitalization. He has since been the Chief of Medicine

at Veterans Hospital in Lebanon, Pennsylvania, and presently is with the Central Office of the Department of Medicine and Surgery in charge of heart, lung, and toxicological problems of the Veterans Administration nationwide. He has been trained both as a physician and as a scientist. He has studied the effects of inhaling foreign substances in South African mines. He has served as Director of Research at an institute which concerned itself with the problem of diseases causes by exposure to environmental hazards, both on and off the job. He served with the Du Pont Company for five years, studying the biological effects of Du Pont products. He served with the federal Food and Drug Administration, evaluating the toxicity of new drugs. Dr. Schepers' most recent areas of interest are forensic medicine and toxicology, areas dealing with unnatural causes of ill health. Dr. Schepers has done research all his life and has authored numerous books and articles. Currently, he is completing work on the nature of lung damage caused by chemical substances, and the consequences of such damage on the other parts of the body. Dr. Schepers is board certified in toxicology and, in South Africa, in internal medicine.

Dr. Schepers testified that the inflammation of the soles of Claimant's feet, diagnosed by Dr. Neptune, is a condition which can be caused by chemical poisoning and that chemical poisoning is one of the most important causes. The chemicals, he testified, can go directly to the inflammed area or, in the most usual way, damage the blood vessels supplying the area. Also, the chemicals can damage organs such as the liver, which maintain the normality of the area. He testified that the finding of Dr. Neptune was confirmatory of his diagnosis of Toluol poisoning.

Also confirmatory of this diagnosis was the abnormal finding by Dr. Neptune of the evoked potentials at the junction of Claimant's nerves and muscles. Such abnormality is demonstrated when there is damage within the nerve. Dr. Schepers testified that Toluol can kill the cells covering nerve fibers and such destruction could appear as abnormal evoked potentials, even though the time it takes for the nerve impulse to travel through the nerve is normal. Dr. Neptune's findings of appreciable reduction of muscle strength signified a degeneration of Claimant's muscles to Dr. Schepers. Dr. Schepers testified that liver damage can cause degeneration of other body systems, and such damage often manifests itself in joint, muscle, and tendon aches and pains in its early stages.

Dr. Schepers testified that Dr. Siroospour's findings also confirmed his diagnosis of Toluol poisoning. Significant to Dr. Schepers was the location of the swelling of the ulnar nerve, the damage to Claimant's hands, the apearance of the entrapment in both elbows simultaneously, and no findings of a bony growth in the canal. These factors lead Dr. Schepers to conclude that the ulnar nerve had swollen and become too large for its groove, rather than the groove becoming too small. Dr. Schepers testified that Toluol is a known cause of small blood vessel spasms. Damage to blood vessels supplying a nerve can cause nerve damage.

Dr. Schepers analyzed Claimant's x-rays. Dr. Schepers disagreed with Dr. Trier regarding Claimant's July 24, 1974 chest x-rays. Dr. Schepers saw abnormality in the position of Claimant's ribs, signifying a general bony abnormality or weak interrib muscles. An enlarged or expanded lung could also cause this abnormality. Further, Dr. Schepers saw an abnormality flattened diaphragm, which he interpreted as reflecting either a weakness of the diaphragm muscle or enlarged lungs pushing the diaphragm downwards. Dr. Schepers saw that Claimant had a small heart and a slightly higher than normal aortic arch. He could not see the small blood vessels at the periphery of Claimant's lungs. The outer one-third of each lung was devascularized, according to Dr. Schepers. Such devascularization could signify either damage to the small components of the lung or an underlying emphysematous condition. He perceived tiny dots in Claimant's lung fields, evidence that either tissue was wrapped around the vessels, or certain vessels had been widened, or foreign material was present in the lung. Dr. Schepers refused to label Claimant's lung as normal.

Subsequent x-rays revealed to Dr. Schepers changes in Claimant's anatomy. Dr. Schepers opined that Claimant's muscles between his ribs had atrophied and that his lungs had lost sustenance. X-rays taken on April 3, 1973, were interpreted by Dr. Schepers as showing a progressive atrophy of Claimant's heart muscle. October 15, 1973, x-rays, he testified, showed a systic development in Claimant's lungs.

Dr. Schepers agreed with Dr. Trier that Claimant's gastro-intestinal x-ray was normal. Dr. Schepers testified that such a finding was confirmatory of his diagnosis because Claimant's problems were not caused by gastrointestinal trouble.

Dr. Schepers testified that he disagreed with Dr. Sands' evaluation of Claimant's June 21, 1972 x-rays. The shape of Claimant's thorax, the size of his heart in relation to the size of his chest, and the position of Claimant's aorta were abnormal to Dr. Schepers. Dr. Schepers disagreed with Dr. Sands' statement that the diaphragms of 90% of persons over 45 years of age are a little flattened and testified that age has nothing to do with the flattening. He disagreed with Dr. Sands on the necessity of the oblique x-ray view to adequately visualize the chest.

Dr. Schepers also took issue with Dr. Ravreby's testimony that Claimant's EKGs were probably normal. In the September 16, 1971 EKG, Dr. Schepers noted evidence of an inferior wall myocardial infarction, an anterior septal abnormality, and a heart rate abnormally high. He testified that the heart rate was high in spite of the fact that the EKGs were taken when Claimant was jaundiced and his blood contained bile salts

that slow the heart, that manual laborers usually have slower heartbeats when in a resting position, and the Claimant had been taking dilantin sodium which also slows the heart. Dr. Schepers saw a change in Claimant's EKGs up to February 7, 1973, whereas Dr. Ravreby saw no change.

Dr. Schepers pointed out the abnormalities in Claimant's February 7, 1973 EKG which, he testified, Dr. Ravreby overlooked. He testified that Dr. Ravreby failed to notice that in V3, the R wave was preceded by a Q wave. Also, the R waves in leads 1 and 2 decrease in size instead of increasing.

Dr. Schepers testified that the EKGs and x-rays merely confirmed what he had learned from clinically and biochemically examining Claimant for two years. He testified that his diagnosis of Toluol poisoning was not dependent upon them and that his diagnosis would be the same even if he was incorrect in his x-ray and EKG evaluations. This statement by Dr. Schepers lessens the impact of the irreconcilable differences between his testimony and the testimony of Drs. Trier, Hines, Sands, Ravreby, and Gordon.

Dr. Schepers testified that he considered the abnormalities he saw in the x-rays in making his diagnosis, but testified that they were not the primary basis for that diagnosis. Rather, he considered all the abnormalities he found in all other tests. He ultimately opined that Claimant was poisoned by Toluol and/or Xylol and was permanently and totally disabled. He testified that, based upon the other testimony he heard and what Claimant told him, the levels of exposure to the vapors of Toluol and Xylol were "extraordinarily gross". He was surprised that Claimant was still alive.

The burden of proving that an injury arose out of and in the course of one's employment is upon the claimant. **McClure v. Union et al Counties,** 188 N.W. 2d 283 (Iowa 1971). The burden of proof required in a workmen's compensation case is a preponderance of the evidence. **Musselman v. Central Telephone Co.**, 154 N.W. 2d 128 (Iowa 1967). Absolute certainty as to the cause of an injury is not required. **Jones v. Eppley Hotels Co.**, 208 Iowa 1281(1929).

This case, as it has been presented, consists of conflicting medical testimony. As such, absolute certainty as to the cause of the claimant's physical disabilities is not possible. An award by the commissioner will not be permitted to stand if it is based on evidence that merely shows a possibility of a causal connection between the injury and the claimant's employment. The Supreme Court of Iowa, while holding that a mere possibility of a causal connection is not sufficient to support an award, has held that if medical testimony shows that the causal connection is not only possible but fairly probable, an award will be sustained. **Nellis v. Quealy**, 237 Iowa 507(1946). **Boswell v. Kearns Garden Chapel Funeral Home,** 227 Iowa 344(1939). The situation of conflicting medical testimony in relation to causal connection presents an issue for determination by the commissioner. **Nellis**, supra. In making his determination, the commissioner must take into consideration all medical testimony which bears a relation to causation. **Nellis**, supra.

Of the medical experts who testified in this case only one, Dr. Schepers, had a specialization in the field of toxicology. Dr. Schepers also had the broadest medical view of the claimant of any of the doctors who testified. Those doctors who testified for the defense based their conclusions on their interpretations of certain tests in isolation from other tests, or upon examination of the Claimant on only a few occasions. Dr. Schepers, in contrast, has followed all of the medical aspects of the claimant's case since June 21, 1972.

There are findings by other doctors which tend to confirm the diagnosis of Dr. Schepers. Dr. De Yarman diagnosed liver problems and possibly toxic poisoning in September, 1971. Dr. Siroospour did not find that Claimant's ulnar nerve entrapment was caused by a bony growth and further testified that the bone spur in Claimant's elbow was not in the course of the ulnar nerve. Dr. Neptune found abnormal evoked potentjals, a reduction in the strength of Claimant's grip and a slightly abnormal rate at which Claimant exhaled air. Further, Dr. Gordon did find some degree of abnormality in Claimant's EKG. Drs. Trier, Hines and Sands' interpretations of Claimant's x-rays as normal must be considered in light of the fact that they have no experience in the area of toxicology or how exposure to Toluol or Xylol would appear on an x-ray.

In regard to medical testimony, the commissioner is required to state the reasons on which testimony is accepted or rejected. **Sondag v. Ferris Hardware**, 220 N.W. 2d 903(Iowa 1974). In the matter sub judice, it is not the rejection of testimony that is determinative but the acceptance of other testimony as overriding the contrary testimony that is determinative of the issue. The testimony and diagnosis of Dr. Schepers is herein accepted as the most accurate concerning the causal connection between the injury to the claimant and his employment. This decision is based on three factors. The first concerns the specialized nature of the field of toxicology. The second factor is Dr. Schepers' wide experience in the field of toxicology. Of the doctors who did testify, only Dr. Schepers had experience in research and treating exposure to Toluol or Xylol. The final factor relates to the familiarity which Dr. Schepers has with the claimant's case. Dr. Schepers has followed every medical aspect of the claimant's case since June 21, 1972. In contrast, the other doctors have been called in to render an opinion and have not been involved in the treatment of the claimant.

Claimant's disability must be evaluated industrially, not merely functionally. **Dailey v. Pooley Lumber Co.**, 233 Iowa 758(1943). Consideration must be given to the employee's age, education, qualifications, experience and his future inability to earn a living due to his injury. **Olsen v. Goodyear Service Stores**, 255 Iowa 1112(1963). The claimant has been a common laborer all his life. He testified

that manual labor is now too exhausting for him. Both Dr. Schepers and Dr. From are of the opinion that Claimant will not recover full function of his hands. Thus, Claimant has had a complete reduction in earning capacity and, therefore, is totally and permanently disabled.

The parties stipulated that, should Claimant be entitled to workmen's compensation, the maximum rate effective on the date of injury would apply. Dr. Schepers testified that the Veterans Hospital bill of $3,288 was necessitated by Claimant's exposure to the toxic substances and was fair and reasonable.

WHEREFORE, the Arbitration Decision is hereby affirmed. It is found and held:

That Claimant sustained an injury arising out of and in the course of his employment.

That such injury resulted in permanent total disability of the body as a whole.

That such injury is compensable at the rate of fifty-nine dollars($59) per week.

That the Veterans Hospital bill of $3,288 was fair and reasonable and necessitated by Claimant's injury.

THEREFORE, it is ordered that Defendants pay Claimant 500 weeks of compensation at the rate of fifty-nine dollars($59) per week. Further, it is ordered that Defendants pay the Veterans Hospital bill of $3,288. Accrued paymants are to be paid in a lump sum together with statutory interest. The cost of these proceedings, plus the cost of the shorthand reporter at both the Arbitration and Review hearings, are taxed to Defendants.

Signed and filed this 28 day of February, 1975.

ROBERT C. LANDESS
Industrial Commissioner

Donald K. Wilson, Claimant

vs.

Palco, Inc., Employer,
and
State Automobile and Casualty Underwriters, Insurance Carrier, Defendants.

Review Decision

Mr. G. A. Cady, Attorney at Law, 9 - 1st Street, S. W., Hampton, Iowa 50441, For the Claimant.

Mr. Roy W. Meadows, Attorney at Law, 1400 Central Nat'l. Bank Bldg., Des Moines, Iowa 50309, For the Defendants.

This is a proceeding brought by Palco, Inc., Employer, and State Automobile and Casualty Underwriters, Insurance Carrier, pursuant to Code Section 86.24, for Review of an Arbitration Decision wherein Donald K. Wilson, Claimant, was awarded weekly compensation for permanent total disability, plus medical benefits. The case was presented on the transcripts of the evidence presented at the Arbitration proceeding and the evidence of several doctors presented at the Review hearing.

Donald Wilson, Claimant, was 47 years old and has an eighth grade education. He began working as a painter as a young man and has continued this vocation all of his life.

Claimant worked as a spray painter for Erickson Manufacturing Co. from 1966 to 1967. He then worked as a dip painter for Van Raden Co. from 1967 to 1969. He did not do much spray painting for Van Raden Co. In March, 1969, Defendant acquired Van Raden Co. and Claimant continued his duties, but with more spray painting chores.

Claimant analogized the paint room in which he worked to a double garage, approximately twenty-two feet by twenty-six feet, connected to the manufacturing building. One door led to the welding room and another, a garage type door, led to the outside. The room was ventilated by a fan on the floor, which was not always operable, and by louvered openings in the walls. Wilson testified that the thermostat was set at 90°, so the paint would dry quickly.

Five gallon buckets, fifty-five gallon barrels, and two tanks filled with paint in which the manufactured products were dipped were located in the room. One dip tank was six to eight inches high, 13½ to 14½ feet long, and 5½ to 6 feet wide and used for dipping long gates. Approximately fifty-five gallons of paint thinner were poured into this tank. The other tank was approximately a four foot cube and used to dip other manufactured items. Spray paint equipment was available in the room for items too large to fit in the dip tanks.

The paint was delivered to the plant in fifty-five gallon cans. The thinner was delivered every two weeks by a truck which would pump the thinner into two fifty-five gallon barrels. Claimant testified that generally more thinner than paint was used in the paint room.

Paint and thinner were transferred to the dipping tanks by tipping the barrels, pouring the paint or thinner into five gallon cans, and then emptying the cans into the tanks. When the barrel was light enough to be lifted, it would be picked up by hand and the remaining paint or thinner poured into the tank. A trail and error method was used to achieve the desired ratio of paint to thinner. The barrels of thinner were kept sealed except during the pouring process. Paint was transferred from the tanks to the receptacle used for the spray gun. Claimant helped with this process.

The air in the paint room was stagnant. Claimant complained of this, but nothing was done. Claimant testified that gloves were not always available. He testified that the masks were either in poor condition, lacking filters, or were not designed for use by a spray painter. He testified that no precautions in the use of the thinner were noted.

He testified that the clean-up procedure at the end of the day was to use the thinner to wash one's hands. Each night, instead of emptying the dip tanks, the paint was covered with a layer of thinner to prevent scum from accumulating on the paint surface overnight. In the morning, this

layer would be mixed in with the paint. Fumes rose from the dip tanks, which would cause tears to come to his eyes and made his nose burn whenever he had to lean over the tanks.

Claimant spent nine hours in the room five days per week, continually dipping or spraying. Claimant did most of the spraying. On a typical day he would spray fifteen to twenty gallons of paint.

On approximately April 1, 1972, Claimant first experienced problems in connection with his work. He felt dizzy, got numb, and his throat went dry. He staggered into the welding room, where he was seated by a welder. He had been spray painting at the time. Previously, the intoxicated feeling produced by the paint room would pass quickly with exposure to fresh air, although he testified that he had become "shakey" and had trouble falling asleep.

Claimant went home and did not work the following week. He testified he had to hold onto the walls to steady himself. He experienced some difficulty in breathing and could not eat. He continued to feel sick during the week that he didn't work. He then returned to work for three days. Again, on April 13, Claimant became ill while spray painting and went home. Claimant went to a Dr. Garrell and was admitted to Veterans Hospital on April 25, 1972.

Previous to this episode, Claimant had been experiencing coldness and aching in his hands and elbow. Also, Claimant lost six teeth in 1972. Claimant has had no employment since April 13, 1972. He has tried to work around his house, but tires so easily that he finds work very difficult.

John Nikkel has been Defendant's plant manager since 1969. He testified that Defendant has purchased two chemicals used for paint thinner, Toluol and Xylol. Toluol was used in the summer, while Xylol was used in the winter. Both were used for spray and dip painting.

From Barton Solvents, Inc., Defendant purchased 1,377 gallons of Xylol between March 16, 1969 and September 8, 1972, and 1,121 gallons of Toluol between August 6, 1969 and May 24, 1972. From Vogel Paint and Wax Co., Defendant purchased 108 gallons of "V-100" thinner, another substance similar to Xylol, between March 6, 1970 and February 26, 1971.

Nikkel affirmed that the garage type door to the paint room was open in the winter only when things were taken in or out of the room. Occasionally, it would be open a crack, but it was never left standing open. He testified that the paint room employees were allowed to step outside in the fresh air. He testified that Claimant was cautioned about the effects of the paint and was told not to wash his hands in the thinner too often.

Nikkel testified that Claimant would not spray paint an entire nine hour shift. He testified that an industrial hand cleaner was available, so that Claimant was not required to use the thinner to wash his hands. Further, he testified that gloves and masks were available.

Nikkel testified that Claimant habitually became sick in the paint room. Frequently, he was allowed to leave early on Fridays because, as Nikkel testified, the paint room was not a pleasant place to work. Nikkel testified that around the first part of April, 1972, Claimant brought a bottle of Toluol to work. The bottle indicated on its label the symptoms of overexposure to Toluol. Prior to this time, Nikkel had not observed these symptoms in Claimant, but he began to observe them during the ensuing two week period. Nikkel believed that Claimant fabricated his illness after reading the label. He felt that Claimant had feigned illness in the past.

Delores Wilson, Claimant's wife, testified that, late in 1971, she first noticed Claimant having health problems. He began sleeping with the windows open in the winter. He vomited red phlegm in the morning. She testified his hearing began to fail. She testified as to his inactivity around the house.

The portion of the Arbitration Decision (pp. 6-29) which summarizes the medical evidence presented at the Arbitration hearing is incorporated into this Review Decision by reference with the following changes:

Page	Line	Correction
7	26	Strike "encaphalopathy". Insert "encephalopathy".
7	30	Strike "Phes.". Insert "Phos."
7	31	Strike "IDM". Insert "LDH". Strike "Anylase". Insert "Amylase" Strike "DUN". Insert "BUN". Strike "BEG". Insert "EEG".
8	19	Insert the word "pretty" between the words "feels" and "good."
8	31	Insert the words "indications of" between the words "and" and "some"
12	20	Strike "6.1". Insert "6.11"
12	21	Add the words "Hemoglobin - 17.4".
13	44	Strike "27". Insert "34"
13	46	Strike "15". Insert "+5"
13		Add to blood gas analysis of 5/9/72, the following result—"HCO_3—27".
16	2-23	Strike the results of the Motor function and motor nerve velocities test of 4/5/73. Insert the following: "Motor nerve conduction velocities were repeated on all four extremities and the latencies were within normal limits and somewhat close to those findings of May 72. However, the motor velocities obtained this time for the right common peroneal and posterior tibial nerves still revealed slight slowness and the evoked potentials obtained were generally good except for polyphasic activities for the left ulnar with temporal dispersion also in the left common peroneal nerves."
17	46	Strike "77%". Insert "7%".
19	25	Strike "4/2/73". Insert "4/1/73"

19	46	Strike "16%". Insert "20%"
23	25 & 29	Remove quotation marks from this paragraph.
24	17	Strike "hyperlipoprotemia". Insert "hyperlipoproteinemia"
25	14	Strike "1031". Insert "1.031"
25	29	Strike "April 2, 1973". Insert "April 6, 1973"
26	9	Strike "below normal". Insert "at the lower edge of normal"
29	7	Insert, after "exposure." the sentence "Further, Dr. Schepers interpreted an EKG as signifying that the part of Claimant's heart lowermost and opposite his diaphragm was not receiving a normal supply of blood."
29	11	Strike "tumor". Insert "tremor"

Additional testimony presented at the Review proceeding is summarized as follows:

Dr. Kyle T. De Yarman, M.D., a ward physician at Veterans Hospital who specializes in internal medicine, testified that the routine tests conducted on Claimant in April, 1973, produced normal results. However, he discovered a slight heart murmur, slight hardening of the arteries, a slight basal transverse perfusion of the right lung, and a slight increase in liver size. Claimant was discharged a few weeks after his admittance to resume his pre-hospitalization activities.

Dr. Paul Trier, M.D., chief of radiology at Veterans Hospital and board certified in radiology, testified that x-rays taken on June 21, 1972 displayed a normal chest and heart. The blood vessels leading from the heart were normal. Distribution of vessels throughout the lung appeared normal to him.

Dr. Trier examined x-rays taken on various dates up to October 16, 1973. He felt they were normal. A change in a pulmonary vessel appeared on an x-ray taken on August 7, 1972, but whatever the problem was it disappeared by August 30, 1972. Dr. Trier found no evidence of changes in Claimant's lung through inhalation of poisons, although he admitted he had had no experience in toxicology since medical school.

Dr. David W. James, M.D., has interpreted electroencephalograms (EEGs) since 1950 and currently conducts all the neuropsychiatric examinations at Veterans Hospital in Des Moines. He interpreted EEGs taken on May 18, 1972, and August 30, 1972, as normal. He testified that there could be damage in the depths of the brain, even though a normal EEG was presented.

Dr. Julio Acebey, M.D., specializes and is board certified in radiology. He interpreted Claimant's series of chest x-rays as normal. He testified that it would be very difficult to determine by x-ray whether a chemical substance had attacked the lung. A kidney, ureter, bladder x-ray taken on April 2, 1973, was interpreted by Dr. Acebey as normal. He reported than an aortic arch study was normal, but that a femoral angeogram showed evidence of hardening of the arteries with some obstruction of leg arteries. Dr. Acebey has had no education in the exposure of chemicals to the body.

Dr. Mark Ravreby, M.D., specializes in the reading of electrocardiograms(EKGs) and is board certified in internal medicine. He testified that Claimant's EKGs were normal. He opined that there were no changes between them to signify heart damage. He was of the opinion that Claimant had a normal heart, from the reading of the EKGs. However, he refused to disagree with Dr. Gordon's interpretation.

Dr. David F. Gordon, M.D., a specialist in cardiovascular diseases and board certified in cardiovascular diseases and internal medicine, interpreted EKGs and vectorcardiograms taken of Claimant.

An EKG of April 26, 1972, was found to be normal by Dr. Gordon. He could not say anything was wrong with Claimant's heart. An EKG of April 3, 1973, presented no significant change. Dr. Gordon found no evidence of heart disease, based upon these EKGs. An EKG of June 21, 1972, also was interpreted as within normal limits.

An EKG of July 24, 1972 presented to Dr. Gordon a slight abnormality and was interpreted as being on the borderline between normal and abnormal. However, in view of the April 3, 1973 EKG, Dr. Gordon attached no significance to the July 24, 1972 EKG. An EKG of August 7, 1972 was interpreted as being the same as the April 3, 1973 EKG. An EKG of August 30, 1972 was interpreted as being a borderline to abnormal tracing. Again, in view of the April 3, 1973 EKG, Dr. Gordon attached no significance to the August 30, 1972 EKG. An EKG of October 16, 1973 presented only insignificant changes from the April 3, 1973 EKG.

Dr. Gordon attached no significance to the variation in the axis of Claimant's heart. He testified that there was insufficient evidence of right ventricular enlargement in the EKGs he reviewed. Nor did he find evidence of right ventricular enlargement in the vectorcardiogram taken on October 16, 1973.

Dr. Gordon found no EKG showing an axis of 90° in the frontal or horizontal plane of Claimant's heart, as Dr. Schepers found. Dr. Schepers interpreted certain changes in the EKGs as being caused by toxic exposure and that part of the heart was receiving an insufficient blood supply. Dr. Gordon testified that insufficient blood supply was one of many causes for such changes.

Dr. Gordon admitted he is not familiar with the field of toxicology or the EKG changes caused by Toluol poisoning. He admitted that he cannot tell simply from reading the EKGs whether toxic substances have had any effect upon Claimant's heart. Dr. Gordon testified that it was possible for a person to have a normal EKG and simultaneously have bad heart arteries. He testified that he could more intelligently interpret an EKG if he knew the other conditions of a patient. However, he testified that few readers of EKGs would diagnose right ventricular enlargement based on Claimant's EKGs. He refrained from making a diagnosis of whether or not Claimant

had heart disease.

Dr. Gerrit W. H. Schepers, M.D., has been transferred to the Central Office of the Department of Medicine and Surgery with his area of responsibility being in charge of heart, lung diseases and toxicological problems of the Veterans Administration nationwide. Dr. Schepers began treating Claimant in 1972. He noticed that Claimant went through an initial stage in which the symptoms of the intoxication receded. Initially, Dr. Schepers noted mental or brain dysfunction. He observed that Claimant was confused and hyperexcitable. Damage to internal organs was diagnosed. Since these syndromes were present simultaneously, Dr. Schepers felt that Claimant had a general, rather than selective, intoxication.

Gradually, the acute phases subsided and Claimant became dull and apathetic. Dr. Schepers diagnosed poisoning by a solvent and testified that the clinical findings and the trend of Claimant's health were consistent with his diagnosis. Further, he testified that subsequent tests were consistent with his diagnosis.

Dr. Schepers testified that his diagnosis was based upon a consideration of the clinical condition of Claimant, the laboratory results, the changes and trends in Claimant's health, and knowledge of the nature of the toxic material and its peculiar properties. He testified that an individual test may be interpreted as normal but, when viewed in perspective with other tests, would give an impression of abnormality to someone familiar with toxic poisoning.

Dr. Schepers found an enlarged right ventrical and pulmonary arteries in x-rays taken on June 21, 1972. X-rays of July 24, 1972 were consistent with these findings. The heart was growing larger and Dr. Schepers felt it was surrounded by fluid.

By August 7, 1972, Claimant's x-rays indicated to Dr. Schepers an abnormality in the base of Claimant's right lung. Knowing Claimant, Dr. Schepers felt that Claimant's condition in October, 1973 confirmed his opinions of Claimant's x-rays.

Dr. Schepers testified that Claimant's brain damage was of a diffuse type, affecting all parts of his nervous system. He testified that it was possible for a person to have gross brain damage and simultaneously present normal EEGs, as that test measures signals coming from the surface of the brain only.

Dr. Schepers testified that the majority of blood vessels in the lung which are likely to be damaged by inhalation of Toluol or Xylol are too small to appear on an x-ray. However, damage to larger blood vessels would appear.

Dr. Schepers opined that, considering all the tests and x-rays, and his knowledge of Claimant, Claimant had been poisoned by Toluol or Xylol and was permanently and totally disabled. He testified that, based upon the other testimony he heard and what Claimant told him, the levels of exposure to the vapors of Toluol and Xylol were "extraordinarily gross." He was surprised that Claimant was still alive.

Dr. Schepers disagreed with Dr. Ravreby's evaluation that the May 16, 1972 EKG was normal and presented no change from the April 26, 1972 EKG. Dr. Schepers saw an unusually large, notched P wave, abnormally low QRS and T wave voltages, and an axis shift of the heart. By October 16, 1973, Claimant's heart had rotated to between 80 and 90 degrees, Dr. Schepers testified, evidencing an enlarged right part of the heart or a shrunken left part. Dr. Schepers testified that the EKGs were not affected by Claimant's food intake.

He testified that Claimant's April 26, 1972 EKG was abnormal because the T waves were lower than the P waves and that the P waves were notched, a condition noticed by Dr. Ravreby but not considered by him to be abnormal. Further, both Dr. Gordon and Dr. Schepers noted a smallness of the QRS complex in the AVF lead. Whereas Dr. Gordon would not state that there was anything wrong with a heart producing this type of EKG, Dr. Schepers related the smallness in the QRS complex to Toluol poisoning and testified that all Claimant's abnormalities attributed to the poison soaking into Claimant's organs had to be considered in explaining the smallness of the QRS complex. Further, Dr. Schepers testified that the hyperthyroidism Dr. From diagnosed was another reason why the electrical impulses of the heart were so low.

Dr. Schepers also testified that he disagreed with Dr. Gordon's conclusion against right ventricular enlargement. He testified that the sagittal EKG view of the heart was very important, so as to accurately correlate the deflections in one plane with the deflections in another. Dr. Schepers pointed out that Dr. Gordon did not report from this particular view.

Dr. Schepers explained that the x-rays and EKGs were merely supportive of all the other things he learned by clinically and biochemically examining Claimant over two years. The diagnosis was not dependent on them, however, and his diagnosis of Toluol poisoning would be the same even if he was incorrect in his evaluation of the x-rays and EKGs.

Dr. Schepers also disagreed with Dr. Gordon. Dr. Schepers testified that a determination of heart axis shift was not guesswork, but rather required a ten minute calculation to plot an Einhoven triangle. Dr. Schepers did this.

The areas of sharpest disagreement between doctors in this case were the interpretations of x-rays and EKGs.

The burden of proving that an injury arose out and in the course of one's employment is on the claimant. **McClure v. Union et al Counties,** 188 N.W. 2d 283(Iowa 1971). The burden of proof required in a workmen's compensation case is a preponderance of the evidence. **Musselman v. Central Telephone Co.,** 154 N.W. 2d 128(Iowa 1967). Absolute certainty as to the cause of an injury is not required. **Jones v. Eppley Hotels Co.,** 208 Iowa 1281(1929).

This case, as it has been presented, consists of conflicting medical testimony. As such, absolute certainty as to the cause of the claimant's physical disabilities is not possible. An award by the commissioner will not be permitted to stand if it is based on evidence that merely shows a possibility of a causal connection between the injury and the claimant's employment. The Supreme Court of Iowa, while holding that a mere possibility of a causal connection is not sufficient to support an award, has held that if medical testimony shows that the causal connection is not only possible but fairly probable, an award will be sustained. **Nellis v. Quealy**, 237 Iowa 507 (1946), **Boswell v. Kearns Garden Chapel Funeral Home**, 227 Iowa 344 (1939). The situation of conflicting medical testimony in relation to causal connection presents an issue for determination by the commissioner. **Nellis**, supra. In making such determinations, the commissioner must take into consideration all medical testimony which bears a relation to causation. **Nellis,** supra.

Of the medical experts who testified in this case only one, Dr. Schepers, had a specialization in the field of toxicology. Dr. Schepers also possessed the broadest medical view of the claimant of any of the doctors who testified. Those doctors who testified for the defense based their interpretations of certain tests in isolation from other tests, or upon examination of the claimant on only a few occasions. Dr. Schepers, in contrast, has followed all the medical apsects of the claimant's case for a considerable period of time, since May, 1972.

In regard to medical testimony, the commissioner is required to state the reasons on which testimony is accepted or rejected. **Sondag v. Ferris Hardware,** 226 N.W. 2d 903(Iowa 1974). In the matter sub judice, it is not the rejection of testimony that is determinative of the issue. The testimony and diagnosis of Dr. Schepers is herein accepted as the most accurate concerning the causal connection between the injury to the claimant and his employment. This decision is based on three factors. The first concerns the specialized nature of the field of toxicology. The second factor is Dr. Schepers' wide experience in the field of toxicology. Of the doctors who did testify, only Dr. Schepers had experience in research and treating exposure to Toluol and Xylol. The final factor relates to the familiarity which Dr. Schepers has with the claimant's case. Dr. Schepers has followed every medical aspect of the claimant's case since May, 1972. In contrast, the other doctors have been called in to render an opinion and have not been intimately involved in the treatment of the claimant. Considering all medical testimony and giving weight to that of Dr. Schepers, it is felt that the claimant has sustained his burden of proving that he incurred an injury arising out of and in the course of his employment.

Claimant's disability must be evaluated industrially, not merely functionally. **Dailey v. Pooley Lumber Co.**, 233 Iowa 758(1943). The factors which must be considered are Claimant's age, education, qualifications, experience and his future inability to earn a living. **Olson v. Goodyear Service Stores,** 255 Iowa 1112(1963). Claimant has only an eighth grade education. He has been a painter all his life. It is felt by Dr. Schepers that Claimant should not be further exposed to paint solvents. Thus, a considerable portion of Claimant's vocation is foreclosed to him. He testified he does not have sufficient strength to work. Considering Dr. Schepers' evaluation of permanent total functional disability, it is felt that Claimant has incurred a permanent total industrial disability.

It has been stipulated that, should Claimant be entitled to workmen's compensation, the maximum rate on the date of injury would apply. Dr. Schepers testified that the Veterans Hospital bill of $3,054 was necessitated by Claimant's exposure to toxic substances and was fair and reasonable.

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.

That such injury resulted in permanent total disability of the body as a whole.

That such injury is compensable at the rate of fifty-nine dollars($59) per week.

That the Veterans Hospital bill of $3,054.00 was fair and reasonable and necessitated by Claimant's injury.

THEREFORE, it is ordered that Defendants pay Claimant five hundred(500) weeks of compensation at the rate of fifty-nine dollars($59) per week. Further, it is ordered that Defendants pay the Veterans Hospital bill of $3,054.00. Accrued payments are to be paid in a lump sum together with statutory interest. The cost of these proceedings, plus the cost of the shorthand reporter at both the Arbitration and Review hearings, are taxed to Defendants.

Signed and filed this 28 day of February, 1975.

ROBERT C. LANDESS
Industrial Commissioner

Appealed to District Court; Dismissed

Vornese Givhan, Claimant

vs.

Chamberlain Manufacturing Corp., Employer, Self-Insured, Defendant.

Review Decision

Mr. Robert D. Fulton, Attorney at Law, 616 Lafayette Street, Waterloo, Iowa 50705, For the Claimant.

Mr. Jay P. Roberts, Attorney at Law, 300 W.S.B. Building, Waterloo, Iowa 50704, For the Defendant.

This is a proceeding brought by the Defendant, Chamberlain Manufacturing Corp., a self-insured

Employer, for Review of an Arbitration Decision, pursuant to Code Section 86.24, wherein Claimant Vornese Givhan was awarded permanent partial disability benefits, healing period compensation and medical and hospital expenses for an injury received on or about April 13, 1972. The case was submitted for Review upon the transcript of the evidence presented at the Arbitration proceedings, plus the evidentiary deposition of Dr. Raul E. Espinosa, which was filed January 3, 1975.

Claimant is a 37-year old woman with no dependent children. She has worked for Defendant since May 9, 1966. Between that time and January of 1972, Claimant has worked in almost every department of Defendant's plant. During this period Claimant has shown herself to be a reliable and hard-working employee. Claimant was laid off in January of 1972 and recalled by Defendant on April 12, 1972. Prior to returning to work, on April 10, 1972, Claimant was examined by a Dr. Zager, Defendant's physician, and determined to be available for work.

On April 12, 1972, Claimant was requested to go on the 411 rougher line. Claimant requested a transfer to another department due to the heavy nature of the work required on the 411 line. This request was denied. Claimant's job required her to bend over and lift shell casings from a three foot tub. She would lift, turn 90 degrees, and place the casing on a machine which would perform work on it. She would then remove the casing from the machine, turn and move to another machine a few feet away. Claimant finally would remove the casing from this machine and put it on a line to go elsewhere. The job required continuous performance and each shell casing weighed about 45 to 50 pounds.

On April 12, 1972, Claimant performed this job for one hour and experienced a sore back after work. On April 13, 1972, Claimant performed this job the entire day and testified that her back and side started hurting badly and her stomach was sore.

The following day, April 14, 1972, Claimant notified Defendant that she would not be at work and thinks that she stated that her back was hurting. Claimant then went to a Dr. Robert A. Weyhrauch, M.D., with complaints of back pain and abdominal discomfort. Claimant told Dr. Weyhrauch that she had been lifting heavy objects at work and thought this was the cause. However, she did not state a specific incident as the causative factor. Claimant returned to Dr. Weyhrauch on April 17, 1972, with complaints of stiff neck muscles. His impression was that her main problem was infection in her pelvis. He further indicated that he was unable to tell how much the backache and neckache were secondary to lifting. On this date Claimant also informed Defendent that her back was hurting. On April 2, 1972, Claimant returned to Dr. Weyhrauch with back pain complaints. Dr. Weyhrauch placed Claimant in Schoitz Hospital for seven days and treated her for back and neck pains and pelvic inflammatory disease, which Dr. Weyhrauch diagnosed as partially causative of Claimant's complaints, he also diagnosed chronic back strain.

Claimant was again treated by Dr. Weyhrauch on May 5 and 12, 1972, due to heavy menstrual flow. Dr. Weyhrauch then sent Defendant a note stating "that she still had right flank pain when doing any lifting and suggested that she have less heavy a job."

Claimant returned to work around May 20, 1972, and informed Defendant that she hurt her back lifting 411's. Defendant had Claimant examined by Dr. Zager who x-rayed Claimant's back and diagnosed strained muscles. Dr. Zager requested a job shift for Claimant.

Claimant worked off and on until December of 1972. During this period her back and side pains persisted even though she had a job which required little lifting. Claimant saw Dr. Weyhrauch three times concerning her back pains during this period and was again hospitalized by Dr. Weyhrauch on December 4, 1972. Claimant was treated with rest, heat and diathermy. Claimant improved somewhat and was discharged with no specific diagnosis other than musculoskeletal pain of some type.

Claimant was examined by Dr. Robert Kyle, M.D., on December 19, 1972, for low back pain with radiation down the back of the right leg on stooping and lifting. Examination revealed a right sided limp with marked limitation of forward bending. Dr. Kyle hospitalized Claimant on December 20, 1972, for a myelogram. The result of the myelogram was normal, but the plain x-rays indicated a mild scoliosis, which is a curvature of the spine. Dr. Kyle diagnosed lumbar sprain, mild dorsolumbar scoliosis and mild essential hypertension. Dr. Kyle recommended that Claimant wear a Richard's lumbar corset and take Equagesic. Dr. Kyle also sent the following return-to-work slip to Defendant, dated December 21, 1972.

> "Vornese is released to light work December 26, not to lift over 25 lbs. and to avoid excess stooping & lifting
>
> Thanks ***/s/*** **R. Kyle** M.D."

Claimant returned to work under this restriction and after a few hours her employment was terminated. Claimant testified that Defendant would not accept her with the restrictions placed on her by Dr. Kyle.

Claimant was seen by Dr. Kyle again on January 22, 1973, and February 5, 1973, for her headache, dizziness and pain. At this time Dr. Kyle recommended that Claimant return to Dr. Weyhrauch, which she did on February 20, 1973.

Claimant again saw Dr. Weyhrauch on March 20, 1973, for excessive menstrual bleeding and pain in her right side. On March 26, 1973, Claimant was placed on medicine for her low blood count. She returned again on April 16, 1973, for her blood.

On April 23, 1973, Claimant again had menstrual problems and Dr. Weyhrauch indicated that Claimant was developing muscle tumors in her uterus which can cause heavy bleeding and

stomach pain, but hardly ever causes pain to radiate into the leg.

On May 24, 1973, Claimant had the usual pains in her right side and flank and Dr. Weyhrauch noted that the pain was not typical of pelvic problems and that the pain was believed to be from the spine. Dr. Weyhrauch referred Claimant to a Dr. Waldorf for her menstrual and pelvic problems. Dr. Waldorf suggested a hysterectomy. On June 18, 1973, Dr. Weyhrauch advised Claimant that he could not encourage her that a hysterectomy would help her flank pain. Again no diagnosis of the cause of the pain was made. Claimant was hospitalized in September, 1973, and underwent a hysterectomy.

On November 5, 1973, Claimant was seen by Dr. Weyhrauch for complaints of back and flank pain. Again, Dr. Weyhrauch could not diagnose the cause of the pain but he still did not believe it was directly work related. Claimant returned on November 12, 1973, with the same complaint. At this time, Dr. Weyhrauch referred Claimant to a Dr. Walker to check the possible involvement of a disc.

Claimant was seen by Dr. Kyle again on December 12, 1973, for back and right flank pain. Dr. Kyle found she had a normal gait, but also had irritation of the sciatic nerves. Dr. Kyle felt that Claimant was still disabled for work that involved heavy lifting or continued stooping and bending. The 25-pound limitation on lifting was still recommended.

Dr. Kyle was of the opinion that heavy stooping and lifting by the Claimant while at work had aggravated Claimant's preexisting condition of a curvature of the spine by irritating her sciatic nerves. Dr. Kyle indicated that Claimant's functional disability was twenty percent(20%). On cross-examination, Dr. Kyle explained that the curvature of the spine was not the cause of the sciatic nerve irritation and the curvature did not contribute to his rating of twenty percent.

On December 13, 1973, Claimant saw Dr. Weyhrauch with pain in the right flank. On January 21, 1974, Dr. Weyhrauch referred Claimant to a Dr. Saul, a neurologist, to check for possible degenerative disease of the spinal cord. Final diagnosis as a result of her hospitalization of February 7, 1974, by Dr. Weyhrauch and Dr. Saul was "radiculopathy of the lower thoracic upper lumbar spine of undetermined etiology and chronic back strain." Dr. Weyhrauch still had no definite diagnosis concerning Claimant's back and flank pain.

Dr. Weyhrauch testified that Claimant has had constant complaints about back problems ever since April 14, 1972. The history taken by Dr. Weyhrauch did not reflect a change of jobs by Claimant immediately prior to his examination of April 14, 1972. He testified that, had he known that Claimant had worked from 1966 to 1972 without back problems and that for the two days prior to her first visit to him on April 14, 1972, she had done heavy lifting, such a history would affect his opinion.

Dr. Raul E. Espinosa, a board certified neurologist at Mayo Clinic first examined the claimant on May 13, 1974. He conducted a neurological examination which he interpreted as normal. His impression was that Claimant's pain was musculoskeletal in origin, so he referred her to Dr. L.F.A. Peterson, an orthopedist.

Dr. Peterson noted that the claimant was obese at 203 pounds; that she had back limitation on forward flexion and lateral bending; some limitation on straight leg raising; x-rays were interpreted as minimal L-5 joint space, mild degenerative disease of L-5 disc, and functional overlay.

Dr. Espinosa noted Claimant was a bit depressed and requested her to complete a multiphasic personality inventory, which he thought showed the depression scale was elevated. He then referred her to Dr. Gerald Peterson, a psychiatrist, for evaluation. Dr. Peterson's evaluation was interpreted by Dr. Espinosa as not showing significant depression to require anti-depressant medication.

Dr. Espinosa again saw Claimant on September 18, 1974, because of her persistence of symptoms. She had gone through an unrelated emotional stress in the interim. Her weight was reduced to 178 pounds. Her neurological examination remained normal. She requested to see Dr. L.F.A. Peterson again for the possible use of a back brace.

Dr. Espinosa felt that Claimant had a back sprain and that she should engage in vocational rehabilitation so that she could do work that would not entail any heavy lifting and continue to aggravate the pain problem. Dr. Espinosa refrained from estimating Claimant's degree of disability, as she had no neurological deficit but rather orthopedic which he did not feel qualified to assess.

Virginia Koch, a co-employee of Claimant, testified that Claimant rarely missed work. Ms. Koch had known Claimant for five years and testified that Claimant had never displayed nor complained of back pain. Dolores Morrison, another co-employee of Claimant, corroborated Ms. Koch's testimony concerning Claimant's lack of absenteeism and prior back complaints.

Lester Givhan, Claimant's brother, testified that he lives with Claimant. Prior to April 12, 1972, Claimant had no back problems and actively did the housework. He further testified that Claimant always went to work and never complained about her back, that the back pain began a short time after Claimant resumed work in April, 1972, and that Claimant spoke of how heavy the work was and how her back hurt. Since April 1972, Lester has had to help with the housework which Claimant is not able to do.

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 she bases her 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. The incident or activity need not be the sole proximate cause, if the injury is traceable to it. **Langford v. Keller Excavating & Grading, Inc.,**

191 N.W. 2d 667 (Iowa).

A personal injury means an injury to the body, the impairment of health or a disease which comes about, not through the natural building up or tearing down of the human body, but because of a 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. The injury must be something, whether an accident or not, that acts extraneously to the natural process of nature, and thereby impairs the health, overcomes, injures, interrupts, or destroys some function of the body, or otherwise damages or injures a part or all of the body. **Almquist**, supra.

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, she 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. Although the question of medical causation is essentially within the domain of expert medical evidence, the 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.

There is more than adequate evidence to substantiate a finding that Claimant received an injury arising out of and in the course of her employment on April 13, 1972. Although the defendant has attempted to show that the claimant may have a degree of animosity toward her employer, the facts are that prior to her injury she was a willing worker, that the work she performed on the 411 rougher caused her a back strain and that pain from the back strain has persisted for a considerable length of time.

Although Dr. Weyhrauch believed Claimant's complaints were partially caused by pelvic inflammatory disease, he, along with Drs. Kyle and Espinosa, diagnosed a back strain. It is the symptoms from the back strain which have persisted and constitute the injury in this matter.

It is conceivable that Claimant's disability may someday clear up. It is indeed hopeful that if the claimant continues on the weight reduction program, exercises and rehabilitative programs offered to her, that she will improve completely.

Permanent disability does not have to be a disability that is intended to last forever. Permanent means for an indefinite and undeterminable period. **Wallace v. Brotherhood of Locomotive Firemen and Engineers,** 230 Iowa 1127, 300 N.W. 322; **Garden v. New England Mutual Life Insurance Co.,** 218 Iowa 1094, 254 N.W. 287.

When the injury suffered is a general body injury such as in this case, the claimant's disability is evaluated from an industrial and not an exclusively functional standpoint. **Martin v. Skelly Oil Co.,** 252 Iowa 128, 106 N.W. 2d 95. 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.

Unfortunately, the record is void as to Claimant's education and experience except as hearsay testimony in the history given by the claimant to Dr. Gerald Peterson, as recited by Dr. Espinosa.

Claimant's age at the time of her injury was 37. She had worked for the defendant in various departments since 1966. Claimant has applied for and been accepted for vocational rehabilitation as a craftsman or stenographer. She has attempted some vocational rehabilitation training and apparently expects to continue efforts in learning new work. Witnesses testified to her apparent intellectual ability to carry on gainful employment in areas for which she could be trained.

Although this commissioner had no opportunity to observe first hand the demeanor or make impressions as to her intellectual ability, the circumstantial evidence along with the opinion of the deputy allude to the fact that the claimant has good opportunity for satisfactory gainful employment.

Claimant is, however, restricted for some period of time from carrying on gainful employment in work requiring heavy lifting, stooping and bending.

The medical bills of Dr. Weyhrauch, Schoitz Memorial Hospital, and Mayo Clinic, were stipulated to be fair and reasonable. Dr. Weyhrauch established the necessity for his charges and those of Schoitz Hospital. Dr. Kyle established the fairness, reasonableness and necessity for his charges. Defendant made no objections to the bills of Mayo Clinic.

WHEREFORE, it is found that Claimant received an injury arising out of and in the course of her employment on April 13, 1972, resulting in permanent partial disability to the body as a whole in the amount of fifteen percent(15%). Claimant is entitled to benefits at the rate of fifty-nine dollars ($59.00) per week for permanent disability and sixty-four dollars($64.00) per week for healing period. Claimant has been incapacitated from work for at least forty-five(45) weeks, entitling her to a maximum healing period of sixty percent(60%) of her permanent partial disability. The medical expenses of Drs. Kyle, Weyhrauch, Schoitz Memorial Hospital, and Mayo Clinic are found to be fair, reasonable, and necessary for the treatment of Claimant's injury.

THEREFORE, Defendant is ordered to pay Claimant seventy-five(75) weeks of permanent partial disability at the rate of fifty-nine dollars($59.00) per week. Defendant is further ordered to pay Claimant forty-five(45) weeks of healing period compensation at the rate of sixty-four dollars($64.00) per week. Accrued payments are to be paid in a lump sum together with statutory interest, pursuant to Section 85.30, from the date of this award. Defendants are further ordered to pay the medical and hospital expenses ordered by the Arbitration decision and the charges of Mayo Clinic referable to Claimant's diagnosis and treatment for the injury in this matter.

Costs of the court reporter at the Arbitration proceeding and costs of transcription of those proceedings and the depositions of Drs. Kyle, Weyhrauch and Espinosa are taxed to Defendant.

Signed and filed this 27 day of January, 1975.

ROBERT C. LANDESS
Industrial Commissioner

No Appeal

H. Raymond Smith, Claimant,

vs.

Walnut Grove Products, Employer,
and
Maryland Casualty Co., Insurance Carrier, Defendants.

Review of Adjudication of Law Point

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

Mr. Craig H. Mosier, Attorney at Law, P. O. Box 2486, Waterloo, Iowa 50705, For the Defendants.

This is a proceeding for Review, pursuant to Section 86.24, Code of Iowa, of a ruling on an Adjudication of Law Point. The parties stipulated that the sole issue to be determined is whether or not the payment of regular wages to an employee who receives an injury arising out of and in the course of his employment is such a payment of weekly compensation as is contemplated by the Workmen's Compensation Act as to toll the statute of limitations provided in Section 85.26, Code, for the reasons recited in Section 86.13.

A brief recitation of the facts is necessary to put the case in proper perspective, as the ruling herein made is not at all finally determinative of the ultimate issues of the compensability of or ability to maintain this cause of action. There may be facts not presented which would allow this action to be maintained on some other legal theory.

The question here is whether or not the continuance of regular wages during periods of disability resulting from on the job injuries does, as a matter of law, amount to a payment of "weekly compensation" as contemplated by the Workmen's Compensation Act so as to toll the statute of limitations for the commencement of an original proceeding for compensation for failure to file a memorandum of agreement.

The evidence consists solely of the testimony of the claimant and expense account records submitted by the claimant to his employer.

Claimant was injured on February 9, 1967, in an automobile accident which, it was admitted, arose out of and in the course of his employment. Claimant received treatment from various doctors and hospitals thereafter, including Mayo Clinic, at various times throughout the following many months for his injuries received as a result of such accident.

Expense account records offered into evidence indicate Claimant was off work for injury or illness on the following dates, which absences Claimant testified were all as a result of the accident: February 9, 10, 11, 1967; March 10, 1967; May 2, 3, 4, and 9, 10, 11, 1967; September 10, 11, 12, 13, and 15, 16, and 20, 21, 1967; January 31, February 1, and 2, and 12, 13, 1968; May 16, 19, 20, 21, 22, 23, 1968; August 14, 15, 16, 17, 18, 19, 1968. Other occasions were indicated by the claimant as having been taken as vacation time during which he was recuperating from his injuries. During the other periods of time not set out above, the claimant testified that he was performing the duties of his employment as branch sales manager for the defendant employer's operation out of Waverly, Iowa. During the entire time, he received his regular semi-monthly checks from his employer.

A first report of injury was filed with the office of the industrial commissioner on March 6, 1967, indicating the name of the defendant insurance carrier and further stating that the claimant had returned to work on February 14, 1967, and had only lost two days from work. On May 24, 1973, Claimant filed for Review-Reopening of his claimed 1967 injury. A Motion to Dismiss was overruled, whereupon an Answer was filed alleging that no compensation was paid to the claimant. Claimant filed a Motion for Summary Judgment which was denied. Thereafter, the hearing was held which resulted in the order which is not the subject of this Review. It was stipulated at the former hearing that Claimant's original action be amended to a proceeding in Arbitration rather than Review-Reopening.

Claimant cites the case of **Rusher v. City of Des Moines,** 26th Biennial Report Iowa Industrial Commissioner, p. 63, as authority for his proposition that the continuation of wages without filing a memorandum of agreement toll the statute of limitations. That case clearly is distinguishable from the present case in that the claimant in the **Rusher** case was disabled for a continuous period in excess of seven days and, more importantly, was specifically being paid leave of absence with pay from a fund established by ordinance for injuries or occupational disease incurred while in the performance of duty. During such injury

leave, the City paid Rusher his full pay, either as direct payment from salary funds or as workmen's compensation insurance benefits, or both. As the City was a self-insurer, it was merely a bookkeeping entry as to which fund that payments would be charged and it was held the City would not be allowed to frustrate the intent of the Workmen's Compensation Act in such a manner.

This often happens in similar situations where a claim is reported by the employer to a sickness and accident carrier instead of a workmen's compensation carrier where the injury was clearly covered under the Workmen's Compensation Act. Under such conditions, it is not difficult to determine that such benefits were paid in lieu of workmen's compensation and as such, constitute weekly compensation, thereby requiring the filing of a Memorandum of Agreement in order to toll the statute of limitations.

The instant case is frustrated by two matters not present in the **Rusher** case or the example set out above. First, there is no explicit showing that the claimant was off work for a continuous period shown on the expense account records where the claimant was off work in excess of seven days, but the notation indicates that he was "home ill". There is no showing that the defendant employer **then** knew that such illness was a result of Claimant's injuries which would indicate that their continuation of regular salary was a payment in lieu of workmen's compensation.

A case somewhat similar to this is **Rees v. Garst & Thomas Hybrid Corn Co.**, et al, filed May 2, 1973, to be contained in 31st Biennial Report Iowa Industrial Commissioner. A quote from that case is appropriate to the issue herein involved.

> "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 incident in question."

It should be pointed out, however, that in the **Rees** case, compensation was not being sought for any permanency as a result of the prior injuries but only those of 1969 and 1970. Therefore, the tolling of the statute of limitations problem or any questions of waiver or estoppel were not before the commissioner in that case.

We do not mean to imply that a person must have continuous temporary total disability as a result of his injury in order to qualify for weekly compensation benefits, but it is a factor that can be considered in determining the probable intent of the parties as to whether or not payments made subsequent to such injury are for a responsibility under the Workmen's Compensation Act.

Professor Arthur Larson states "...the majority rule apparently is that payment of wages to a disabled worker does not toll the statute unless the employer is aware or should be aware that it constitutes payment of compensation for the injury." 3 Larson's Workmen's Compensation Law, Section 78.43(c), p. 96.

Professor Larson later propounds what he considers to be a theoretically correct rule: "Payment of wages tolls the statute if it was intended to be made on account of compensation liability, **or** if the employee reasonably believed it was so intended." 3 Larson's, Section 78.43(c), p. 99.

Claimant contends this is the proper rule and supports his case. Even if it is the proper rule, the evidence does not support either that the employer intended the payments to be on account of compensation liability or that the employee believed them to be so intended.

Little evidence of the employer's probable intent is available and its competency is questionable. It consists solely of defendant employer's answers to interrogatories and the first report of injury signed by the defendant employer. The answers to interrogatories attest that the Claimant did not have regularly scheduled work hours, but could choose his own work schedule; that he submitted weekly expense reports which indicated he was "home ill from injury in auto wreck" for three days; that he was apparently at Mayo Clinic on various days; and that he was "home ill" on various days. The first report of injury indicated that he had been injured on February 9, 1967, and returned to work on February 14, 1967. This evidence in no way supports a contention that the employer intended the payments to be on account of compensation liability.

Several statements made by the claimant are inconsistent with his belief that the payments made to him were for compensation liability. Claimant testified at one point:

> "I took two weeks of my vacation to try to recuperate from it (the injury) because I didn't want to lose any more work than I had to."

At another point, his testimony revealed:

"Q. You received your regular pay at all times?
"A. Yes.
"Q. And you do not know if you received workmen's compensation benefits or not?
"A. I don't remember."

He further testified:

"A. Well, they have a policy that, oh, sickness or accident or anything that they pay the full amount of the salary for three months and then one half of the salary for three months. And then we have an insurance program if a permanent disability after six months this picks up, takes over.
"Q. Do you know where you are -- how often you were paid?
"A. Twice a month.
"Q. Do you know the source of these salaried checks to you for the time you were off work, that is from the sick fund or disability fund or just from the regular?
"A. The ordinary checks that I received."

These statements certainly do not appear consistent with a belief on the part of the claimant that the monies paid to him were for any workmen's compensation liability of the employer.

In a case where the duration of disability was much greater; the period of time between the injury and the filing much less; and the testimony similar if not stronger as to the purpose for which the claimant believed the continued wage payments were being made, the Colorado Supreme Court overruled their prior holdings and established a rule which is quite applicable to this case. In **Pacific Employers Ins. Co. v. Industrial Commission**, 127 Colo. 400, 257 P2d 404, at page 409, the court stated:

"In order that the payment of wages during the absence of an employee may be held to be payment of compensation under the Workmen's Compensation Act, it must be established by competent evidence or reasonable inferences to be drawn therefrom that in making these payments the employer was doing so conscious of the fact that he was making the same as compensation, and it must be received by the employee with the knowledge or reasonable grounds for assuming that the payments made to him were being made as compensation for his injuries. The payment of wages to an employee while disabled, and particularly before he has filed any claim for compensation, does not, ipso facto, establish the payment of compensation tolling the statute of limitations provided in the Workmen's Compensation Act."

Thus, it is found that no "agreement in regard to the compensation" was reached pursuant to Section 86.13, which would toll the statute of limitations for failure to file a memorandum thereof.

As indicated in **Huston v. Ford Motor Company,** 30th Biennial Report Iowa Industrial Commissioner, p. 33, the statute does not contemplate the filing of a negative memorandum of agreement in the event an employee is paid for reasons other than a workmen's compensation liability.

WHEREFORE, the Adjudication of Law Point filed July 22, 1974, is hereby reversed. The case is remanded to the deputy industrial commissioner for further proceedings applicable by law and consistent with this decision.

Signed and filed this 9th day of January, 1975.

ROBERT C. LANDESS
Industrial Commissioner

Appealed to District Court; Affirmed

Denny Rhoades, Claimant,

vs.

City of Fort Dodge, Employer,
and
Maryland Casualty Company, Insurance Carrier, and State of Iowa, Defendants.

Review Decision

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

Mr. W.C. Hoffmann, Attorney at Law, 1040 Des Moines Building, Des Moines, Iowa 50309, For Maryland Casualty Co.

Mr. Donald J. Mitchell, Attorney at Law, 142 North Ninth Street, Fort Dodge, Iowa 50501, For the City of Fort Dodge.

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

This is a proceeding brought by the City of Fort Dodge and Maryland Casualty Company, seeking Review under the provisions of Section 86.24 of the Iowa Workmen's Compensation Act, of an Arbitration Decision wherein the Deputy Industrial Commissioner determined that the Defendant Insurance Carrier was the workmen's compensation carrier for the Defendant Employer and further that the carrier's liability was established by the liability of Defendant Employer to Claimant.

The parties in the original hearing stipulated that the issues to be determined would be confined to the questions of whether the injury arose out of and in the course of Claimant's employment and whether the employer, insurer, or State of Iowa is responsible for payment of benefits.

Claimant testified that on March 17, 1972, he was a member of the Fort Dodge Police Department. While working in the early morning of March 18, the department dispatched Claimant and Roger Hewin to investigate a loud party. Claimant further testified that he injured his wrist while trying to appre-

hend several of the persons at the party. Hewin corroborated the facts testified to by Claimant, although he stated he did not see Claimant injure his wrist. Claimant also testified that his hospital and medical services were paid by the City of Fort Dodge.

The Deputy Commissioner found from such evidence that the Claimant had shown by a preponderance of the evidence that he sustained an injury to his wrist arising out of and in the course of his employment.

However, the question determinable on review is whether the claimant is covered by Chapter 85 of the Workmen's Compensation Act. Claimant contends that he is within the coverage of Chapter 85 because he has sustained a permanent partial disability which is not compensable under Chapter 411 of the Iowa Code, even though a person in his position may receive payment for hospital and medical services under Chapter 411 of the Iowa Code.

A historical review of successive legislative enactments and cases pertaining to workmen's compensation coverage of law enforcement officers is necessary to construe the compensation act existing at the time of Claimant's injury.

The original workmen's compensation legislation enacted in 1913 contained no provision for persons engaged in law enforcement. In 1917, the case of **Dickey v. Jackson**, 181 Iowa 1155, 165 N.W. 387, involving a policeman of the City of Des Moines, Iowa, was decided by the Iowa Supreme Court, which held that the policeman could draw benefits under both what are now Chapters 85 (Workmen's Compensation) and 410 (Policemen's Pension Fund), Code of Iowa, as the provisions were not then mutually exclusive.

In 1922, legislation was enacted making workmen's compensation benefits and the policemen's pension fund mutually exclusive, and providing for payment of benefits from the general funds of the State of Iowa. Section 1422 of the 1924 Code. This section later became Iowa Code Section 85.62. It provided that those policemen not pensioned under the policemen's pension fund would receive compensation for disability from workmen's compensation and, in addition, payment for hospital and medical services.

In 1957, the Iowa Supreme Court in the consolidated cases of **City of Emmetsburg v. Gunn**, and **City of Estherville v. Hackett**, 249 Iowa 297, 86 N.W. 2d 829, recognized the applicability of the Workmen's Compensation Act to policemen. In this case, the only issue was payment of medical benefits and the Supreme Court held that the state was liable for these payments under Section 85.62.

In 1963, during the time Section 85.62 of the Iowa Code was still in effect, the Iowa legislature passed an additional provision to Chapter 411, the Policemen and Firemen Pension Fund. The addition of Section 411.15 stated that:

> "Cities and towns shall provide hospital, nursing, and medical attention for the members of the police and fire departments of such cities, when injured while in the performance of their duties as members of such department, and the cost...shall be paid out of the appropriation for the department to which such injured person belongs: provided that any amounts received by such injured person under the workmen's compensation law of the state, or from any other source for such specific purposes, shall be deducted from the amount paid by such city or town under the provisions of this section." Added Acts 1963 (60th G.A.) Ch. 253 §1.

An examination of the above section and Section 85.62 of the Iowa Code, will reveal that the two sections were intended to be used together to provide hospital and medical attention for policemen or firemen who were injured in the course of their employment. Section 411.15 would be a secondary source of hospital and medical payment if the benefits received under workmen's compensation (particularly Section 85.62) failed to pay the amount of the total medical and hospital expense. We must assume that at this point in time, the intent of the legislature was to make the State of Iowa primarily liable for medical services for policemen and firemen, and the cities would provide a secondary fund if the state had exhausted its benefits provided by law. It should be noted that the cities' funds are not derived from the pension fund, but rather drawn from the appropriations of the department to which the injured party belonged.

The legislative events of 1971 altered the sources of hospital and medical attention and are presently applicable to the case sub judice. The Iowa legislature repealed Section 85.62 of the Iowa Code in its entirety, thus relieving the State of Iowa from payment of compensation benefits to certain peace officers including policemen. The effect of this repeal placed the liability of hospital and medical attention totally upon the cities as employers. In those cities to which Chapter 411 applied, such payment would be obligated by Section 411.15.

The repeal of Section 85.62 was accompanied by the addition of Section 85.1 (6), a provision under the section which designates when the provisions of the Workmen's Compensation Act are not applicable.

Section 85.1 (6) states that Chapter 85 shall not apply to "Persons entitled to benefits pursuant to Chapter 411".

The above mentioned section must be read in light of another section which precludes workmen's compensation coverage, Section 85.1 (4) of the Code of Iowa.

Section 85.1 (4) reads:

> "As between a municipal corporation, city, or town, and any person or persons receiving any benefits under, or who may be entitled to benefits from, any firemen's pension fund or policemen's pension fund of any municipal corporation, city, or town under the provisions of Chapter 411, except volunteer firemen and except as otherwise provided by law."

As the policy of insurance issued to the defen-

dant employer by the defendant insurance carrier did not provide coverage for the classifications of firemen or policemen, then the City cannot be considered to have voluntarily elected to provide workmen's compensation coverage for policemen or firemen as allowed by Section 85.1 (5). Coverage extends only to "such employee or person or such classification of employees as are within the coverage of the...workmen's compensation insurance contract."

Both 85.1 (4) and 85.1 (6) deal with Chapter 411. However, 85.1 (4) must be said to have a more specific construction than that of 85.1 (6), in order for the two provisions to be in harmony. This is required by Section 4.11 of the Iowa Code, which provides:

> "If amendments to the same statute are enacted at the same or different sessions of the general assembly, one amendment without reference to another, the amendments are to be harmonized, if possible, so that effect may be given to each...."

In addition, the Iowa Supreme Court has stated when an amendment is adopted, it is presumed the legislature intended to make a change in the existing law. **Consolidated Freightways Corp. v. Nicholas**, 258 Iowa 115, 125, 137 N.W. 2d 900 (1965).

The reason that 85.1 (4) is more specific is because it refers to "benefits from any...pension fund...under the provisions of Chapter 411" while 85.1 (6) applies to benefits pursuant to the **entire** Chapter 411. Section 85.1 (6) must then include hospital and medical attention even though those benefits are not derived from a pension fund, but rather from appropriations from the department to which the injured person belongs, pursuant to the direction of a provision of Chapter 411.

This conclusion finds additional support in the definition of the word "benefit". According to the rules of construction pursuant to Section 4.1 (2) of the Iowa Code (1973):

> "Words and phrases shall be construed according to the context and the approved usage of the language: but technical words and phrases, and such other as may have acquired a peculiar and appropriate meaning in law shall be construed according to such meaning."

The word "benefit" has been defined as meaning "Pecuniary help in time of sickness," **Schweigert v. Beneficial Standard Life Ins. Co.**, 204 ORE 294, 282 P 2d 621, 625.

Medical attention has been classified as benefits under the Workmen's Compensation Act in a number of related occasions. For example, in **Powell v. Bestwall Gypsum Co.**, 255 Iowa 937, 124 N.W. 2d 448 (1963), the Iowa Court, in discussing benefits, held:

> "An analysis of our compensation Act shows it creates three distinct **benefits** for an injured employee or his dependents. They may be classified as (1) **medical and hospital care**, (2) burial expense, and (3) weekly death or disability compensation. 45 I.L.R. 867" (Emphasis added)

As it is the word "benefits" as used in the Workmen's Compensation Act that is being construed, then the word must be given meaning as its usage is interpreted under the Workmen's Compensation Act. Therefore, medical and hospital attention are considered included in the "benefits" to which 85.1 (6) refers.

From the evidence presented, it has been shown that the City of Fort Dodge has paid for the medical attention received by the claimant as a result of his injured wrist. Even if the City had not so paid, the Claimant would have been entitled to such payment as he was injured in the line of duty. Claimant, therefore, is a person "entitled to benefits pursuant to Chapter 411" and as such excluded from coverage under Chapter 85.

The fact that the claimant may not be entitled to some benefits provided by the Workmen's Compensation Act which are not provided by Chapter 411 does not alter the fact that he is entitled to benefits and did receive benefits pursuant to Chapter 411. This is offset to some degree by the fact that pursuant to Chapter 411, persons may often be entitled to greater benefits than they would be entitled to under Chapter 85 for the same injury.

No contention was made at the Review proceedings that dismissal of the State of Iowa as a party defendant was improper. This action was proper and is hereby upheld.

WHEREFORE, the Arbitration Decision is hereby affirmed in part and reversed in part.

It is hereby held as finding of fact that the claimant received an injury arising out of and in the course of his employment with the defendant City of Fort Dodge, and that as a result of such injury the Claimant was paid medical benefits by the defendant City of Fort Dodge.

It is further held that the defendant City of Fort Dodge had not voluntarily elected to provide benefits to the claimant under the Workmen's Compensation Act.

It is hereby held as conclusions of law that the claimant was a person entitled to benefits pursuant to Chapter 411 of the Code and therefore excluded from coverage under Chapter 85 of the Code.

THEREFORE, recovery must be and is hereby denied to the claimant. Claimant's Application for Arbitration is hereby dismissed. Each party is directed to pay the costs of producing their own evidence. The defendants, City of Fort Dodge and Maryland Casualty Company, are ordered to share the cost of the attendance of the shorthand reporter at the Arbitration and Review hearings.

Signed and filed this 9th day of January, 1975.

ROBERT C. LANDESS
Industrial Commissioner

Appealed to District Court; Affirmed

Harold Lindeman, Claimant,

vs.

Orkin Exterminating Co., Inc., Employer,

and

Continental Casualty Co., Insurance Carrier,
Defendants.

Review Decision

Mr. George E. Wright, Attorney at Law, 607 Eighth Street, Fort Madison, Iowa 52627, For the Claimant.

Mr. Walter L. McNamara, Attorney at Law, 4403 First Avenue, SE, Cedar Rapids, Iowa 52402, For the Claimant.

Mr. John M. Bickel, Attorney at Law, P.O. Box 2107, Cedar Rapids, Iowa 52406, For the Defendants.

This is a proceeding brought by the defendants, Orkin Exterminating Co., Inc. and its insurance carrier, Continental 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, Harold Lindeman, was found to have sustained an injury which arose out of and in the course of his employment on May 2, 1973. The case was presented for review on the transcript of the evidence presented at the arbitration hearing, additional evidence on behalf of the employer and the oral arguments of counsel.

Claimant began work for Defendant Employer on October 31, 1967, as a service routeman and had worked continuously until May 4, 1973, except for two and one-half months in 1971. Claimant sprayed chemicals nine hours per day, five to six days per week. He was trained in the safe use of chemicals and was careful in his use of the pesticides.

During November of 1972, Claimant began feeling ill. His primary symptom at that time was tiredness. In March and April of 1973, Claimant described his complaints as "rapid heartbeat, out of breath, and light-headed." On May 2, 1973, Claimant consulted Dr. Henderson E. Galbreath, a family practitioner. His complaints at this time were "extreme tiredness for the previous 6 months and a cough of one month's duration." Dr. Galbreath's initial diagnosis was anemia.

Defendant Employer arranged for Claimant to be examined on May 8, 1973, by Dr. M.J. Gregson and Dr. R.B. Widmer at the Family Practice Clinic in Oakdale Hospital as a participant in the long-term physical examination program of the Iowa Community Pesticides Study.

On May 9, 1973, Claimant was admitted to Mercy Hospital in Iowa City, Iowa. A case history was taken by Victor B. Beat, D.V.M., a veterinary epidemiologist with the Iowa Pesticides Study group. Dr. Beat noted the use of the following pesticides by Claimant:

> The subject has used many pesticides during the 5½ year period. Dursban, an organophosphate insecticide, has been used for one year, and it is used every day. Chlordane, a chlorinated hydrocarbon insecticide, is used every day during the summer for 5½ years. Diazinon, an organophosphate insecticide, was used every day for 4½ years. During the last year it was replaced with Dursban. Malathion, an organophosphate insecticide, was used more a few years ago, but is rarely used today. DDVP or Vapona, an organophosphate insecticide, may occasionally be used when mixed with Dursban. The following rodenticides have been used: Warfarin - nearly every day., Zincphosphide - very little used., DDT - very little used., RD-98 - rodenticide powder is very dusty., antuc - very little., Kepone - very little. The lindane bugmaster, shell strips have never been used in the home. Heptachlor about 100 days a year. Endrin (Rid-a-bird), a chlorinated hydrocarbon insecticide, was used 3 years of employment with Orkin. During this period he got some endrin on his fingers. He washed as soon as possible. Pyrethrins are used about 125 days a year. A fogging machine is used once a month. A gauze mask is used while using the fogger. A whiff of product in fogging machine burned his eyes. He doesn't know the name of the product. The odor is similar to pyrethrin bombs. A few years ago he used Baygon some, but only Baygon bait is used now. It is an organophosphate. The subject reports when using the fogger, Chlordane Dust and RD-98 Powder in the morning that he didn't feel right all day.
>
> When the subject got a new account, the first treatment was a cleanout, and during this treatment a stronger solution was used. This treatment also caused the eyes to burn.

Dr. Beat reported the cholinesterase and pesticide residue values of the laboratory tests conducted by his group to be in the normal range. However, he added that the group did not know what these values were in the past eight or more years.

A bone marrow aspiration was performed on May 9, 1973, which showed a "hyperplastic marrow with moderate erythroid hyperplasia and abnormal maturation of erythroid elements, bone marrow aspirate." On May 10, 1973, Dr. M. Craig Champion, an internal medicine specialist, examined Claimant and made a diagnosis of "Aplastic anemia, in fact, pancytopenia, etiology not clear at this time."

Claimant was discharged from the hospital on May 16, 1973. At the time of his discharge Claimant's condition was diagnosed by Dr. Gregson as:

> Pancytopenia. At this time we are unable to determine the exact etiology and the patient will be followed to determine the future as best we can, if this is either 1) toxic effect, 2) preleukemic state, 3) preaplastic marrow state.

Dr. Gregson recommended that Claimant not return to any type of job which uses pesticides.

Between May 2, 1973, and June 7, 1973, various tests were run on Claimant to determine the cause of Claimant's illness. On June 7, 1973, Dr. Widmer prepared a Surgeon's Report for Defendants. Dr. Widmer described the accident as "exposure to toxic chemicals for past 5½ years." Under the portion of the form entitled "The Injury," Dr. Widmer wrote: "Toxic reaction of bone marrow to chemicals-Anemia, thrombocytopenia, leukopenia, and abnormal bone marrow." Dr. Widmer mentioned that

the only cause of the claimant's condition was his exposure to the chemicals.

On June 8, 1973, Claimant, apparently being confused and concerned about his condition, sought the opinion of the Mayo Clinic concerning his condition. At the Mayo Clinic Claimant was under the care of Dr. Mahlon K. Burbank, a specialist in internal medicine. Dr. Burbank asked Dr. Robert M. Petitt, a specialist in internal medicine with a subspecialty in hematology, to join him in consultation. Based on Claimant's history, a physical examination and the blood and marrow tests, Dr. Petitt made a diagnosis of aplastic anemia.

Dr. Petitt testified in his deposition, "I felt that Mr. Lindeman's chronic exposure to insecticides was the most likely explanation for his aplastic anemia." This particular opinion of Dr. Petitt was also contained in the Mayo Clinic records. His impression on July 12, 1973, was: "Aplastic Anemia, most probably (90%) due to insecticides." Dr. Petitt recommended that Claimant avoid any employment in any industry using insecticides or benzene derivatives. Dr. Burbank concurred with the diagnosis of Dr. Petitt.

After returning from the Mayo Clinic, Claimant continued under the care of Dr. Galbreath. Dr. Galbreath testified that he treated Claimant in conjunction with Dr. Koontz, Dr. Burbank, and Dr. Petitt, and concurred with the diagnosis of Dr. Petitt and Dr. Burbank. Although Dr. Galbreath was not able to say the percentage of permanent partial disability, he expressed the opinion that Claimant should never return to employment where he might be exposed to insecticides. He also stated that Claimant was not able to perform manual or physical labor.

Aplastic anemia as used by Dr. Petitt, Dr. Burbank and Dr. Galbreath was defined by Dr. Petitt as a condition of the bone marrow which is characterized by a decrease in the production of normal marrow products, including red blood cells, white blood cells and platelets.

Dr. Henry E. Hamilton, M.D., a hematologist, testified on behalf of Defendant Employer. Although Dr. Hamilton did not personally examine Claimant, he testified that he had reviewed the medical histories of Mercy Hospital, Mayo Clinic, Oakdale Family Practice Clinic and St. Lukes Hospital. Dr. Hamilton defined aplastic anemia as he used it in his deposition as follows:

> Well, the term is imprecise and the so-called aplastic anemias are part of a much larger group of anemias, the pancytopenias. In the aplastic anemia, there is the failure of the bone marrow to deliver an adequate number of cells to the circulation. Now, thus the concept of aplastic anemia as is ordinarily understood is restricted to conditions where there is some degree of pancytopenia caused by a functional hypoplasia of the bone marrow whereby there is a fatty replacement of the marrow with resulting decrease in output of the cells and a decrease then in cells of the bloodstream...

Dr. Hamilton testified that he disagreed with the diagnosis of Dr. Petitt and Dr. Burbank "...within the framework of aplastic anemia as has been defined here." Dr. Hamilton expressed an opinion that the blood disorder Claimant had fits under a broad blood classification of dyserythropoietic disorder. Dyserythropoiesis was defined by Dr. Hamilton to be another broad category under pancytopenias, characterized by a quality defect of the bone marrow. In contrast, aplastic anemia is characterized by a quantity defect in the bone marrow. Dr. Hamilton compared nineteen (19) normal blood, chemical and clinical values with the values in the recorded cases of possible pesticide-related aplastic anemia and drug-induced aplastic anemia and the values contained in the medical records of the claimant. Based on his analysis and his definition of aplastic anemia, Dr. Hamilton concluded that the pesticides used by the claimant did not cause Claimant's blood condition. The basis of his opinion was (1) that there are no recognized cases in human beings having the same reaction as Claimant to these pesticides, and (2) that Claimant was careful in his use of the pesticides.

Dr. Hamilton on cross-examination did state, however, that there have been documented cases where insecticides or rodenticides have caused aplastic anemia, but again stated that Claimant's blood condition was not what he defined as aplastic anemia. Dr. Hamilton did state that Claimant's initial low white count, low platelet level and low red cell count was consistent with aplastic anemia.

Keith R. Long, Ph.D., also testified on behalf of the Defendants. Dr. Long received his doctorate in bacteriology and is now a professor at the Department of Preventive Medicine Environmental Health at the University of Iowa. Although Dr. Long did not personally examine Claimant, he did review the medical records in this case, plus the exhibits detailing the pesticides used by the claimant. Dr. Long testified that the residue levels determined by the Iowa Community Pesticide Group on May 8, 1973, do not reflect a great deal of exposure to the pesticides in question. He expressed his opinion that the pesticides used by Claimant did not produce Claimant's blood disorder, although he stated that he was not qualified to diagnose Claimant's condition as aplastic anemia.

A personal injury means an injury to the body, the impairment of health or a disease not excluded from 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**, 218 Iowa 724, 254 N.W. 35 (1934). 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 disability while work for an employer is being pursued. It is only when there is a direct causal connection between exertion of the employment and injury that a compensation award can be made. The question is whether the diseased condtion was the cause, or whether the employment was a proximate contributing cause.

Musselman v. Central Telephone Co., 154 N.W. 2d 128 (Iowa 1967).

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 (1960). The burden of proof required in a workmen's compensation case is a preponderance of the evidence. **Musselman v. Central Telephone Co.**, supra. Absolute certainty as to the cause of an injury is not required. **Jones v. Eppley Hotels Co.**, 208 Iowa 1281, 227 N.W. 153 (1929). 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 1971).

Some discussion of an evidentiary matter seems appropriate. The claimant prior to the review proceeding gave notice of additional evidence which was to be by the deposition of Dr. Petitt. The defendants in compliance with the notice of the taking of the deposition appeared in Rochester, Minnesota, for such purpose. They were accompanied by Dr. Hamilton. Claimant refused to take the deposition of Dr. Petitt in the presence of Dr. Hamilton. Claimant attempted to invoke the "rule on witnesses" to the supposed evidentiary deposition of Dr. Petitt. After considerable discussion, the deposition of Dr. Petitt was taken outside the presence of Dr. Hamilton.

At the review proceeding the deposition of Dr. Petitt was not available. Claimant indicated no intention to introduce the deposition of Dr. Petitt as part of their testimony. Defendants then attempted to introduce the deposition as their evidence to which Claimant objected as no notice had been given by Defendants to introduce testimony of Dr. Petitt and further that Defendants could not introduce their cross-examination of Dr. Petitt without Claimant introducing its direct which they had no intention of doing. Reluctantly, Claimant's objection to the introduction of the deposition of Dr. Petitt was sustained. Defendants were allowed to introduce the deposition under an offer of proof, but the testimony in the deposition was not considered in the opinion herein.

After the deposition was received for the purpose of making it a part of the record for the purpose of any appeal from the commissioner's rejection of the inclusion of the deposition in the record, it was noted that there was not any real agreement in the stipulation between the parties as to the purposes for which the deposition could be used.

It is extremely unfortunate that under a procedure which is supposed to be informal and nontechnical that this should have come about. However, since in the final analysis the parties did not stipulate in a manner which permitted the use of the deposition as evidence in the review proceeding, no part of it should be taken unless the entire thing is taken.

This case, as it has been presented, consists of conflicting medical testimony. As such, absolute certainty as to the cause of the claimant's physical disabilities is not possible. An award by the commissioner will not be permitted to stand if it is based on evidence that merely shows a possibility of a causal connection between the injury and the claimant's employment. The Supreme Court of Iowa, while holding that a mere possibility of a causal connection is not sufficient to support an award, has held that if medical testimony shows that the causal connection is not only possible but fairly probable, an award will be sustained. **Nellis v. Quealy**, 237 Iowa 507, 21 N.W. 2d 584 (1946). **Boswell v. Kearns Garden Chapel Funeral Home**, 227 Iowa 344, 288 N.W. 402 (1939). In making a determination between conflicting medical testimony, the commissioner must take into consideration all medical testimony which bears relation to causation. **Nellis**, supra.

Statements of at least six doctors were introduced into the evidence to establish that the claimant had aplastic anemia and that it was causally connected to Claimant's continual exposure to insecticides. Three doctors were general practitioners and three had a speciality in internal medicine. Dr. Petitt had a subspecialty in hematology. All six personally examined and treated Claimant in an attempt to cure him of his disease. Dr. Hamilton, also a hematologist, and Dr. Long, a microbiologist, testified that their opinion was that Claimant's condition was not connected to his exposure to the insecticide.

In regard to the medical testimony, the commissioner is required to state the reasons on which testimony is accepted or rejected. **Sondag v. Ferris Hardware**, 220 N.W. 2d 903 (Iowa 1974). In the matter sub judice, it is not the rejection of testimony that is determinative of the issue. The testimonies and diagnoses of Doctors Galbreath, Champion, Gregson, Widmer, Burbank and Petitt are herein accepted as the most convincing concerning the causal connection between the injury to the claimant and his employment. This decision is based on two factors. The first concerns the familiarity which the six doctors have had with the claimant's case. The six doctors have followed the medical aspects of Claimant's case as treating physicians. At least three independant medical centers, Oakdale Family Practice Clinic, Mercy Hospital and Mayo Clinic, reached the same conclusion that the five and one-half years of exposure to insecticides caused Claimant's blood disorder. In contrast, the other doctors have been called in to render an opinion and have not been intimately involved in the treatment of the claimant. The second factor is that all the internists agreed that aplastic anemia does not have a precise medical meaning, but the defendants' expert gave it a specific meaning and proceeded to explain why he disagreed with the diagnosis of the treating doctors. It is not that Dr. Hamilton's testimony is rejected, but only that it did not overcome or sufficiently rebut the claimant's experts' opinions of the probable connection between Claimant's disability and his exposure to the insecticides. Considering all medical testimony and giving weight to that of Doctors Galbreath, Champion, Gregson, Widmer, Burbank and Petitt, it is felt that the claimant has sustained his burden of proving that he

incurred an injury arising out of and in the course of his employment.

Claimant's disability must be evaluated industrially, not merely functionally. **Dailey v. Pooley Lumber Co.**, 233 Iowa 758, 10 N.W. 2d 569 (1943). The factors which may be considered in addition to functional disability are claimant's age, education, qualifications, experience and his further inability because of his injury to earn a living. **Olsen v. Goodyear Service Stores**, 255 Iowa 1112, 125 N.W. 2d 251 (1963). It is the reduction of earning capacity, not merely functional disability, which must be determined. **Burton v. Nevada Poultry Co.**, 253 Iowa 285, 110 N.W. 2d 660 (1961).

Claimant has only a high school education. It is felt by Doctors Gregson, Petitt and Galbreath that Claimant should not be further exposed to insecticides or benzene derivatives. These industries could include service stations, garages, automotive repair, dry cleaning, paints, and business handling insecticides and aerosols. Dr. Galbreath testified that Claimant was not able to perform manual or physical labor. Thus, a considerable portion of Claimant's vocation is foreclosed to him. He testified he was weak, out of breath and that his eyes still bothered him. It is felt that Claimant has incurred a permanent partial disability to the body as a whole in the amount of forty (40) percent.

WHEREFORE, the arbitration decision is hereby affirmed. It is found and held as finding of fact:

That Claimant sustained an injury arising out of and in the course of his employment.

That such injury resulted in a permanent partial disability to the whole body in the amount of forty (40) percent and that the healing period amounted to forty-nine and five sevenths (49 5/7) weeks.

That such injury is compensable at the rate of sixty-three dollars ($63) per week and that the healing period is compensable at sixty-three dollars ($63) per week.

That the following medical bills were found to be fair and reasonable and necessitated by Claimant's injury.

Mercy Hospital (5/8/73 to 5/16/73)	$804.40
University of Iowa Hospitals and Clinics (May, 1973)	11.00
Weland Medical Laboratory (Services requested by Dr. Galbreath)	230.00
Dr. Galbreath	27.67
Dr. Champion	50.00
Oakdale Family Practice	105.00
Dr. Koontz	71.00
St. Luke's Hospital	4.00
Mayo Clinic	552.00
Sorg Pharmacy	216.45

THEREFORE, Defendants are ordered to pay Claimant two hundred (200) weeks of permanent disability compensation at the rate of sixty-three dollars ($63) per week. Defendants are further ordered to pay Claimant forty-nine and five-sevenths (49 5/7) weeks of healing period compensation at the rate of sixty-three dollars ($63) per week. It is further ordered that Defendants are to pay the above medical bills.

Defendants are further ordered to pay Claimant ten cents ($.10) per mile for the mileage of one thousand one hundred two (1,102) miles.

The cost of these proceedings, plus the cost of the shorthand reporter at both the arbitration and review hearings and the deposition of Dr. Petitt and Dr. Burbank are taxed to Defendant.

Signed and filed this 8 day of December, 1975.

ROBERT C. LANDESS
Industrial Commissioner

No Appeal

Frank H. Holbert, Claimant,

vs.

Townsend Engineering Company, Employer,
and
Hawkeye Security Insurance Co., Insurance Carrier, Defendants.

Review Decision

Mr. Donald A. Wine, Attorney at Law, 2300 Financial Center, Des Moines, Iowa 50309, For the Claimant.

Mr. David L. Phipps, Attorney at Law, 1400 Central National Bank Building, Des Moines, Iowa 50309, For the Defendants.

This is a proceeding brought by the defendants, Townsend Engineering Company, employer, and Hawkeye Security Insurance Company, its insurance carrier, seeking a review of an arbitration decision wherein the claimant, Frank H. Holbert, was awarded benefits under the Iowa Workmen's Compensation Act to the extent of fifty (50) percent industrial disability of the body as a whole plus a healing period of one hundred fifty (150) weeks for an injury sustained by Claimant on or about May 28, 1973. The case was presented for review on the transcript of the evidence presented at the arbitration hearing, the deposition of Dr. Mark Ravreby, M.D., and the oral arguments of counsel.

The claimant, sixty-one (61) years old at the time of the arbitration proceedings, had been employed by the defendant employer since February 2, 1970, as a machinist. He had worked for various employers as a machinist since 1949. His work record was excellent. He testified that he had missed only three days of work since 1949 when it was determined Claimant had a diabetic condition. Claimant appeared to be a man who took pride in himself and his job performance.

On or about May 28, 1973, Claimant slipped on some oil on the plant floor at Defendant Employer. Claimant fell backward but was able to catch himself from falling to the floor by grasping a workbench. At that time Claimant thought he

had pulled a muscle in his left leg. He reported this incident on the day it happened to Robert Foster, a fellow employee, and Donald Max Rinehart, Claimant's supervisor. Foster remembers being told of the incident on the day it happened. Rinehart did not remember being told and did not have it recorded on his "pad" but did not doubt that Claimant did tell him of the injury.

Claimant had discomfort to his back which continued for three to four weeks. Claimant again informed his supervisor of his pain, but it was dismissed by his supervisor as arthritis. The claimant told his supervisor of his pain on various occasions without being referred to a doctor. A friend of Claimant from the plant office suggested that Claimant seek medical attention on his own. Claimant testified that he did not consider this advice as an official recommendation.

Claimant was not able to get an appointment with Dr. Sinesio Misol, M.D., an orthopedic surgeon, until November 6, 1973. Upon examining Claimant, Dr. Misol found Claimant to have a list of fifteen (15) degrees deviation to the right, a narrowing of the disc space internally between the fourth and fifth lumbar vertebrae and acute back pain. A back brace and medication were prescribed to relieve Claimant's pain and discomfort.

Claimant was seen two other times in November for follow-up examinations, and on December 21, 1973, after noticing no improvement, Dr. Misol made arrangements to have Claimant admitted into Mercy Hospital for physical therapy treatments.

Claimant was hospitalized from January 2, 1974, to January 19, 1974. The pain and discomfort were less, and the strength in Claimant's legs had improved by February, 1974; but Dr. Misol noted that the pain in Claimant's back would return if Claimant would walk a block or a block and a half. Dr. Misol felt that this man was in no shape to return to work.

On March 21, 1974, Claimant was told by Dr. Misol that he could go back to work, if he could get a job that did not require bending, lifting or prolonged standing.

Claimant reported to Defendant Employer for work, but he was informed that he was not going to be able to continue working for them and was given an early retirement and a year's sick pay. Claimant has not sought employment elsewhere.

The testimonies of four doctors were submitted into evidence. Dr. Misol, the treating physician, testified as follows:

> A.***It is my opinion that this 60 year old man had degenerative arthritis in his back and that according to his story he did not have any pain in his back with his degenerative arthritis until the day when he slipped at work and then something happened and it hurt him. That something that happened obviously is not a ruptured disc, it is not a tumor, it is not a fracture and if it is we have been unable to see it or prove it and that is what my opinion is.
>
> Q. Doctor, was that injury in your opinion an aggravation of a previously existing condition to cause the degree of physical impairment that you find at the present time?
>
> A. Yes, I do think so...

Dr. Misol did not give a medical opinion as to Claimant's functional disabilities, but he did express an opinion that Claimant is now able to accept only half the jobs that he normally would have been able to accept.

Dr. Donald W. Blair, M.D., an orthopedic surgeon, diagnosed Claimant's condition as a degenerative disc disease of the L4-L5 level, as well as the L5-S1 level with persisting low back discomfort. Dr. Blair felt that Claimant had a preexisting condition as far as the bony structure in his back was concerned and inasmuch as the claimant did not have a history of back trouble; the doctor felt it safe to assume the accident of May 28, 1973, did precipitate or aggravate the symptoms of which the claimant now complains. Dr. Blair evaluated Claimant to have a five percent functional impairment.

Dr. David B. McClain, D.O., an orthopedic surgeon, diagnosed Claimant's condition as a lumbar spondylosis and a change of the lumbar spine. Dr. McClain defined spondylosis as the result and product of degeneration and trauma. This diagnosis is consistent with that of Dr. Misol and Dr. Blair. Dr. McClain rated Claimant's functional disability as five to eight percent, but he added that the claimant was virtually finished in manual labor.

At the review hearing, the deposition of Dr. Mark Ravreby, M.D., an internist, was introduced into evidence. Dr. Ravreby's testimony was directed to the relationship between Claimant's diabetic condition and his back problem. Dr. Ravreby stated that even though a diabetic condition could produce undesirable effects to the body after a trauma, such effects would be immediate. He also stated that the diabetic condition would not delay whatever healing that would take place in Claimant's back. Dr. Ravreby did not examine the claimant personally but did offer the opinion that the May 28, 1973, injury did not cause the discomfort Claimant now experiences.

Several issues are presented for review. The first is whether proper notice of the injury was timely given to Defendant Employer. Section 85.23 of the Code provides for notice to the employer or his representative of the occurrence of an injury, unless there is actual knowledge of the occurrence within thirty (30) days of the injury. Section 85.24 of the Code provides that no particular form of notice shall be required. Also see **Nicks v. Davenport Produce Co.**, 254 Iowa 130, 115 N.W. 2d 812 (1962) and **Alm v. Barick Cattle Co.**, 240 Iowa 1174, 38 N.W. 2d 161 (1949). The evidence revealed that the custom at Defendant Employer was for the employees to report injuries to their supervisors. The testimony of Claimant reveals that he followed this procedure and personally told his supervisor when and where the injury

occurred on the day it happened. His testimony was supported by Foster, a fellow employee. The supervisor did not doubt that he was told of the incident on May 28, 1973, but only that he did not record it on his working pad.

The second issue is whether the defendants are liable for the medical expenses generated because of Claimant's condition. The defendants' argument is briefly that since they did not authorize Claimant's medical expenses, they should not be awarded even if it is found as fact that Claimant's back condition arose out of and in the course of his employment.

Section 85.27 of the Code provides that the employer, with knowledge of an injury, shall furnish reasonable medical services to the employee. The employer, being obliged to furnish reasonable, professional and hospital care to treat an injured, 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.

The evidence shows that Claimant repeatedly reported his pain and discomfort to Defendant Employer through his supervisor, Rinehart. No action whatsoever was authorized by Defendant Employer. It is not the intent of the Iowa Workmen's Compensation Act to permit employees to go without medical care because of the disinterest of the employer; nor is it the position of this department that an injured employee must first obtain permission from this department to seek medical help when his employer refuses any authorization. Therefore, the argument persented on this issue by the defendant is without merit.

The third issue is the duration of the healing period for which Claimant was awarded compensation. Section 85.34 (1) of the Code as of May 28, 1973, provided that:

> ...the commissioner may, upon application of the claimant, extend the healing period for such time as is necessary but not beyond a total of sixty percent for both the original healing period and such extended period. However, in no event shall such payments for healing period be made for a period longer than the actual time employee is incapacitated from work because of such injury.

The evidence shows that Claimant left work December 24, 1973, for Christmas/New Year's vacation. January 2, 1974, the date of his hospitalization, was the first date Claimant missed work. Dr. Misol released Claimant to return to work on March 21, 1974, with work restrictions. Claimant testified he felt he was able to work according to the restrictions and attempted to go back to work. These facts indicate that as of at least March 21, 1974, Claimant was no longer incapacitated from some form of work because of his injury. Therefore, the deputy erred in his award of one hundred fifty (150) weeks for a healing period.

The final issue is whether Claimant's back condition was caused by a personal injury arising out of and in the course of his employment. A personal injury means an injury to the body, the impairment of health or disease which comes about not through the natural building up and tearing down of the human body, but because of the traumatic effect or other hurt or damage to the body of the employee. **Almquist v. Shenandoah Nurseries,** 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 his employment. **Musselman v. Central Telephone Co.,** 154 N.W. 2d 128 (Iowa 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. **Ziegler v. United States Gypsum Co.,** 252 Iowa 613, 106 N.W. 2d 591 (1961).

Taking the evidence in a light most favorable to the claimant, it would appear that the claimant did experience an injury on May 28, 1973. Dr. Misol, when specifically asked if the May 28, 1973, incident would cause the degree of physical impairment found with the claimant, he answered, "I think so...." Dr. Blair, an orthopedic surgeon and defendants' witness, stated that his impression was "...that the symptoms have increased or been precipitated by the injury." Dr. McClain also agreed that an injury of the type Claimant experienced on May 28, 1973, would stir up Claimant's preexisting condition.

Only Dr. Ravreby felt that Claimant's disability was not causally connected to the May 28, 1973, incident. He felt that the duration between the injury and Claimant's symptoms was too remote to be rationally linked together. It should be noted that Dr. Ravreby did not examine Claimant personally and that his specialty is an internist, while the three concurring doctors are orthopedic surgeons.

The incident or activity need not be the sole proximate cause if the injury is directly traceable to it. **Langford v. Kellar Excavating and Grading, Inc.,** 191 N.W. 2d 667 (Iowa 1971). It is found that Claimant's back injuries in question arose out of and in the course of his employment.

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 (1943). 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 Store,** 255

Iowa 1112, 125 N.W. 2d 251 (1963). 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 (1961).

Doctors McClain and Blair were the only doctors who testified as to Claimant's functional impairment. Dr. Blair rated it at five percent and Dr. McClain rated it at five to eight percent. Dr. Blair accurately described the relationship between a functional impairment and an industrial disability when he said:

> From a functional standpoint, the man can have a relatively mild disability and still not be able to carry out his regular job, which would involve an industrial disability estimation.

Claimant was restricted from standing for long periods and from frequent lifting of up to twenty to thirty (20-30) pounds. Walking more than a block to a block and a half would cause great pain to Claimant. The evidence revealed that the claimant, who had an excellent work record, was restricted from performing his previous job and was virtually finished as a manual laborer.

Considering the claimant's age, education, qualifications, experience and inability to engage in employment for which he is fitted, the only positive factor is his education. He has, however, had little experience in applying his prior training. He is nevertheless educable and probably capable of learning other skills which he could perform gainfully. Claimant's age, qualifications, experience and inability to carry on the employment in which he has been engaged or similar type employment are negative factors bearing upon Claimant's earning capacity. It is therefore determined that Claimant has suffered an industrial disability of fifty (50) percent as a result of this injury.

WHEREFORE, the arbitration decision is hereby affirmed in part and modified in part.

It is found and held as finding of fact:

That the claimant sustained a personal injury arising out of and in the course of his employment with defendant, Townsend Engineering Company, on May 28, 1973.

That the claimant timely notified Defendant Employer of his injury and that the following medical expenses were reasonable and necessary in the care of Claimant's injury:

Mercy Hospital	$1,484.69
Orthopedic Associates	203.00
Dr. James W. Chambers, M.D.	151.00
Medical Associate Pharmacy	109.05
Back brace & misc. drug bills	90.03

That the claimant's healing period consisted of eleven and one-seventh (11 1/7) weeks and that the claimant has received fifty-two weeks of benefits under a self-funded sick leave and disability income program set up by Defendant Employer.

That the claimant sustained a permanent partial industrial disability of fifty (50) percent as a result of his injury on May 28, 1973, which amounted to two hundred fifty (250) weeks of benefits.

It is further found that Claimant is entitled to a total of two hundred sixty-one and one-seventh (261 1/7), (250 + 11 1/7), weekly benefits (permanent disability and healing period). That fifty-two (52) weeks of benefits previously paid by the employer is to be credited against the two hundred sixty-one and one-seventh (261 1/7) weeks of benefits.

THEREFORE, it is ordered that the defendants, Townsend Engineering Company, and its insurance carrier, Hawkeye Security Insurance Company, pay the claimant two hundred nine and one-seventh (209 1/7) weeks of permanent partial disability at the rate of sixty-three dollars ($63) per week. The defendants are also ordered to pay the medical expenses itemized above and to reimburse Claimant for amounts paid by him.

It is further ordered that the defendants pay the cost of this and the arbitration proceeding, including that of the attendance of the shorthand reporter at the arbitration hearing.

Signed and filed this 16 day of October, 1975.

ROBERT C. LANDESS
Industrial Commissioner

No Appeal

Elmer M. Troendle, Claimant,

vs.

Penick and Ford, Ltd., Employer,
and
Fireman's Fund American Insurance Companies,
Insurance Carrier, Defendants.

Review Decision

Mr. Stephen Jackson, Attorney at Law, 205 United Fire & Casualty Bldg., Cedar Rapids, Iowa 52401, For the Claimant.

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

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

This is a proceeding brought by the defendant employer, Penick and Ford, Ltd., and defendant insurance carrier, Fireman's Fund American Insurance Companies, seeking a review of an arbitration decision wherein the claimant, Elmer M. Troendle, was awarded benefits under the Workmen's Compensation Act for an occupational disease he sustained on March 20, 1974. The case was presented on the transcript of the evidence at the arbitration proceeding, the written briefs and oral arguments of counsel.

Claimant began work for Defendant Employer on January 27, 1953. Since February 15, 1965, Claimant has worked as a machinist for Defendant Employer. His work responsibilities are mainly confined to the machine shop: running a lathe and making parts.

In September of 1971, Claimant was treated by University Hospital in Iowa City for dermatitis. At that time, a medical history was taken by the staff doctors. The history revealed that Claimant was exposed to a corn, water and sulfuric acid solution by immersing his hands into the solution on August 11, 1971. By November 15, 1971, his condition cleared up, and Claimant experienced no major difficulties with dermatitis until March, 1974.

On March 18 and 19, 1974, Claimant was assigned to repair a fan in Building No. 5, a part of the grind area where the mill and feed houses are located. The grind area is the "wet part of the plant."

On March 20, 1974, Claimant's hands began to swell and break out with small blisters and became sore. He informed Robert Tiedke, the safety officer, of his condition and was directed to see the company doctor, Dr. William R. Basler. Valisone cream and acetic soaks were prescribed. Claimant followed the advice of Dr. Basler but was not able to return to work until April 9, 1974.

Approximately two weeks later, April 23, 1974, Claimant's hands again broke out with a rash and became swollen. Again, Tiedke directed Claimant to see Dr. Basler, who referred Claimant to the Department of Dermatology and Syphilogy at University Hospital in Iowa City. On May 6, 1974, Claimant was seen by Dr. Christian E. Radcliffe, a dermatologist, who examined Claimant's hands and prescribed griseofulvin and soakings in an acetic acid solution. By June 10, 1974, Claimant's hands cleared up and he was released to go back to work.

On June 21, 1974, Claimant was administered patch tests to help determine what caused Claimant's contact dermatitis. A variety of chemicals were tried but all had a negative reaction. Dr. Radcliffe stated that a negative patch test does not absolutely rule out that a specific chemical is not a factor to an individual's reaction. Dr. Radcliffe diagnosed Claimant's condition as an irritant contact dermatitis which "because of his historical association, was undoubtedly associated and caused or aggravated by materials with which he came in contact at work."

Claimant testified, and was supported by testimony of fellow employees, that after the 1971 problem with his hands that he used his union seniority and the cooperation of his fellow employees to have as little contact as possible with the grind area of Defendant Employer's plant. Defendants did not show convincingly that Claimant had worked for any extended period of time in the grind area after the 1971 problem, except for March 18, 1974.

Claimant has the burden of proving by a preponderance of the evidence that some employment incident or activity brought about the cause of the health impairment on which he bases his claim. **Lindahl v. 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.

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, together with other disclosed facts, **Burt v. John Deere,** supra. The opinion of experts need not be couched in definite, positive or unequivocal language. **Dickinson v. Mailliard,** 175 N.W. 2d 588, 593 (Iowa 1970).

Iowa Code Section 85A.8 defines occupational disease as follows:

> Occupational diseases shall be only diseases which arise out of and in the course of the employee's employment. Such diseases shall have a direct causal connection with the employment and must have followed as a natural incident thereto from injurious exposure occasioned by the nature of the employment. Such disease must be incidental to the character of the business, occupation or process in of the business, occupation or process in which the employee was employed and not independent of the employment. Such disease need not have been foreseen or expected but after its contraction it must appear to have had its origin in a risk connected with the employment and to have resulted from that source as an incident and rational consequence. A disease which follows from a hazard to which an employee has or would have been equally exposed outside of said occupation is not compensable as an occupational disease.

Dr. Radcliffe first stated his diagnosis of Claimant's condition in a letter to a claim adjusting company representing the defendant insurance carrier on July 12, 1974, as follows:

> ****Mr. Troendle has been seen many times in the Dermatology Out Patient Clinic in the past. He has had the diagnosis of irritant contact dermatitis which has been associated with coming into contact with a mixture of materials while he is at work.***
>
> His diagnoses are two:
>
> 1. Irritant contact dermatitis undoubtedly associated and caused and aggravated by materials of which he comes in contact at work.
> 2. Fungus infection of the feet which tends to be recurrent and has no relation to his work.****

After being informed that the defendant insurance carrier had declined Claimant's claim for benefits, Dr. Radcliffe restated his opinion in a letter to the defendant insurance carrier on August 14, 1974, as to the connection of Claimant's contact dermatitis and his employment. In the letter, Dr. Radcliffe stated:

> ****He was seen on 6 May, 20 May, and 31 May 1974 as well as on 19 and 21 June 1974. As indicated in my letter of 12 July 1974, he had two diagnoses, one of which was con-

nected with his work and the other a fungus infection of his feet which had no relation to his work.

However, on the visits in May and June 1974 when he had fungus infection of his feet he also had difficulty with his hands which was **work related,** and was not related to the trouble on his feet.****

Again on April 14, 1975, in his deposition, Dr. Radcliffe maintained that Claimant's contact dermatitis was work related.

Defendant contends that Claimant's medical history is incomplete in that the doctor did not know with what specific element in the defendant employer's plant Claimant came into contact. The medical history did reveal in 1971 Claimant immersed his hands into the corn solution and contracted contact dermatitis. Dr. Radcliffe's testimony as to the direct causal connection of the disease to the employment best describes the natural incident of exposure of the corn solution to the disease. Dr. Radcliffe's testimony was:

> A good many times, I mentioned earlier, you have the one problem in that negative patch test doesn't really rule anything out. The positive one says yes and that's why so many times we have to go on the historial relationship that--so historically he will get into trouble upon contact with it and when he was removed from the environment--there was only one facet in his work--I mentioned that the--the relationship to his work but his work was in several areas, as I understand the historical, and he was working with the corn water- or whatever was the mixture--he seemed to have trouble. When he was removed from that environment and put into the shop area in contact with greases and things like that, he did not have trouble, which would indicate historically that there is something in that solution which was giving him trouble. Now, there's two kinds of contact dermatitis, the true contact allergic type dermatitis and this is best described by saying that somebody gets exposed to the oil in a leaf of poison ivy and they develop a true allergy to it and after a while it takes very little exposure and they'll blow up with an allergic problem because they're allergic to the ivy and develop what we refer to as a very high sensitivity and produces this kind of an allergic response in a large number of people. The second type of contact dermatitis is the contact irritant dermatitis. In other words, certain people's skin have certain problems, no matter what the original source. The skin is aggravated--the skin problem is aggravated markedly to certain chemicals, which is--could have been either/or, you see, but the negative patch test would say probably it wasn't an allergic response but it could have been the irritating response. Contact allergic response is not ruled out by the patch test, as I have indicated before. 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 1970).

The medical evidence, plus the additional evidence concerning the claimant's work habits, supports the finding that the claimant has sustained his burden of proof that the disease experienced on March 20, 1974, arose out of and in the course of employment and resulted in disability and medical expenses.

The arbitration decision is hereby affirmed. It is found and held as a finding of fact:

That Claimant sustained an occupational disease arising out of and in the course of his employment with the defendant, Penick and Ford, Ltd., on March 20, 1974.

WHEREFORE, it is ordered that the defendant, Penick and Ford, Ltd., and its insurance carrier, Fireman's Fund American, pay Claimant nine and one-seventh (9 1/7) weeks of temporary disability compensation at a rate of ninety-one dollars ($91) per week. The defendants are also ordered to pay medical expenses as follows:

Dr. Basler	$ 21.00
University of Iowa Hospitals & Clinics	27.00
Dr. Radcliffe	100.00

It is further ordered that Defendants pay the costs of both the review and the arbitration proceedings, including that of the attendance of the shorthand reporter at the arbitration hearing.

Signed and filed this 2 day of October, 1975.

ROBERT C. LANDESS
Industrial Commissioner

No Appeal

Floyd D. Smith, Claimant,

vs.

Shivvers Enterprises, Inc., Employer,
and
Bituminous Casualty Co., Insurance Carrier, Defendants.

Review Decision

Mr. John A. Jarvis, Attorney at Law, 301 N. 22nd, Chariton, Iowa 50049, 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 defendant employer, Shivvers Enterprises, Inc., and its insurance carrier, Bituminous Casualty Co., pursuant to Section 86.24 of the Iowa Workmen's Compensation Act, seeking a review of an arbitration decision wherein the claimant, Floyd D. Smith, was awarded medical benefits for an injury sustained on June 3, 1974. The case was presented for review on the transcript of the evidence pre-

sented at the arbitration hearing and oral arguments of counsel.

After reviewing and reorganizing the evidence submitted by the counsels for Defendant Employer and Claimant, the following sequence of events was able to be extracted. On June 3, 1974, Claimant sustained an industrial injury when a stack of metal parts fell on his leg, pinning Claimant against some steel cases. Claimant's initial injuries were bruises on his legs. He worked the remainder of the day after the injury but did not work the following day. He returned the day thereafter and worked all but two days until July 15 after which he was continuously off work.

Claimant testified that he experienced back pain after the June 3, 1974, event even though he did not mention it to anyone at work. On June 20, 1974, Claimant was examined by Thomas R. McMillan, M.D., an associate of the Leon Clinic. Dr. McMillan could not state with any certainty the extent of his examination or what was prescribed on that date. His notes seemed to be incomplete and illegible, even to himself. However, Claimant did receive an injection. A statement for professional services and medication shows that Claimant was charged for a medical prescription of Depo-medral and Xylocaine on June 20, 1974.

In **American Drug Index 1975** by Charles O. Wilson, Ph.D., and Tony E. Jones, Ph.D., Depo-medral is described as an anti-inflammatory drug; and Xylocaine is described as a local anesthetic.

Claimant also received a note from Dr. McMillan that stated: "No heavy lifting till (sic) back improves," dated June 20, 1974.

The record is not clear, but it appears that Claimant was treated for diarrhea on July 17, 1974. This treatment followed an episode wherein Claimant testified that two of his calves died from a fly spray treatment on July 14, 1974. Dr. McMillan stated that there was no mention of any treatment for back problems, but his patient records have the following notation: "Emp #3." Emp #3 is a common notation for Empirin #3, a pain medication. Claimant testified that he received an injection for his back just prior to July 20, 1974.

Claimant did not work after July 12, 1974, but he did attend a company picnic on July 20, 1974. The evidence shows that Claimant participated in various activities at this picnic; namely, a sack race, an egg race and volleyball. He did decline an invitation to join a few of his fellow workers in a boat ride after the picnic. Claimant testified he declined because his back was bothering him.

On July 22, 1974, Claimant again saw Dr. McMillan. Dr. McMillan stated that on this date his notes did indicate that Claimant complained of back pain. The treatment at this time consisted of taping the back, prescribing Roboxin, a muscle relaxant, and a cortisone injection.

On July 24, 1974, Claimant was admitted to the Decatur County Hospital. Complaints by Claimant on admission were acute back strain and headaches. Traction, hot moist packs and pain medication were prescribed to relieve Claimant's discomforts.

On August 6, 1974, Claimant was transferred to Iowa Methodist Hospital by Dr. McMillan. Claimant was then under the care of Dr. Robert Hayne, a neurosurgeon, who performed a myelogram on August 7, 1974. The myelogram was normal except for a slight asymmetry of the nerve root at the L4-5 level on the left side as compared to the right. Claimant was treated symptomatically until his discharge on August 11, 1974.

Dr. Hayne's diagnosis was that Claimant had a herniated disc at the fourth lumbar interspace on the left side; suspected but not proven. Dr. Hayne recommended that Claimant curtail his activities until he was seen at a check-up examination and that he refrain from activities which entailed heavy lifting.

Claimant was seen monthly between August 11, 1974, and January 27, 1975, at which time he was readmitted to Iowa Methodist Hospital for another myelogram. Dr. Jerome Bashara, an orthopedic surgeon, was called in for consultation. The result of the second myelogram did not change Dr. Hayne's diagnosis of Claimant's problem. Dr. Hayne felt Claimant should not return to work if it aggravated his back but suggested to Claimant to look for employment he could handle. Dr. Hayne felt Claimant could tolerate infrequent lifting up to twenty-five (25) pounds. Dr. Hayne causally connected the condition in Claimant's back to the history of the injury given by the claimant.

It is the claimant's burden to prove by a preponderance of evidence that he sustained an injury arising out of and in the course of his employment. It is also Claimant's burden to show a causal connection between his 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 medical testimony. **Bradshaw v. Iowa Methodist Hospital**, 251 Iowa 375, 101 N.W. 2d 167. 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 1971).

Claimant's uncontradicted testimony established that he sustained an injury in the course of his employment on June 3, 1974. The question to be determined is whether the injury on June 3, 1974, caused the condition in Claimant's back for which Claimant now seeks compensation.

The testimony of Dr. McMillan did not specifically connect Claimant's back condition with the June 3, 1974, incident; but his records and treatment did substantiate Claimant's testimony. Claimant testified that he experienced pain and discomfort in his back following the June 3, 1974, injury and that he visited Leon Clinic for medical help for his back. Even though Dr. McMillan did not say how Claimant was treated, it appears that two different pain medications were prescribed and that Dr. McMillan felt the necessity to write the note to the defendant employer. This supports Claimant's contention that he was having complaints concern-

ing his back as early as June 20, 1974.

The second visit, on July 17, 1974, to the Leon Clinic was similar to the first in that what transpired was not accurately documented and the doctor could not recall accurately. There was a notation, however, in the patient's records of "Emp #3," which is a pain medication.

The third visit, on July 22, 1974, is the first time the back problem was specifically mentioned in Dr. McMillan's records; and the treatment at this time was similar to the treatment on June 20, 1974.

The examination and treatment following the hospitalization at Decatur County Hospital and Iowa Methodist Hospital established that Claimant did, in fact, suffer from pain and back discomfort. The testimony of Dr. Hayne causally connected Claimant's back condition with the history of injury given to him by the claimant. This history is the first thorough history recorded by an attending physician.

The record is adequate to support a prima facie case that Claimant's back discomfort and pain were attributed to the June 3, 1974, injury. The burden thereupon falls to the defendant to go forward with the evidence and overcome or rebut the case made by the claimant. **Nelson v. Cities Service Oil Co.**, 259 Iowa 1209, 146 N.W. 2d 261.

Although Defendants' evidence certainly provides an opportunity for speculation or conjecture as to some other incident causing or creating the back condition of which the claimant complains, the defendants' contention that the claimant's activities in conjunction with the fly spraying incident or the fact that Claimant participated in activities at the company picnic might have caused Claimant's disability was not sufficient to overcome Claimant's tracing of his disability to the June 3, 1974, injury. Claimant's complaints regarding his back condition antedate either of these incidents. The treatment rendered upon initial examination was compatible with these complaints.

A preponderance of evidence does not mean that such proof must be beyond a reasonable doubt. **Jones v. Eppley Hotels Co.**, 208 Iowa 1281, 227 N.W. 153. 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.

The parties submitted little evidence as to the duration of Claimant's disability. Dr. Hayne testified on March 24, 1974, that Claimant should seek employment and could tolerate infrequent lifting up to twenty-five (25) pounds.

THEREFORE, 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 his employment with the defendant, Shivvers Enterprises, Inc. on June 3, 1974, resulting in temporary disability from July 15, 1974, to March 24, 1975.

That the following medical bills are related to Claimant's injury:

Leon Clinic	$122.00
Dr. Hayne	110.00
Dr. Bashara	71.00
Decatur County Hospital	716.30
Iowa Methodist Hospital	433.32
Iowa Methodist Hospital	338.37

THEREFORE, it is ordered that the defendants pay thirty-six (36) weeks of temporary disability compensation at the rate of eighty-one and 70/100 dollars ($81.70). Defendants are also ordered to pay the medical expenses itemized above.

It is further ordered that the defendants pay the cost of this and the arbitration proceeding, including that of the attendance of the shorthand reporter at the arbitration proceeding.

Signed and filed this 30 day of September, 1975.

ROBERT C. LANDESS
Industrial Commissioner

No Appeal

Patricia A. Brim, Claimant,

vs.

Franklin Mfg. Co., Div. of White Consolidated Industries, Employer,
and
Travelers Insurance Company, Insurance Carrier,
Defendants.

Review Decision

Mr. Patrick B. Chambers, Attorney at Law, 623 Second Street, Webster City, Iowa 50595, For the Claimant.

Mr. Robert L. Ulstad, Attorney at Law, P.O. Box 1377, Fort Dodge, Iowa 50501, For the Defendants.

This is a proceeding brought by the defendant employer, Franklin Manufacturing Company, division of White Consolidated Industries, and its insurance carrier, Travelers Insurance Company, pursuant to the provisions of Section 86.24 of the Iowa Workmen's Compensation Act, for review of an arbitration decision wherein the claimant, Patricia A. Brim, was held to have received injuries arising out of and in the course of employment on February 6, 1973. The matter was submitted on the transcript of the arbitration proceeding, additional evidence by both parties and the oral arguments of counsel.

Patricia A. Brim, claimant, was at the time of the arbitration proceeding twenty-six (26) years old and single. She had been employed by the defendant employer for five and one-half (5½) years as an assembly line worker to build timer brackets for dryer tops at three and 34/100 dollars ($3.34) an hour. Part of the job called for Claimant to lift boxes of timers from the floor to her workbench. A box of timers weighs between thirty-five and forty (35-40) pounds. On the afternoon of February 6, 1973, Claimant felt a pop or a snap in the lower part of her back as she was lifting a box of timers. She experienced some pain at that time, but she continued working the remainder of the day.

That evening, while Claimant was relaxing, the pain in her back increased. The next morning the claimant reported to the plant nurse about her injury. Both the claimant and the plant nurse thought at that time the injury consisted of a pulled or strained muscle. Moist heat was prescribed to relieve Claimant's discomfort, but she also continued to work. The pain in her lower back continued, especially when she did any amount of lifting. She described the pain as starting in her back and then radiating down to her leg.

On February 12, 1973, after discussing the injury with the plant nurse, it was decided that the claimant should see Dr. J.D. Barry, an osteopathic physician in Williams, Iowa. Dr. Barry noted that Claimant's symptoms were trouble in stooping or bending and soreness and tenderness in the lower back, the lumbar area. Dr. Barry treated Claimant with manipulation and shortwave therapy daily between February 12 and February 15 at which time Claimant was admitted to the Hamilton County Public Hospital.

An X-ray report showed that Claimant had moderate postural abnormalities consisting of a scoliosis convex to the left in the mid and lower lumbar spine with accentuated lower lumbar lordosis. Individual osseous parts and disc spaces essentially normal. Suspect the scoliosis may be somewhat chronic in view of a trace of hypertrophic lipping on the right superior margin of L4 and minimal sclerosis in the left sacroiliac, both which appear likely to be reactive changes to slightly abnormal weight bearing. The claimant had no previous history of back pain.

Treatment given the claimant at the hospital consisted of pelvic traction, hotpacks and massage for what Dr. Barry diagnosed as a lumbar strain.

On March 5, 1973, the claimant was referred to Dr. John A. Grant, an orthopedic surgeon in Ames, Iowa. After examining the claimant and reviewing her X-rays and history, Dr. Grant concluded that Claimant's injury suggested a possible damaged intervertebral disk in the lumbar spine. The claimant was given symptomatic treatment which consisted of instructions in exercises. She was also advised to use a firm, hard bed; and she was given medication for pain and to reduce the inflammation of the nerve.

The claimant was again seen by Dr. Grant on March 29, 1973. She was reported as being greatly improved and was told to report back if she had any further trouble.

Claimant returned to work March 21, 1973, and continued working throughout the summer and fall of 1973. Richard Creek and Marcia Pruismann, fellow workers, both testified that the claimant experienced difficulties in her job performance. Her efficiency dropped because she had trouble lifting the boxes of timers and had to be assisted in this task.

Clarice Brim, Claimant's mother, testified that Claimant has been a healthy young lady, an outdoor girl; but since February, 1973, she has restricted her physical activities.

On November 19, 1973, Claimant again saw Dr. Grant and reported that she was having back discomfort most of the time. She was particularly bothered by sitting or standing for long periods or riding in a car. Her symptoms were much like those of March, 1973. Claimant was again put on the same routine that Dr. Grant prescribed in March, 1973.

A myelogram was performed on December 6, 1973. The only significance it showed was a possible bulging disk at the lumbar 4th-5th level, which was a very minimal abnormality. Dr. Grant stated that a myelogram is not completely accurate; it is simply an adjunctive test. Claimant was last seen by Dr. Grant on January 14, 1974. At that time she continued to have a nagging backache, a nagging distress of the legs and a slight weakness in the extensor strength on the tendon pulling up the big toe on the left.

On cross-examination of Dr. Grant by the defendants, the following question and answer was stated:

> Q. Doctor, how do we account on March 29, 1973, that she really doesn't have any symptoms at that time of disk, but she does on November 19th, a period of approximately nine months later?
>
> A. Simply because this is not an unusual history at all for people with sciatic nerve difficulty or disk problem. They may have symptoms off and on for three or four years or five years. Then they may spontaneously improve enough that nothing--they just seem to quit having symptoms. Or they may all of a sudden rupture the disk and wind up with an operation. It's not unusual for me to see people off and on for one year, two years, five years, with symptoms that will get quite acute, and then they will seem to settle down; they will improve. They go back to work. They do well for an indefinite period of time, and then they will flare up with symptoms again. So this is not too unusual.

Dr. Grant, with the aid of the guideline published by the American Academy of Orthopedic Surgeons, estimated Claimant to have a fifteen (15) percent of permanent partial physical impairment of the whole body.

Dr. Robert A. Hayne, witness for the defendant, examined Claimant on April 3, 1974, and January 23, 1975. Dr. Hayne is a neurological surgeon from Des Moines, Iowa. Dr. Hayne felt that Claimant's symptoms were related to the injury on February 6, 1973; but that they were in the nature of back strain with muscle and ligament injury. Dr. Hayne estimated Claimant's disability to be six percent of the whole body.

Much was made of the fact that Claimant had been very active in sports in high school and in girls' summer softball. It should be noted, however, that Claimant did not participate in such activities after the February 6, 1973, injury.

The claimant has a burden of proving by a preponderance of the evidence that the injury of February 6, 1973, was the cause of her disability on

which she bases her 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 incident or activity need not be the only proximate cause if the injury is directly traceable to the disability. **Langford v. Kellar Excavating and Gravel Inc.**, 191 N.W. 2d 667 (Iowa 1971). The extent of compensation payments to which the claimant may be entitled is determined by the loss (disability) resulting from 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 the disability. **Burt v. John Deere Waterloo Tractor Works**, supra.

Considering the evidence in light of the foregoing principles, Claimant sustained her burden of proof by a preponderance of the evidence that her disability was causally connected to the injury arising out of and in the course of her employment on February 6, 1973. Claimant had a good work record prior to February 6, 1973. Both doctors agree that her symptoms were causally connected to the work-related activity. The fellow employees' testimonies reveal that Claimant's work habits changed drastically after the February 6, 1973, incident.

On January 14, 1974, Dr. Grant, the treating physician, related that Claimant's disability was fifteen (15) percent to the body as a whole. After examining the claimant on April 3, 1974, and January 23, 1975, Dr. Hayne rated Claimant's disability as six percent to the body as a whole.

The initial examination by Dr. Hayne was made subsequent to the arbitration hearing of February 12, 1974. Apparently, counsel were given the opportunity to file subsequent evidentiary medical depositions which was not done and the record was closed on September 19, 1974.

Therefore, this evidence was not available to the deputy at the time of making his arbitration decision. The second examination by Dr. Hayne was subsequent to the filing of the arbitration decision. Testimony based upon both of these examinations was not available to the deputy. Section 86.24, Code, provides for review by the commissioner of the decision of a deputy if a party is aggrieved by such decision. A party who is aggrieved by the decision of a deputy cannot be said to be so because evidence was not considered which was not available at the time of that decision. Dr. Hayne's estimate of Claimant's degree of disability was his opinion based upon his evaluation of all matters, including his January, 1975, examination.

Although additional evidence may be presented at a review proceeding, we have consistently held that this must be evidence pertaining to matters which could have been presented at the arbitration proceeding. Otherwise, the hearing is in the nature of a review-reopening pursuant to Section 86.34 of the Code for a subsequent change of condition. The industrial commissioner under Section 86.24 is reviewing a decision of the deputy. The only matters which are subject to the review are those which were in existence at the time the evidence was presented to the deputy. Additional evidence is that which could have, but for some reason was not, presented to the deputy at the time of the arbitration proceeding.

THEREFORE, it is found that Claimant on February 6, 1973, sustained an injury which arose out of and in the course of her employment and resulted in permanent partial disability to the body as a whole in the amount of twenty (20) percent. It is further found that Claimant was incapacitated from working for at least seven and four-sevenths (7 4/7) weeks, and that Claimant incurred hospital and medical bills as a result of said injury in the amount of five hundred ninety-eight and 39/100 dollars ($598.39).

WHEREFORE, the Arbitration Decision is hereby affirmed. The Defendants are ordered to pay to the claimant seven and four sevenths (7 4/7) weeks healing period at the rate of sixty-eight dollars ($68) per week. Defendants are further ordered to pay the claimant one hundred (100) weeks permanent partial disability at a rate of sixty-three dollars ($63) per week. Defendants are further ordered to pay the medical and hospital bills incurred. Defendants are further ordered to pay the costs of both the Review and the Arbitration proceedings, including that of the attendance of the shorthand reporter at the Arbitration hearing and the Review proceeding.

Signed and filed this 16 day of September, 1975.

ROBERT C. LANDESS
Industrial Commissioner

Appealed to District Court; Dismissed

Joan M. Courtney, surviving spouse of David L. Courtney, Claimant,

vs.

Dale's Towing Service, Employer,
and
IMT Insurance Company, Insurance Carrier,
Defendants.

Review Decision

Mr. Robert W. Braun, Attorney at Law, P.O. Box 2486, Waterloo, Iowa 50705, For the Claimant.

Mr. Charles F. Hinton, Attorney at Law, 751 Progress Avenue, Waterloo, Iowa 50701, For the Employer.

Mr. Larry Spaulding, Attorney at Law, 11th Floor Des Moines Building, Des Moines, Iowa 50309, For the Insurance Carrier.

This is a proceeding brought by IMT Insurance Company hereinafter referred to as insurance

carrier pursuant to §86.24, Code of Iowa, for review of a March 27, 1975, arbitration decision improperly styled "Jean" instead of "Joan" M. Courtney which overruled insurance carrier's special appearance. The matter was presented for review on the transcripts of the evidence presented at the arbitration proceeding and the written briefs and the oral arguments of counsel.

The only issue for review is whether workmen's compensation policy No. WC 9305 issued by insurance carrier to Dale Callies d/b/a Dale's Towing Service hereinafter referred to as employer was in effect on August 20, 1974, the date Claimant's spouse was killed while working for employer.

Sometime before Christmas, 1973, Ross Blow & Associates, an insurance agency, hereinafter referred to as agent was contacted by Merle Chase, office manager and day dispatcher for employer, concerning various insurance coverage. Following the initial contact between employer and agent, policy No. 1-830-905 was issued by American Interinsurance Exchange covering the Business vehicles of employer from February 1, 1974, to February 1, 1975. Policy No. 1-260-342 was issued by American Interinsurance Exchange covering a 1972 Oldsmobile from February 19, 1974, to February 19, 1975.

Employer issued a check on January 23, 1974, to agent in the amount of eighty-nine and 50/100 dollars ($89.50). Employer issued a check on January 31, 1974, to American Interinsurance Exchange in the amount of one thousand three hundred seventy-five and 75/100 dollars ($1,375.75). In February, 1974, garage liability, fire and workmen's compensation insurance coverage was discussed by Ross Blow and Dale Callies of employer. Employer issued another check on March 18, 1974, to agent in the amount of three thousand two hundred dollars ($3,200.00). All checks issued by employer were cashed by agent or deposited to an agent's account.

Sometime prior to May 7, 1974, agent issued an oral binder covering workmen's compensation to employer. Following this oral binder, an interoffice memo to agent from insurance carrier in Des Moines, Iowa, dated May 7, 1974, confirmed the binding of workmen's compensation coverage, effective April 25, 1974.

The record reveals that the next transaction occurred on July 9, 1974, when agent billed employer in the amount of one thousand seven hundred eighty-six and 63/100 dollars ($1,786.63) as "balance due on account." The "message" portion of the billing stated the following:

Policy 1260342-car policy	$ 451.00	
Credit on acct.		$1375.75
Policy 1260342-add. on car	55.00	
Credit		3200.00
Policy 1830905-Garage Liab.	7512.00	
Credit on 1830905		2269.00
Policy GA17319-Gen. Liab.	613.38	
TOTAL	$8631.38	$6844.75

TOTAL due on acount (sic) is $1,786.63
This does not include the fire or workmens comp as the policies are not in yet. If you have any questions, please call.

SIGNED /s/ **Ross Blow**

Between July 9, 1974, and July 12, 1974, agent received workmen's compensation policy No. WC 9305 from insurance carrier covering employer. On July 12, 1974, agent billed employer one thousand five hundred seventeen and 50/100 dollars ($1,517.50) for amount due for workmen's compensation policy No. WC 9305. The evidence shows that the practice of agent was to keep possession of all insurance policies as long as there were premium payments still owing.

On July 15, 1974, Blow personally contacted Callies at employer's place of business to discuss the three thousand three hundred four and 13/100 dollars ($3,304.13) employer owed agent. Blow testified that the purpose of this meeting was to discuss all the insurance policies that were issued to employer and not just specifically the workmen's compensation policy No. WC 9305. Exactly what was said at the meeting was not agreed upon by Blow and Callies. The one point not in dispute, however, is that Callies did not give Blow any funds on July 15, 1974.

Following this meeting agent sent the following memo to insurance carrier in Des Moines, Iowa:

DATE July 15, 1974
TO Underwriting
RE Dale Callies

Enclosed are Policy GA 17319 and WC 9305 for the above. Please cancell (sic) effective midnight tonight (July 15, 1974). Also do not issue the fire policy we recently requested. The insured decided he did not want coverage so please take care of this for us. Thank you.

A copy of this communication was not sent to employer.

Written cancellation of policy Nos. 830-905 and 260-342 were sent to employer from American Interinsurance Exchange on July 18, 1974. The effective date was July 31, 1974, which was later amended to August 1, and again amended to August 21.

On August 21, 1974, Claimant's spouse was killed while working for Defendant Employer.

On September 16, 1974, agent sent to employer a memo which stated:

Enclosed is your refund check. The Premiums you paid provided the following coverages:

EFFECTIVE DATE OF CANCELLATION

Policy #830-905 8-21-74	$3356.00
Policy #260-342 7-31-74	205.00

We applied refund toward the following:

surrendered policies:
WC 9305 4/25/74 to 7/15/74 $ 454.94

GA 17319 4/25/74 to 7/15/74	136.17
TOTAL EARNED PREMIUM	$4152.11
Our check enclosed	513.14

This memo shows that agent applied four hundred fifty-four and 94/100 dollars ($454.94) to workmen's compensation policy No. WC 9305 as earned premium.

Section 515.80, Code of Iowa, provides for notice of forfeiture of policies of insurance as follows:

> **Forfeiture of policies--notice.** No policy or contract of insurance provided for in this chapter shall be forfeited or suspended for nonpayment of any premium, assessment, or installment provided for in the policy, or in any note or contract for the payment thereof, unless within thirty days prior to, or on or after the maturity thereof, the company shall serve notice in writing upon the insured that such premium, assessment, or installment is due or to become due, stating the amount, and the amount necessary to pay the customary short rates, up to the time fixed in the notice when the insurance will be suspended, forfeited, or canceled, which shall not be less than thirty days after service of such notice, which may be made in person, or by mailing in a certified mail letter addressed to the insured at his post office as given in or upon the policy, and no suspension, forfeiture, or cancellation shall take effect until the time thus fixed and except as herein provided, anything in the policy, application, or a separate agreement to the contrary notwithstanding.

Section 515.81, Code of Iowa, provides for notice to insured or mortgagee of cancellation of a policy:

> **Cancellation of policy--notice to insured or mortagee.** At any time after the maturity of a premium, assessment, or installment provided for in the policy, or any note or contract for the payment thereof, or after the suspension, forfeiture, or cancellation of any policy or contract of insurance, the insured may pay to the company the customary short rates and costs of action, if one has been commenced or judgment rendered thereon, and may then, if he so elect, have his policy and all contracts or obligations connected therewith, whether in judgment or otherwise, canceled, and they and each of them thereafter shall be void; and in case of suspension, forfeiture, or cancellation of any policy or contract of insurance, the assured shall not be liable for any greater amount than the short rates earned at the date of such suspension, forfeiture, or cancellation and the costs herein provided. The policy may be cancelled by the insurance company by service of of notice in writing upon the insured which notice shall fix the date of cancellation which shall be not less than five days after service of such notice. Such service of notice may be made in person, or by mailing such notice to the insured at his post office address as given in or upon the policy, or to such other address notice of which the insured shall have given to the company in writing. A post office department receipt of certified or registered mailing shall be deemed proof of receipt of such notice. When canceled by the insurer, it may retain only the pro rata premium, and in the event the initial cash premium, or any part thereof, shall not have been paid, then said policy may be canceled by the insurer by giving said notice to the insured and ten days' notice to the mortgagee, or other person to whom the policy is made payable, if any, without tendering any part or portion of such premium, anything to the contrary in the policy notwithstanding.

Insurance carrier argued that compliance with either Section of the Code of Iowa, was not required of them since there was not a workmen's compensation policy in force or effect with employer, and that the oral binder expired by its own terms at midnight, July 15, 1974. Insurance carrier relied heavily on **Hartford Accident and Indemnity Co. v. McCullough,** 235 Cal App. 2d 195, 44 Cal Rptr. 915 for its proposition.

In the **Hartford** case, an insurance policy was "issued" to the insurance agent covering an auto owned by a Mr. McCullough. McCullough did not pay any premium, and the agent sent the policy back to the insurance company to void. No written notice was sent to McCullough of the Policy's termination. The California Insurance Code Sections 651 and 652 were similar in effect to Iowa Code Sections 515.80 and 515.81 except that they dealt only with automobile liability insurance. The District Court of Appeal, Fifth District, California, held that the insurance policy never became effective because it was never delivered to the insured, and thus the cancellations statutes were not applicable. The court stated further, however, that it was never the intention of either the insurer or the proposed insured that the policy should actually be effective until the payment of the first premium.

The California case can be distinquished from the present one in that the facts of the California case show that (1) the agent was dealing with the prospective insured on an isolated transaction rather than multiple transactions, (2) the agent never received any money from the prospective insured and (3) the prospective insured agreed that he did not have any coverage through this agent.

In the present case the facts show that the agent was holding insurance policies of the employer which were in effect without the premiums

being paid in full. Garage liability insurance, policy number 1-830-905 and car liability, policy number 1-260-342, were issued through the insurance agent in February, 1974, to employer. Employer made three separate payments on these policies, the total of which did not pay the amount owed in full; yet they were in effect and being held by the insurance agent.

In April, 1974, employer received an oral binder from agent on his workmen's compensation coverage. Insurance carrier notified agent in writing that they were binding coverage on employer effective 4-25-74.

On July 12, 1974, agent notified employer that they had received his workmen's compensation policy. Agent had possession of this policy. They also had possession of two previous policies issued to employer which were in effect.

Insurance carrier contends that the binder expired by its own terms at midnight, July 15, 1974; but the facts show that agent wrote to insurance carrier directing them to "cancel" workmen's compensation policy No. WC 9305.

Insurance carrier charged the account of their agent for coverage from 4-25-74 to 7-15-74 for workmen's compensation policy No. WC 9305 which they claim was never in effect. Agent applied four hundred fifty-four and 94/100 dollars ($454.94) of monies received from the employer to cover the cost of the workmen's compensation coverage afforded by the insurance carrier from 4-25-74 to 7-15-74.

The above evidence shows the agent held policies which were in effect, even though the premiums were not paid in full; that workmen's compensation policy No. WC 9305 was issued by insurance carrier; and that workmen's compensation policy No. WC 9305 was considered by the defendant insurance carrier to be in effect between April 25, 1974, and July 15, 1974.

The facts in this case show that (1) the agent was dealing with the defendant employer on multiple transactions rather than merely the issuance of a workmen's compensation policy, (2) that the agent had received four thousand six hundred sixty-five and 25/100 dollars ($4,665.25) in payment of various premiums from the defendant employer, (3) the defendant employer did not agree to the cancellation of his workmen's compensation policy but felt that amounts he had previously paid could be credited to such coverage until he could make further payments and (4) that four hundred fifty-four and 94/100 dollars ($454.94) of monies paid to the agent by the defendant employer was applied to coverage provided by workmen's compensation policy WC 9305 issued by defendant insurance carrier.

The burden of proof as to cancellation of a policy rests on the insurance company. **Shelken v. Northland Insurance Company**, 249 Iowa 1047, 90 N.W. 2d 29. A binding contract of insurance may be made without a delivery of the policy to the insured, in the absence of an agreement to the contrary. **Ulledalen v. United States Fire Ins. Co.**, 23 N.W. 2d 856 (N.D. 1946). Notice of cancellation must be in strict compliance with the statute. All ambiguities are resolved in favor of the insured. **Farmers Insurance Group v. Merryweather**, 214 N.W. 2d 184 (Iowa 1974).

Insurance carrier does not contend that they gave effective notice of cancellation, but that no policy existed that required compliance with the Iowa cancellation statutes.

The facts show that the insurance agent had in the past obtained effective insurance policies for employer without full payment of premium. The evidence is in dispute as to whether the workmen's compensation policy No. WC 9305 was to be paid in full before it was to be effective. Therefore, relying on **Farmers Insurance Group,** supra, the ambiguities as to the necessity of the condition precedent of full payment of the premium before the policy became effective are resolved in favor of the employer.

WHEREFORE, it is found that workmen's compensation policy No. WC 9305 was in effect. It is further found that Defendant Insurance Carrier failed to sustain his burden of effective cancellation of the workmen's compensation policy No. WC 9305, issued to the defendant employer by Defendant Insurance Company Carrier.

THEREFORE, the decision of the Arbitration hearing is hereby affirmed. The Special Appearance of Defendant Insurance Carrier is overruled.

Signed and filed this 15 day of September, 1975.

ROBERT C. LANDESS
Industrial Commissioner

Appealed to District Court; Pending

Leo Sondag, Claimant,

vs.

Ferris Hardware, Employer,
and
Grain Dealers Mutual Insurance Co., Insurance Carrier, Defendants.

Review Decision

Mr. Michael R. Mundt, Attorney at Law, 203 North Main, Denison, Iowa 51442, For the Claimant.

Mr. Burns H. Davison II, Attorney at Law, 1040 Des Moines Building, Des Moines, Iowa 50309, For the Defendants.

This is a proceeding in Arbitration brought by the claimant, Leo Sondag, against his employer, Ferris Hardware, and Grain Dealers Mutual Insurance Company, the insurance carrier, to recover benefits under the Iowa Compensation Act on account of an industrial injury which occurred on or about August 20, 1971. This matter comes to the attention of this department on an Order of

Remand from the Iowa Supreme Court. The decision of the Iowa Supreme Court directed this department to reconsider Dr. Banitt's testimony in light of the proper evidentiary rule, or, further, for a supplemental decision showing the evidence the Commissioner relied on, the standards applied, and the reasoning used in rejecting that testimony. This was then remanded by the Industrial Commissioner, with instructions, to this deputy.

As the original Deputy Industrial Commissioner hearing the case, the matter is now on remand to the undersigned. An additional evidentiary medical deposition of Dr. Louis Walter Banitt was filed with this department July 25, 1975. Subsequent thereto, counsel filed supplementary memorandum briefs, the last of which was filed August 4, 1975, and at that point the record in this remand was closed.

Dr. Banitt expressed the medical opinion that, based upon a reasonable degree of certainty, the aggravation caused when the claimant continued to work after the onset of the myocardial infarct in question constitutes a material aggravation of the claimant's preexisting condition. Dr. Banitt does not, however, attempt to specifically say any percentum or degree to which the claimant's condition was aggravated and, further, indicates that it is not medically possible to differentiate the damage that would have been sustained to the heart by the continuation of the work as compared to the damage that would have been sustained had the person stopped working.

It is, of course, well settled that when an employee is hired, the employer takes him subject to any active or dormant inpairments incurred prior to this employment. If this condition is considered more than slightly aggravated, the resultant condition is considered a personal injury within the Iowa law. **Jacques v. Farmers Lumber and Supply Co.**, 242 Iowa 548, 47 N.W. 2d 236; **Ziegler v. U.S. Gypsum Co.**, 252 Iowa 613, 106 N.W. 2d 591; **Yeager v. Firestone Tire & Rubber Co.**, 253 Iowa 369, 112 N.W. 2d 299. The claimant is not entitled to recover benefits for the results of a preexisting injury or disease, but only for an aggravation thereof which resulted in the disability found to exist. **Olson v. Goodyear Service Stores,** 255 Iowa 1112, 125 N.W. 2d 251.

The evidence contained in this record is clear that the claimant, Leo Sondag, has lost a sufficient capacity of his heart to pump blood so as to prevent him from ever again performing acts of gainful employment. The term myocardial infarction means actual death of heart muscle. The heart muscle, which is obligated to continue contracting with every beat, gradually loses a sufficient amount of oxygen, sugar and protein to maintain its life and, therefore, after a period of time the heart muscle will die in a certain area. The appropriate treatment is to reduce the heart's work load, and under ideal conditions, a patient suffering from chest pain should be allowed to rest. The continuation of the effort expended is then, therefore, a **material** aggravation of the claimant's preexisting coronary deficiency.

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

1. That the claimant sustained an industrial injury on August 20, 1971, and that said injury arose out of and in the course of Claimant's work assignments.

2. That the industrial injury sustained aggravated the preexisting coronary deficiency from which the claimant was suffering.

3. That the aggravation that occurred was a material aggravation.

4. That as a result of such an injury, the claimant has been unable to perform acts of gainful employment since that date.

5. That the claimant is permanently and totally disabled from performing acts of gainful employment.

WHEREFORE, it is ordered that the defendants pay the claimant five hundred (500) weeks at fifty-nine dollars ($59) per week, payments dating commencing with the date of injury, accrued payments to be made in a lump sum together with interest running from the date of the decision in accordance with Section 85.30, Code of Iowa.

It is further ordered that the defendants pay the claimant the following medical expenses, reimbursing the claimant those amounts which he has paid:

Pathology Center	67.00
Nebraska Methodist Hospital	1276.95
D. D. Neis, M.D.	600.00
Crawford County Hospital	2603.15
D. J. Soll, M.D.	108.00
D. J. Soll, M.D.	189.00
Nebraska Methodist Hospital	684.00
D. J. Soll, M.D.	24.00
Pathology Center	25.00
D. D. Neis, M.D.	225.00
James Flood, M.D.	5.00
Mayo Clinic	404.10
Denison Drug	356.12

Defendants are further ordered to pay the costs of these proceedings, consisting of the transcription of the deposition of Dr. Banitt.

Signed and filed this 26 day of August, 1975, at the office of the Iowa Industrial Commissioner at Des Moines.

HELMUT MUELLER
Deputy Industrial Commissioner

Appealed, to Commissioner; Affirmed
Appealed to District Court; Pending

Arlinda Kilburn, Claimant,

vs.

Goodwill Industries of Southeast Iowa, Employer, and

Employers Mutual Casualty Co., Insurance Carrier, Defendants.

Review Decision

Ms. Mary Ellen Kerr, Staff Attorney, HELP Legal Assistance, 235 Union Arcade Bldg, Davenport, Iowa 52801, For the Claimant.

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

This is a proceeding brought by the claimant, Arlinda Kilburn, against her employer, Goodwill Industries of Southeast Iowa, and its insurance carrier, Employers Mutual Casualty Company, pursuant to the provisions of Section 86.24 of the Iowa Workmen's Compensation Act for Review of an Arbitration Decision wherein she was denied recovery of benefits from her employer on account of injuries she sustained on July 2, 1973. The case on Review was submitted on transcript of the evidence, written briefs and oral arguments of counsel.

The issue presented at this proceeding is whether Claimant received an injury in the course of her employment. The facts are not substantially in dispute. Claimant was hired by the defendant employer to sort clothing, shoes and other articles donated to Defendant Employer. Her duties were performed solely inside the defendant employer's building. Claimant worked an eight-hour day, generally from 8:30 to 5:00, and was given an unpaid half-hour period between 12:00 and 12:30 for lunch. Defendant Employer did not provide cafeteria facilities, and the employees were free to eat wherever they chose. There were two eating facilities within three blocks of Defendant Employer.

The claimant was not required to have a vehicle in the performance of her duties, and the employees were free to park wherever they chose. No parking area was provided for the employees.

On July 2, 1973, the claimant, while on her lunch period, fell in the public parking/sidewalk area in front of the defendant employer's building and severely injured her hand. Defendant Employer did not have control of this area.

In the course of employment relates to time, place and circumstances of the injury. It refers to the period of employment, at a place where the employee reasonably may be in the performance of his duties or engaged in doing something incidental thereto. **Golay v. Keister Lumber Co.** 175 N.W. 2d 385 (Iowa, 1970).

"The basic rule, then, is that the journey to and from meals on the premises of the employer, is on (sic) the course of employment. Conversely, when the employee with a fixed time and place of work has left the premises for lunch, he is outside of the course of his employment if he falls...or is otherwise injured.***" 1 Larson, The Law of Workmen's Compensation, §15.51 (1972).

The courts have generally adopted the above so-called "going and coming rule"; the hazards encountered by the employee in going to or returning from work are not ordinarily incident to his employment. **Bulman v. Sanitary Farm Dairies** 247 Iowa 488, 73 N.W. 2d 27.

The claimant's own testimony reflects that she left work at 12:00 on July 2, 1973, for her lunch period. She had been waiting for her ex-husband ten to fifteen (10-15) minutes in front of Defendant Employer's building before the fall happened. There was no evidence that she was directed to be there, or that she was on any special mission for her employer. She was performing no service to her employer. 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.

THEREFORE, the Arbitration Decision is hereby affirmed. It is held and found as finding of fact that Claimant did not sustain an injury arising out of and in the course of her employment on July 2, 1973.

WHEREFORE, 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 3 day of September, 1975.

ROBERT C. LANDESS
Industrial Commissioner

No appeal

Steven John Larrew, Claimant,

vs.

Turner Furniture Manufacturing Company, Employer

and

The Western Insurance Company, Insurance Carrier, Defendants.

Review Decision

Mr. J. C. Salvo, Attorney at Law, P. O. Box 509, Harlan, Iowa 51537, For the Claimant.

Mr. R. J. Laubenthal, Attorney at Law, P. O. Box 249, Council Bluffs, Iowa 51501, For the Defendants.

This is a proceeding brought by the claimant, Steven J. Larrew, against his employer, Turner Furniture Manufacturing Company, and its insurance carrier, Western Insurance Company, 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 on December 18, 1972, but denied weekly compensation benefits for temporary or permanent partial disability. The matter was submitted on Review with no transcript of the arbitration proceeding except the depositions of Dr. Gary W. Jorgensen, D.C., Dr. R. E. Donlin, M.D. and Dr. Gerald E. Ries,

M.D. together with exhibits relating to Claimant's health care and expenses. Original and additional evidence were presented on behalf of the parties, plus arguments of counsel.

Claimant experienced at least two incidents which could have caused the injury for which he claims benefits. The first incident happened on December 18, 1972, while Claimant was at work for the defendant employer. Claimant was employed as a cutter's helper at two dollars and fifty cents ($2.50) per hour. While lifting a roll of fabric to his shoulder, Claimant testified he felt his "muscle collapse" in his right shoulder. On trying to lift the roll a second time, Claimant felt a beltline pain in his left side. Claimant then informed his foreman of his discomfort and was restricted to light work the remainder of the day.

Claimant returned to work the next day, but still experienced discomfort in his back. He described it as being "tight." That evening, December 19, 1972, Claimant saw Dr. Gary W. Jorgensen, a chiropractor in Harlan, Iowa. Dr. Jorgensen treated Claimant with chiropractic manipulation and ultrasound. His diagnosis of Claimant's injury was a lumbar sacral strain with sciatica. Dr. Jorgensen testified that Claimant had seen him fairly regularly with varying complaints of muscle spasm or tension. The doctor's records revealed Claimant had been treated on December 5, 8, and 12, just prior to the December 18, 1972, injury. As early as December 11, 1971, Claimant had been treated for trouble of the L-4 or L-5 vertabrae.

The second incident occurred on the morning of December 20, 1972. Claimant, as he was leaving to go to work, slipped on an icy sidewalk in front of his residence and landed on his rear. After this fall, Claimant felt tremendous pain in his left hip and lower back. He reported for work but his foreman excused him and he returned home.

Claimant was treated by Dr. Jorgensen the afternoon of December 20, 1972, with chiropractic manipulation and ultrasound and again on December 21 and December 22, 1972. Treatment was continued until January 6, 1973. Dr. Jorgensen testified Claimant's complaints were definitely greater after the December 20 fall.

Claimant was seen between December 21, 1972, and January 5, 1973, by Dr. R. D. Harris and Dr. R. E. Donlin, both general practitioners in Harlan, Iowa. A diagnosis of a herniated disk was made, and hospitalization was then advised. A myelogram was given on January 15, 1973. The results showed that there was a filling defect at the L-4, L-5 level on the left, which is consistent with a diagnosis of a herniated intervertebral disk.

Claimant was then referred to Dr. Gerald Ries, an orthopedic surgeon in Omaha, Nebraska. On January 26, 1973, Claimant had a "partial hemilaminectomy surgery, with a removal of the fourth disk." Claimant was released from hospital care on February 4, 1973.

Dr. Ries testified that many different things could cause the type of problem Claimant had, or that it can just happen without any cause. He stated that slipping usually causes this problem and that lifting occasionally does. In answering a hypothetical question describing the December 18, 1972, incident, the doctor responded that it could very well cause the disk protrusion in the claimant.

On cross-examination by Defendants, Dr. Ries answered a hypothetical question describing both the December 18 and December 20 incidents that it would be difficult to say if the disk protrusion occurred on the 18th or the 20th of December.

The incident on December 18, 1972, at the defendant employer is not disputed as an injury arising out of the course of employment; nor is the slipping on the ice on December 20, 1972, claimed to be a work-related injury. The question to be determined is whether the protruded disk at the L-4, L-5 level was caused by the December 18, 1972, incident or the December 20, 1972, incident.

The burden of proof is on the claimant to prove some employment incident or activity was a proximate cause of the health impairment on which he bases his claim. A possibility is insufficient; a probability is necessary. **Anderson v. Oscar Mayer & Co.**, 217 N.W. 2d 531, 535 (Iowa 1974); **Holmes v. Bruce Motor Freight, Inc.** 215 N.W. 2d 296 (Iowa 1974). Claimant need not prove that an employment injury be the sole proximate cause of his disability, but that it is directly traceable to an employment incident or activity. **Langford v. Kellar Excavating & Grading Inc.**, 191 N.W. 2d 667 (Iowa 1971).

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.

Considering the evidence offered in light of the foregoing principles, Claimant failed to sustain his burden of proof that the incident on December 18, 1972, caused the herniated lumbar disk. Dr. Jorgensen, who treated the client on December 19, the day after the work-related incident and the day before the nonwork-related incident, testified the claimant had a lumbar sacral strain. He further testified that Claimant was in a definitely greater discomfort on the afternoon of December 20. Dr. Jorgensen gave no opinion as to the cause of the injuries.

Dr. Donlin diagnosed the claimant's injuries on January 5, 1973, as a herniated lumbar disk. Dr. Donlin expressed the opinion that a fall would cause a lumbar disk protrusion. He gave no opinion as to whether lifting would cause such an injury.

Dr. Ries, the specialist called in to treat the claimant, testified that anything could cause Claimant's injuries. He stated that this type of injury was "usually" caused by slipping and "occasionally" by lifting. Dr. Ries concluded that it "would be difficult" to determine which incident did cause the injury and did not give an opinion as to which incident did, in fact, cause Claimant's injury. Not one of the three doctors could say with any degree of probability that the claimant's injuries were caused by lifting a roll of fabric.

THEREFORE, the Arbitration Decision is hereby affirmed. It is found and held as finding of fact

that the claimant sustained an industrial injury on December 18, 1972, with the Turner Furniture Manufacturing Company; that the claimant sustained a nonindustrial injury on December 20, 1972; and that the herniated lumbar disk was not causally connected with the industrial injury with any degree of probability.

WHEREFORE, Defendants are ordered to pay the medical bill in the amount of thirty dollars ($30) to Dr. Gary W. Jorgensen. Defendants are ordered to pay the cost of aribitration proceedings and the attendance of the shorthand reporter at the Review.

Signed and filed this 4 day of September, 1975.

ROBERT C. LANDESS
Industrial Commissioner

No appeal

George McCall, Deceased,
Vernon Monroe, Executor of the Estate, Claimant,

vs.

R.E. and Winifred Draper and Edna D. Lawrence, d/b/a Draper Farms, Employer, Defendants.

Review Decision

Mr. Edwin A. Getscher, Attorney at Law, Hamburg, Iowa 52640, For the Claimant.

Mr. Robert F. Leonard, Attorney at Law, Sidney, Iowa 51652. For the Defendants.

This is a proceeding brought by the defendants, R.E. Draper, et al, pursuant to §86.24, Code of Iowa, seeking Review of an Arbitration Decision, wherein Vernon Monroe, as executor of the estate of George McCall, deceased, was awarded weekly compensation for temporary total disability. The record consists of the depositions of R.E. Draper, George McCall and Dr. Thomas Largen which were presented at the Arbitration proceeding. The additional depositions of Lee Feil, Rex Nelson and Dale Brooks were presented to the Commissioner at the Review proceeding.

George McCall, Claimant, was sixty-seven (67) years old at the time of his injury. He testified his employment duties were as follows:

> "...there was carpenter work and some fencing around the house and barns and cribs and then I done his weighing down on the bottom of the grain dividing the grain down there quite a lot and cleaning the beans and stuff and just a little bit of everything."

He further indicated that his work was always connected with the farm in some way or another.

R. E. Draper, the named employer, owned the farm on which the injury occurred jointly with his two sisters. Draper, with his sisters, owns several farms in the Sidney-Hamburg, Iowa area. For at least the last twenty (20) years the management and operation of these farms has been his only occupation. Draper stated that McCall at the time of his injury was in his employment and generally assisted in the loading of farming equipment for removal from one farm to another. The record shows that McCall worked for the employer on a "as needed" basis at an hourly rate of $1.50. The record also shows that McCall had worked twenty-five and one-half (25½) hours between May 16, 1972, and May 20, 1972, the date of the injury.

The injury in question occurred while the claimant was attempting to pick up an end of a metal culvert measuring thirty (30) inches in diameter and ten to fifteen (10-15) feet in length. Claimant, Lyle Taylor, George Taylor and Draper were all assisting in the loading of this metal culvert onto a flat back wagon. The purpose for the loading of this culvert was to move it and other farm equipment from the farm located west of Sidney, Iowa, which Draper had contracted to sell, to another farm operation owned by Draper located west of Hamburg, Iowa.

Claimant's injury was severe pain in his back to the extent he could not move under his own power. Claimant was driven to his residence in Hamburg, Iowa. From his hotel the claimant was transferred to the Hamburg Hospital in Hamburg by the emergency squad where he was under the care of Dr. Thomas H. Largen. Dr. Largen testified that his examination revealed that Claimant has suffered a compression fracture of the L3 vertebra. The claimant was given medication, physical therapy and a back brace was prescribed for his injury.

Lee Feil, soil conservation contractor in the Sidney-Hamburg, Iowa area for five years, stated that even though part of his business includes the hauling of culverts, he has seen farmers in this area hauling or dragging culverts the size of the one in the instant case themselves. He further stated that the loading of culverts does not require special equipment. What would be needed would be either a tractor or a loader to load the pipe. He would have used a winch truck to load the culvert on to a pick-up or truck.

Dale Brooks, a fifty-seven (57) year old farmer who has farmed all his life, testified that in the farming profession one occasionally is required to move, install or transport metal culverts. Mr. Brooks further stated that "as far as farm tubes are concerned, to the best of my knowledge, are all moved, unless they are massive in size, are all moved by the farmer himself." He did not consider a tube ten to fifteen (10-15) feet long with a thirty (30) inch diameter as massive. He personally has moved a culvert by himself within the last two years.

Rex Nelson, also a farmer in the Sidney, Iowa area for thirty (30) years, stated that on occasion he had to install, move or transport culverts in his farming operation. A ten to fifteen (10-15) foot culvert with a thirty (30)

inch diameter was considered by him to be a small tube and a very common size tube around the farm. Nelson stated that he personally has never hired an outside contractor to move these tubes and install them. He had always done it himself. Some of the culverts that he has testified to moving have been up to seventy (70) feet long and five (5) feet in diameter. He could remember at least seven (7) or eight (8) times he had occasion to remove or install culverts in the last thirty (30) years. Mr. Nelson further stated, "I don't know of anybody in our area that ever hired anybody to do it."

The question for determination is whether or not the claimant is entitled to compensation under the Workmen's Compensation Act as it existed at the time of the injury. §85.1(3), of the Code 1972, provides as follows:

> "This chapter shall not apply to:
> 3. Persons engaged in agriculture, insofar as injuries shall be incurred by employees while engaged in agriculture pursuits or any operations immediately connected therewith, whether on or off the premises of the employer."

For a person to be excluded from compensation under §85.1(3), Code 1972, two things must be present: 1) he must be engaged in agriculture, and 2) he must be injured while engaged in an agricultural pursuit or any operation immediately connected therewith. **Sheahan v. Plagge**, 255 Iowa 182, 184, 121 N.W. 2d 120 (1963).

The defendant employer was engaged solely in agriculture and had been for the last twenty (20) years. The question now is whether the loading of the culvert was an agricultural pursuit or an operation immediately connected therewith.

The case law concerning the present question looks to the nature of the work done by the employer and the employee at the time of the injury to determine whether or not Claimant was engaged in agriculture. In **Trullinger v. Fremont County, Iowa,** 223 Iowa 677, 273 N.W. 124, the claimant was hired to operate road machinery on a farm. Here the Court found he was engaged in an agricultural pursuit, but his employer, the County, was not engaged in agriculture. §85.1 (3), 1972 Code, thus did not apply. In **Crouse v. Lloyd's Turkey Ranch,** 251 Iowa 156, 100 N.W. 2d 115, the employer was both a farmer and a processor. The claimant was hired solely to work in processing even though the employer was engaged in agriculture. The employee, at the time of the injury, was not in an agricultural pursuit. §85.1 (3), 1972 Code, again did not apply. **Sheahan v. Plagge,** supra, the employer again had two occupations, a farming and sand and gravel business. At the time of the injury, Claimant was helping the employer in his farming operation, thus the Court found that the employer was engaged in agriculture and the employee was in an agricultural pursuit at the time of his injury. §85.1(3), 1972 Code, applied and the employee was excluded from workmen's compensation coverage.

The evidence clearly shows that the defendant employer had only one occupation, that being a farmer. The evidence also substantiates the proposition of the movement and loading of a culvert the size in question as a task normally connected with an agricultural pursuit. The testimony of the two veteran farmers, Nelson and Brooks, and that of the dirt contractors supports a finding that the community practice as it relates to moving a culvert the size in question is that such movement is one of the requirements connected with the farm operation. While it is true a person may be actually engaged in more than one pursuit at the same time. **Sheahan v. Plagge**, supra, at page 186. The court realized in **Trullinger v. Fremont County, Iowa,** supra, that a farmer's hired man would not cease to be a farm laborer while adjusting a harvesting machine, does work on electrical equipment, does carpenter work, etc. This remains true even though a mechanic, electrician or a carpenter does not become a farm laborer when sent out from town for the same occasion.

The **Trullinger** Court stated in 223 Iowa at page 683, in reference to the many skills required of a farm laborer "a farmer's hired man would not cease to be farm laborer while adjusting harvesting machinery or stabling the horses of a contractor drilling a well on the place. The modern farm laborer doubtless does much work on the rapidly increasing electrical equipment on farms. He continues a farm laborer while he does it. But an electrician sent out from town to do the same thing would not become a farm laborer for the occasion. So also a farm laborer does not step out of his own part while doing carpentry work for his farmer employer in the repair of farm buildings. Neither does the carpenter who comes onto the farm for the job of carpentry and nothing more. One continues a farm laborer and the other does not become one."

The same rationale applies to the present case, in that a farm laborer does not transform into a dirt contractor when he is loading a culvert.

WHEREFORE, the Arbitration Decision is hereby reversed and is found as fact that the only occupation of the Defendant was that of being engaged in agriculture; that the movement and loading of a culvert thirty (30) inches in diameter and ten to fifteen (10-15) feet long was an activity commonly required in an agricultural operation; and that the claimant was injured while engaged in an operation immediately connected with an agricultural pursuit.

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

Signed and filed this 14 day of August, 1975.

ROBERT C. LANDESS
Industrial commissioner

No appeal

William E. Scharf, Claimant,

vs.

Hewitt Masonry, Employer,
and
Hawkeye Security Insurance Company, Insurance Carrier, Defendants.

Review Decision

Mr. David A. Opheim, Attorney at Law, Seventh Floor Snell Building, Fort Dodge, Iowa 50501, For the Claimant.

Mr. Robert L. Ulstad, Attorney at Law, 403 Snell Building, Fort Dodge, Iowa 50502, For the Defendants.

This is a proceeding brought by the defendants, Hewitt Masonry, employer, and Hawkeye Security Insurance Company, insurance carrier, pursuant to Code Section 86.24, for review of an Arbitration Decision whereby William E. Scharf, claimant, was awarded benefits for an injury alleged to have arisen out of and in the course of his employment on July 23, 1973. this matter was submitted on review on transcripts of the evidence presented at the Arbitration proceeding, additional evidence presented at the Review proceeding, and written and oral arguments of counsel.

William E. Scharf, claimant, was a passenger in a motor vehicle owned and operated by Rodney Askeland. Claimant and Askeland were employed by Defendant Employer. Claimant was injured when the vehicle in which he was riding was involved in a one-car accident 2-3 miles west of Clare, Iowa, at 7:30 a.m. on Monday, July 23, 1973.

Claimant's injuries were fractures of 1st, 2nd, and 3rd lumbar vertebrae, and a fracture of the left fourth metatarsal. The claimant was hospitalized from July 23, 1973, until August 3, 1973. After his release from the hospital, claimant was under the care of Dr. Charles L. Dagle. Claimant was placed on an exercise regimen and restricted from doing heavy work until January 21, 1974. At the time of the arbitration proceeding, claimant's recovery from his fractures was diagnosed as normal, and he had made a satisfactory recovery from the injuries except for low back pain which increased with strenuous activity.

The normal practice at Defendant Employer was for the employer to provide a pick-up truck for transportation for his employees. Because the trucks were needed at other jobs being done by Defendant Employer, by agreement between Robert Hewitt, owner of Defendant Employer and Askeland, Askeland agreed to transport himself and the claimant the sixty miles to the job site in Storm Lake, Iowa, from Fort Dodge, Iowa the home office of Defendant Employer. Defendant Employer paid for the fuel required for this transportation. This arrangement had been in effect for two weeks prior to the date of the accident.

Claimant was employed as a bricklayer tender at an hourly rate of $2.50. Through an informal agreement, he was to keep a record of his own hours worked. On the day of the injury, Claimant drove to the home of Askeland. The two employees then drove the Askeland vehicle to Standard All Around Truck Stop in Fort Dodge and filled the car with gas. Askeland signed for the gas which was charged to and paid for by Defendant Employer. This was the normal procedure.

The issue to be decided is whether or not Claimant was in the course of employment at the time he was injured.

"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 time, place and circumstances of the injury. **Golay v. Keister Lumber Co.,** 175 N.W. 2d 385, and cases cited therein.

"As to employees having fixed hours and place of work, injuries occurring on the premises while they are going to and from work before or after working hours or at lunchtime are compensable, subject to several exceptions ****" 1 Larson, the Law of Workmen's Compensation §15.00.

An exception to the above general rule is when the journey to and from work is made in the employer's conveyance. The journey is in the course of employment. The risk of employment continues through the journey because the vehicle is under the control of the employer and the employees ride in the vehicle at the direction of the employer. The transportation duties are incidental to but outside the regular duties. The Iowa Court by implication, supported this proposition in **Pribyl v. Standard Electric Co.,** 246 Iowa 333, 67 N.W. 2d 438, when it compensated a union employee who was injured while riding to work. The employment contract between employer and employee specifically required the employer to provide transportation for employees when they were assigned jobs outside the employer's county. By a separate agreement employer agreed to pay 8 cents a mile to the employee when he drove his own vehicle. It should be noted that the employee was not compensated for time spent in travel, but only for a predetermined mileage between home and the work site. The court said: "It must be conceded that there must be something more than mere payment of such transportation cost." **Pribyl,** supra, p. 342. The "something more" was the fact that the employer had contracted to furnish transportation.

In the present case, the provisions for transportation by the employer came about as the result of an oral contract. The unchallenged testimony reveals that the employer approached Askeland and proposed that he use his own personal vehicle to transport Hewitt employees to the job site because the pick-up trucks that were normally used were tied up elsewhere. For his services, Defen-

dant Employer paid Askeland for the gasoline used.

The testimony of Hewitt reveals that he was not adverse to the practice of his employees charging for travel time. It was the practice for the employees to keep their own timesheets. Using the guideline set by the **Pribyl** court, we find that Defendant Employer did more than pay transportation cost. They entered into an oral agreement with one of its employees to provide transportation for the other employees, plus Defendant Employer was willing to compensate its employees for their travel time. The fact that Claimant chose not to take advantage of this benefit is not determinative as to whether at the time of his injury he was in the course of employment.

Defendant contends that the degree of permanent partial disability found by the deputy was not supported by the record. Permanent disability does not have to be a disability that is intended to last forever. Permanent means for an indefinite and undeterminable period. **Wallace v. Brotherhood of Locomotive Firemen and Enginemen,** 230 Iowa 1127, 300 N.W. 322, **Garden v. New England Mutual Life Insurance Co.** 218 Iowa 1094, 254 N.W. 287.

When the injury suffered is a general body injury such as in this case, the claimant's disability is evaluated from an industrial and not an exclusively functional standpoint. **Martin v. Skelly Oil Co.**, 252 Iowa 128, 106 N.W. 2d 95.

The medical testimony reveals that claimant's condition is normal except that he experiences low back pain when he would exert himself in relatively strenuous activity. In determining industrial disability, consideration may be given to the injured employee's 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.

WHEREFORE, it is found and supported by evidence in the record that the customary practice of Hewitt Masonry was to provide transportation for its employees to their respective job sites. It is further found that because of special circumstances, Hewitt Masonry contracted with Askeland to substitute his own vehicle for that of a Hewitt Masonry pick-up truck to provide the customary transportation. At the time of the injury the claimant was riding in the Askeland vehicle as was expected of him, and as such he was performing a duty incidental to his normal job duties. It is further found that the award for benefits in the Arbitration decision is proper.

THEREFORE, the Arbitration Decision is hereby affirmed.

Signed and filed this 19 day of August, 1975.

ROBERT C. LANDESS
Industrial Commissioner

No appeal

Edward J. Polk, Claimant,

vs.

Cedar Valley Corporation, Employer,
and
Employer's Mutual Casualty Co., Insurance Carrier,
Defendants.

Review of Order

This is a proceeding pursuant to section 86.24, Code of Iowa, brought by John E. Behnke, attorney, for Review of an order setting attorney fees for his representation of the claimant for a back injury allegedly received on or about August 15, 1973.

The record reflects that three checks totaling $1,183.00 were paid to the claimant and his attorney Behnke by the insurance carrier for disability apparently related to his back from which Behnke extracted a fee of $394.33. These payments were made by the carrier without the filing of a memorandum of agreement and charged against a file relating to another injury received by the claimant to his eye. The records tend to indicate, however, that claimant's disability during the period covered by these checks was not related to his eye injury.

Behnke prepared for and represented the claimant at a hearing in January of 1974. The record was left open for further medical evidence. Sometime later the claimant discharged Behnke and sought other counsel. It is not clear at what point this discharge was effectuated, but it was apparently sometime in April or May of 1974. There are allegations that the discharge was attempted earlier, but there is no conclusive evidence that there was ever a meeting of the minds in this regard. This is further clouded by the fact that claimant owed Behnke for monies loaned or advanced to him by Behnke. It is represented that an initial offer for settlement of $500.00 had been received by Behnke prior to his discharge. It is not known what further negotiations by Behnke may have accomplished in the event he had not been discharged.

Claimant eventually was represented by Legal Aid and a $2,500 settlement was negotiated. A note in the commissioner's file indicates that this office was first aware that the claimant was represented by Legal Aid on May 29, 1974. This settlement was submitted and approved by this office on August 1, 1974.

It would appear from the record that the majority if not all of the preparatory work and medical examinations had taken place prior to the appearance of Legal Aid into the case. The major contributions of Legal Aid to this matter were the final negotiation of the settlement with the insurance carrier and the attempt to negotiate the fee arrangement between the claimant and Behnke, which by this time had turned into a major confrontation.

The reason for the discharge of Behnke was apparently a general dissatisfaction over the

progress of the case. Nothing herein is intended to reflect upon the justification for claimant's impatience or the diligence of Behnke's representation. This office is cognizant of both of these aspects from this case and others wherein the parties herein have been involved.

Code of Iowa, Section 86.39 states in part:

> "All fees or claims for legal...services rendered under this chapter and chapters 85 and 87 shall be subject to the approval of the industrial commissioner and no lien for such services shall be enforceable without the approval of the amount thereof by the industrial commissioner.****"

In allowing attorney fees consideration should be given to the time spent, the nature and extent of the services, the amount involved, the difficulty of handling and importance of the issues, the responsibility assumed and the results obtained, as well as the professional standing and experience of the attorney. **Kirkpatrick vs. Patterson,** 172 N.W. 2d 259.

Applying these principles to the instant case, it is found that the following fees are reasonable for the services performed in the representation by Behnke of the claimant in his claim for disability benefits relating to an alleged back injury on or about August 15, 1973.

Of the $1,183.00 obtained prior to hearing, twenty percent (20%) or $236.60

Of the $500.00 offer for settlement, twenty-five percent (25%) or $125.00.

Of the $2,000.00 received by the claimant over and above the previous offer, ten percent (10%) or $200.00.

From this will be deducted $394.33 previously paid to Behnke by the claimant for representation in this matter.

	$236.60
+	125.00
+	200.00
=	$561.60
−	394.33
=	$167.27

WHEREFORE, IT IS ORDERED that the reasonable attorney fee due and owing John E. Behnke by the claimant, Edward J. Polk, in this matter is a total of $561.60 of which $394.33 has been previously paid leaving a balance due of $167.27.

Signed and filed this 12 day of August, 1975, at the office of the Iowa Industrial Commissioner at Des Moines.

ROBERT C. LANDESS
Industrial Commissioner

No appeal

James W. Barker, Claimant,

vs.

Richeson Rental, Employer, Defendant.

Review Order

Mr. Donald G. Allbee, Attorney at Law, 402 West Main Street, Marshalltown, Iowa 50158, For the claimant.

Mr. William Hill, Attorney at Law, 11 Woodbury Building, Marshalltown, Iowa 50158, For the Defendant.

James W. Barker, Claimant, filed an Application for Arbitration on August 6, 1974, alleging that he sustained an injury arising out of and in the course of his employment by Richeson Rental, Defendant.

On February 20, 1975, the Arbitration Decision in this matter was filed. The Decision awarded medical benefits and compensation for temporary total disability. On Wednesday, March 5, 1975, Employer's Petition for Review of Arbitration Decision was received and marked "filed" by the Industrial Commissioner. The cover letter sent with Employer's Petition was dated March 1, 1975. On May 19, 1975, Claimant filed a Motion to Dismiss for the reason that Defendant failed to timely file Petition for Review. Defendant filed a Resistance to Claimant's Motion alleging it mailed to the Commissioner a Petiton for Review within the time required by §86.24, Iowa Code.

Code §86.24 says: "Any party aggrieved by the decision or finding 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..." **Barlow v. Midwest Roofing,** 249 Iowa 1358, 92 N.W. 2d 406 (1958) held that it was proper for the Industrial Commissioner to dismiss a Petition for Review not filed within ten days after the filing of the Arbitration Decision. The Court indicated that timely filing was jurisdictional and concluded "that the commissioner himself cannot extend or diminish jurisdiction to act under this law."

In computing time, the first day shall be excluded and the last day included unless the last day falls on a Sunday, in which case the time prescribed shall be extended as to include the whole of the following Monday. Code §4.1 (23). By this method of computing the last day for timely filing after the filing of the Arbitration Decision was Monday, March 3, 1975.

The issue for decision is the meaning of "filed in the office" of §86.24, Iowa Code 1974. In **Brembry v. Armour & Co.,** 250 Iowa 630, 95 N.W. 2d 449 (1959), the Court decided whether the application was timely filed under workmen's compensation laws. In **Brembry,** supra, Claimant was injured in the course of his employment on September 8, 1955. On September 6, 1957, Claimant's attorneys mailed an Application for Arbitration to the Industrial Commissioner. This was Friday and since the office closed on Saturday and Sunday, the Application was not marked "Filed" until September

9, 1957. The Court, in deciding this case, relied entirely on the September 9, 1957, date in determining whether the application was timely filed. The implication is that "filed in the office" means the document is filed when it is delivered to the proper officer and by him received to be kept on file and not when it is mailed. Thus, Claimant's Petition for Review was not timely filed as directed by Code §86.24. Jurisdiction of the industrial commissioner may not be expanded to accommodate such late filing.

THEREFORE, Claimant's Motion to Dismiss is sustained.

IT IS HEREBY ORDERED that Defendants' Petition for Review be dismissed.

Signed and filed this 31 day of July, 1975.

ROBERT C. LANDESS
Industrial Commissioner

No appeal

Dean E. Strub, Claimant,

vs.

William R. Weinrich, Employer,
and
Great West Casualty Company, Insurance Carrier,
Defendants.

Order

NOW, on this 1st day of July, 1975, the matter of defendant's motion to dismiss claimant's petition for review comes on for determination.

Upon review of the file, it is found that the allegations contained in defendant's motion are meritorious.

THEREFORE, claimant's petition for review is hereby dismissed with prejudice.

Signed and filed this 1 day of July, 1975.

ROBERT C. LANDESS
Industrial Commissioner

No appeal

David N. Fredericksen, Deceased,
Lori Fredericksen, Widow, Claimant,

vs.

Northwest Iowa Masonry, Inc., Employer,
and
Hawkeye-Security Insurance Co., Insurance Carrier,
Defendants.

Review Decision

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

Mr. Robert L. Ulstad, Attorney at Law, P. O. Box 1377, Fort Dodge, IA 50501, For the Defendants.

This is a proceeding brought by the defendants, Northwest Iowa Masonry, Inc., and its insurance carrier, Hawkeye-Security Insurance Company, against the claimant, Lori Fredericksen, surviving spouse of decedent David Neil Fredericksen, for review pursuant to the provisions of §86.24, Code of Iowa, of an arbitration decision, wherein the decedent was found to have sustained a fatal injury arising out of and in the course of his employment on October 17, 1974. Claimant was awarded burial expenses and weekly compensation as long as she qualifies under the provisions of §85.43, Code of Iowa. It is further ordered that in the event Claimant becomes ineligible under §85.43, Code of Iowa, payment shall be made to Decedent's surviving son, Neil Fredericksen, in accordance with §85.31, Code of Iowa. The case came on for review on the transcript of the evidence presented at the arbitration proceeding, the transcript of the additional evidence presented at the review hearing and written and oral arguments of counsel.

The sole issue of appeal is whether the fatal injury sustained by the decedent, David Neil Fredericksen, on October 17, 1974 was in the course of his employment for Defendant Employer.

David Neil Fredericksen at the time of his death was married to claimant, Lori Fredericksen, and the father of a seven-month-old son, Neil Fredericksen. Decedent had been employed by Northwest Iowa Masonry, Inc., defendant employer, while in high school on a part-time basis and upon graduation he continued to work on a full-time basis as an apprentice bricklayer until the date of his death on October 17, 1974. Decedent normally worked forty hours per week at the rate of $4.25 per hour.

On October 17, 1974 Decedent left his home in Estherville, Iowa at approximately 6:00 a.m. and traveled in his 1973 Datsun pick-up to Algona, Iowa. On this date, Defendant Employer, a masonry contractor, had three major construction jobs located in Garner, Iowa, Redfield-Dexter, Iowa and Algona, Iowa where Decedent was employed. Jack Fredericksen, secretary-treasurer of Defendant Employer and father of Decedent, and his work crew were assigned to the Algona site. Other members of the work crew in Algona were Ken Kasalke, Dwayne Richard, Michael Schmidt, Ron Westcott, Mickey Wilson and one named Umscheid.

Normally, Decedent rode to the Algona site with Jack Fredericksen, but on this particular day Decedent was told to drive his own truck because Fredericksen had to return home early. Defendant Employer paid no transportation expenses to their employees for going to and from the job site.

For some time prior to October 17, 1974 the forklift at the Algona site had not been operating properly. The trouble was found to originate with the starter motor. A new starter was purchased

from Seig Supply in Algona and installed in the forklift. The old starter was taken to Recher, Inc., in Estherville, Iowa to be repaired; and additional parts were ordered from Minneapolis, Minnesota. On October 17, 1974 Decedent was instructed by Jack Fredericksen, foreman, to check whether these ordered parts had arrived; and if not, Decedent was to pick up the repaired starter motor at Recher, Inc., in Estherville, Iowa and to bring it to the work site in Algona, Iowa on October 18. Fredericksen further testified he told Decedent to be ready to go to work early on the 18th to install the starter motor.

The record establishes that Decedent had previously run errands both during and after working hours. Decedent was compensated for working after hours by a system of "banked" hours compensation. This system provided that whenever the after-hour errands amounted to more than forty hours in one week, the defendant employer would pay the employee for forty hours and allow the employee to accumulate the extra hours to use whenever there was a "short" week.

The record also establishes that on the evening of October 16, 1974, one day before the fatal injury, Decedent attempted to pick up the repaired starter from Recher, Inc., in Estherville, Iowa. The decedent's father-in-law, John Weaver, was the parts man at Recher, Inc., and had access to the building after normal working hours. Decedent was unable to locate Weaver on October 16, 1974.

At the arbitration proceeding, Dwayne Richard testified that when he left the job site on October 17, 1974 Decedent remained. Richard stated that at approximately 5:20-5:25 p.m. he observed Decedent in his pick-up at the intersection of highways 18 and 169. Decedent proceeded west on highway 18, which is the route between Algona and Estherville, Iowa.

At approximately 5:50 p.m., October 17, 1974, Decedent was involved in a head-on truck-car accident about nine miles east of Estherville on highway 9 in Emmet County, Iowa. Deputy Sheriff Lawrence Dickinson observed the scene and testified at the arbitration proceeding that Decedent was traveling west on highway 9 at the time of the accident, a direct route from Algona to Estherville. Decedent was dead at the scene.

The burden of proving that an injury arose out of and in the course of one's employment is on the claimant. **McClure v. Union, et al. Counties,** 188 N.W. 2d 283 (Iowa 1971). The burden of proof required in a workmen's compensation case is a preponderance of the evidence. **Musselman v. Central Telephone Co.,** 154 N.W. 2d 128 (Iowa 1967).

Section 85.61 (6), Code of Iowa, provides:

> 6. The words "personal injury arising out of and in the course of the employment" shall include injuries to employees whose services are being performed on, in or about the premises which are occupied, used, or controlled by the employer, and also injuries to those who are engaged elsewhere in places where their employer's business requires their presence and subjects them to dangers incident to the business.

The supreme court of Iowa in the cases of **Alm v. Morris Barick Cattle Co.,** 240 Iowa 1174 (1949), 38 N.W. 2d 161 and **Pohler v. T. W. Snow Construction Co.,** 239 Iowa 1018 (1948), 33 N.W. 2d 416, held that the phrase, "injuries * * * arising out of and in the course of the employment", should be given a broad and liberal interpretation. In general, the workmen's compensation statutes are to be given a broad and liberal construction to comply with the spirit as well as the letter of the law. **Golay v. Keister Lumber Company,** 175 N.W. 2d 385 (Iowa 1970); **Crowe v. DeSoto Consolidated School District,** 246 Iowa 402, 68 N.W. 2d 63 (1955).

The sole issue on this appeal is whether Claimant's decedent was in the course of employment at the time of the accident. Ordinarily, the phrase, "in the course of the employment", as used in our workmen's compensation statutes, means within the period of the employment, at a place where the employee reasonably may be in the performance of his duties and while he is fulfilling those duties or engaged in doing something incidental thereto. **Bulman v. Sanitary Farm Dairies,** 247 Iowa 488, 73 N.W. 2d 27 (1955). It relates to the time, place and circumstances of the accident. **Buehner v. Hauptly, Iowa,** 161 N.W. 2d 170 (Iowa 1968).

The appellant-defendants claim that the evidence supports the finding that the decedent at the time of the fatal traffic accident was merely returning home in his normal and usual manner (not on a dual purpose trip) and, therefore, not within the course of his employment. Appellee claims her decedent was on a dual purpose trip involving a special errand for his employer at the time of his death and thus, was within the course of his employment.

The courts, including the supreme court of Iowa, have quite generally adopted the so-called "going and coming" rule: that the hazards encountered by the employee in going to or returning from work are not ordinarily incident to his employment within the meaning of the phrase as used in the workmen's compensation law and therefore, an injury suffered by an employee in going to or returning from the employer's premises, except in special instances, does not arise out of his employment so as to entitle him to compensation. **Bulman,** supra; **Kyle v. Greene High School,** 208 Iowa 1037, 226 N.W. 71 (1929).

There are, of course, exceptions to this general rule. The supreme court of Iowa recognized an exception to this rule in **Kyle vs. Greene High School,** supra, on page 1040 of that opinion:

> An exception to the aforesaid general rule is found in cases where it is shown that the employee, although not at his regular place of employment, even before or after customary working hours, is doing, is on his way home after performing, or on the way from his home

to perform some special service or errand, or some duty incidental to the nature of his employment in the interest of, or under direction of, his employer. In such cases, an injury arising en route from the home to the place where the work is performed, or from the place of performance of the work to the home, is considered as arising out of and in the course of the employment.

However, in the instant action, a further distinction is necessary because the trip taken by the claimant's decedent was one of dual purposes–both business and personal purposes. As stated in 1 Larson, **The Law of Workmen's Compensation,** §18.12, and adopted in **Koenen v. Woodford-Wheeler Lumber Co.,** 31st Biennial Report Iowa Industrial Commissioner, page 61:

> 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.

The supreme court of Iowa recognized the dual purpose rule in the case of **Golay v. Keister Lumber Co.**, supra, page 388:

> "Injury during a trip which serves both a business and a personal purpose is within the course of employment if the trip involves the performance of a service for the employer which would have caused the trip to be taken by someone even if it had not coincided with the personal journey. This principle applies to * * *, trips to and from work * * *." 1 Larson, The Law of Workmen's Compensation, 294.3 §18.00 (1965).

A review of the evidence presented and applicable law requires the finding that Claimant sustained her burden of proof by a preponderance of the evidence that Decedent's fatal injury on October 17, 1974 arose out of and in the course of his employment with Defendant Employer. The fatal traffic accident occurred while Decedent was on a dual purpose trip, hence falling within a recognized exception to the "going and coming" rule. The trip combined a non-compensable purpose of returning home from work with a compensable purpose, that of performing a special errand for his employer.

The testimony of Jack Fredericksen at the arbitration hearing reveals that he instructed Decedent to pick up a starter motor at Recher, Inc., in Estherville, Iowa on October 17, 1974. The testimony of Fredericksen also explains the difficulties they were having with the forklift at the Algona job site and the necessity of the forklift on the job site. Decedent's co-workers, Michael Schmidt, Ken Kesalke, and Ronald Westcott, corroborated the testimony of Jack Fredericksen as to the problems that were experienced with the forklift and the need for the forklift at the job site on October 17, 1974.

The deputy industrial commissiner found that, "The operation of the forklift was essential for the performance of the work by Fredericksen's crew at the Algona job site." Defendants at the review proceeding attempted to discredit this finding by offering the testimony of John Isder, an officer of the corporation, that due to the stage of construction at the site, it was not absolutely necessary to have the forklift working properly.

The testimony of Isder is not sufficient to establish that Decedent's trip was unnecessary. The evidence in the record establishes that the forklift had been malfunctioning prior to October 17, 1974 and that Jack Fredericksen, foreman, believed the use of the forklift was necessary to effect the completion of the job and hence instructed Decedent on October 17, 1974 to pick up the repaired starter in Estherville, Iowa if a starter ordered from Minneapolis, Minnesota did not arrive. Jack Fredericksen's determination that the proper functioning of the forklift was necessary to complete the job cannot be questioned by hindsight. Fredericksen's was experienced, knowledgeable and responsible for the timely completion of the project. In his judgement the efficient operation of the forklift was crucial; therefore, he instructed Decedent to run a special errand. If Decedant had not performed the errand, it would have been necessary for Defendant Employer to dispatch another employee.

Defendants also attempt to counter this finding of necessity with proof that a replacement was in fact unnecessary because the forklift operated effectively on October 18, 1974. If weight is to be given to these facts, this tribunal would be required to judge the decision of Jack Fredericksen, in light of facts and circumstances not present at the time Fredericksen made his determination as to the importance of the forklift. This after-the-fact method of reasoning must be rejected and Jack Fredericksen's decision upheld.

Accordingly, the evidence supports the deputy industrial commissioner's finding that Claimant's decedent sustained a fatal injury on October 17, 1974 which arose out of and in the course of his employment. Decedent was on a dual purpose trip at the time of his fatal injury. Decedent had been requested by Jack Fredericksen, foreman, to perform a special errand for his employer. The Iowa case law establishes that when an employee is performing an errand for his employer, the normal "going and coming" rule does not apply. Hence, any injury sustained is compensable.

WHEREFORE, the arbitration decision is hereby affirmed. It is found and held as findings of facts:

That Decedent sustained a fatal injury arising out of and in the course of his employment.

That claimant, Lori Fredericksen, is the surviving spouse of Decedent.

That Neil Fredericksen is Decedent's surviving son.

That such fatal injury is compensable at the maximum rate of ninety-seven dollars ($97.00) per week.

THEREFORE, Defendants are ordered to pay Claimant ninety-seven dollars ($97.00) per week as long as she qualifies within the provisions of §85.43, Code of Iowa. If Claimant becomes ineligible under the provisions of §85.43, Code of Iowa, payment shall be made to Decedent's surviving son, Neil Fredericksen, in accordance with §85.31, Code of Iowa. Defendants are further ordered to pay the burial expense as provided in §85.28, Code of Iowa.

Costs of both the arbitration and review proceedings are taxed to Defendants.

Signed and filed this 15 day of June, 1976.

ROBERT C. LANDESS
Industrial Commissioner

Appealed to District Court: Pending

Daniel Halstead, Jr., Claimant,

vs.

Johnson's Texaco, Employer,
and
The Travelers Insurance Companies, Insurance Carrier, Defendants.

Review Decision

Mr. Louis A. Lavorato, Attorney at Law, 700 West Towers, West Des Moines, IA 50265, For the Claimant.

Mr. Terry L. Monson, Attorney at Law, 920 Liberty Building, Des Moines, IA 50309, For the Defendants.

This is a proceeding to review an arbitration decision brought by Daniel Halstead, Jr., claimant, pursuant to §86.24, Code of Iowa, against Johnson's Texaco, employer, and The Travelers Insurance Companies, its insurance carrier, defendants. Claimant was denied compensation by the arbitration decision. The case was presented for review on the transcript of the evidence presented at the arbitration hearing, the deposition of Daniel Halstead, Jr., and the oral arguments of counsel.

Daniel Halstead, Jr., claimant, was twenty-two years old and employed as a "heavy mechanic" at Johnson's Texaco at 3121 Forest Avenue, Des Moines, Iowa. Claimant's duties consisted of pumping gas, providing a wrecker service and doing mechanical repair work. Claimant's normal work schedule was from 7:30 a.m. to 6:00 p.m. Monday, Tuesday, Thursday and Saturday and from 7:30 a.m. to 10 p.m. on Wednesday and Friday. Claimant was assigned an unpaid lunch hour from 11:30 a.m. to 12:30 p.m., but the specific time varied with the amount of business activity at the station.

On May 9, 1974, Claimant worked at Defendant Employer's gas station from 7:30 a.m. to 11:30 a.m. At 11:30 a.m. Claimant testified that he informed Defendant Employer he was taking his lunch hour, left Defendant Employer's premises and proceeded to his home at 1117 - 22nd Street, Des Moines, Iowa, for lunch. While returning to work at approximately 12:20 p.m., Claimant was involved in a car-motorcycle accident at the intersection of 30th Street and Forest Avenue, Des Moines, Iowa. As a result of the collision, Claimant sustained a broken arm, broken jaw, cuts and bruises.

The sole issue to be determined on appeal is whether or not Claimant was in the course of employment at the time he sustained injuries as the result of a car-motorcycle accident on May 9, 1974.

Claimant has the burden to prove by a preponderance of the evidence that he sustained an injury arising out of and in the course of employment. **Lindahl v. Boggs,** 236 Iowa 296, 18 N.W. 2d 607. Specifically, the definition of the phrase "personal injury arising out of and in the course of the employment" is provided in §85.61 (6), Code of Iowa:

> 6. The words "personal injury arising out of and in the course of the employment" shall include injuries to employees whose services are being performed on, in, or about the premises which are occupied, used, or controlled by the employer, and also injuries to those who are engaged elsewhere in places where their employer's business requires their presence and subjects them to dangers incident to the business.

Our present concern is with the allowable extension of the phrase "in the course of employment". It has been defined as "within the period of the employment at a place where the employer reasonably may be in the performance of his duties or engaged in doing something incidental thereto" It relates to time, place and circumstances of the injury. **Golay v. Keister Lumber Co.**, 175 N.W. 2d 385, and cases cited therein.

An examination of the recorded testimony of Claimant reveals that Claimant was on his lunch hour when injured, that Claimant was not compensated during lunch hour, that Claimant was free to do whatever he chose during his lunch hour, that no lunch facilities were available on Defendant Employer's premises and that Claimant was on no errand for the employer when the car-motorcycle accident occurred. The testimony of David F. Johnson, manager of the defendant employer's gas station, was in substantial agreement with that of the claimant and further stated that the lunch period was flexible in relation to the amount of business activity at the station and on occasion he requested Claimant to pick up parts on his return from lunch.

As an aid to the determination of whether or not an alleged injury of an employee was sustained in the course of the employment, the basic "going and coming rule" has been adopted by the supreme court of Iowa. See **Bulman vs. Sanitary Farm Dairies,** 247 Iowa 488, 73 N.W. 2d 27; **Otto v. Independent School District,** 237 Iowa 991, 23 N.W. 2d 915; **Marley v. Johnson & Co.,** 215 Iowa 151, 244 N.W. 833. The rule as stated in **Otto v. Independent School District,** supra, page 993, provides that:

> Unless it can be fairly said the employee, while going to or from his regular place of work, is engaged in a place where his employer's business requires his presence, his injury en-route is not compensable. It does not arise out of and in the course of his employment.

However, under the factual situation presented, the claimant's injury occurred not while "going or coming" from work but "going and coming" during a lunch period. In **Larson's Workmen's Compensation,** Desk Edition (1973), §15.50, the general "going and coming rule" as to lunch, rest or coffeebreak period is stated:

> When the employee has a definite place and time of work and the time of work does not include the lunch hour, the trip away from and back to the premises for the purpose of getting lunch is indistinguishable in principle from the trip at the beginning and end of the work day, and should be governed by the same rules and exceptions. The basic rule, then, is that the the journey to and from meals, on the premises of the employer, is in the course of employment. **Conversely, when the employee with fixed time and place of work has left the premises for lunch, he is outside of the course of his employment** if he falls, is struck by an automobile crossing the street, or is otherwise injured. (emphasis supplied)

* * *

> The going and coming rule has so far been treated as substantially identical whether the trip involves the lunch period or the beginning and end of the work day. This can be justified because normally the duration of the lunch period, when lunch is taken off the premises, is so substantial and the employee's freedom of movement so complete that the obligations and controls of employment can justifiably be said to be in suspension during this interval.

Claimant contended on appeal that the "going and coming rule" as stated in **Larson's,** supra, should not apply but rather in accordance with the premise that the Workmen's Compensation Act is to be construed broadly in Iowa and the support of cases cited in four other jurisdictions, Claimant's injury should be covered under the Act.

In **Secrest v. Galloway,** 239 Iowa 168, 170; 30 N.W. 2d 793, 795 (1948), the court stated:

> Workmen's Compensation Acts are statutory and are, in various forms, in effect in many jurisdictions. However such acts are not uniform and vary in the several states, both as to content and rules of construction adopted by the courts. Appellees cite many authorities from various states as bearing upon their theory. Appellant could likewise cite authorities, equally as strong, tending toward his theory. *** However, none of them is of particular benefit in determining this appeal as it is the Iowa act with which we are concerned, examined in light of its own wording, historical background and judicial interpretations of this court.

No purpose would be served by repeating the analysis of the Iowa law as adequately and accurately presented in the arbitration decision.

It is contended by the claimant that the right of the defendant employer to control the activities of the claimant throughout the day brings the claimant within the coverage of the Workmen's Compensation Act. The right to control the work is a criterion to be used in determining the employer-employee relationship, but this right does not automatically make the employer responsible for all things that happen to the employee. It is only when they arise out of and in the course of the employment that the employer is responsible under the Workmen's Compensation Act. If the claimant had been on some special errand while returning from lunch or if the employer had subjected the employee to some special risk by altering his lunch break, then possibly the injury could be compensable. Such did not happen in this case, however, and there was nothing to bring the claimant back into the course of his employment so as to make the employer liable.

WHEREFORE, the arbitration decision is hereby affirmed. It is found and held that the claimant failed to sustain his burden of proof by a preponderance of the evidence that the injury of May 9, 1974, arose out of and in the course of his employment.

THEREFORE, it is ordered that the costs of both the arbitration and review proceedings, along with the cost of the shorthand reporter, be taxed to Defendants.

Signed and filed this 29 day of April, 1976.

ROBERT C. LANDESS
Industrial Commissioner

Appealed to District Court; Pending

Floyd D. Smith, Claimant,

vs.

Shivvers Enterprises, Inc., Employer,

and

Bituminous Casualty Company, Insurance Carrier, Defendants.

Review of Ruling

Mr. John A. Jarvis, Attorney at Law, 301 North 22nd, Chariton, IA 50049, For the Claimant.

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

This is a proceeding pursuant to §86.24, Code of Iowa, brought by the defendants, Shivvers Enterprises, Inc., and their insurance carrier, Bituminous Casualty Company, for review of a ruling filed October 15, 1975. It is noted that the file, in addition to Defendants' petition for review filed October 24, 1975, contains a petition for review filed by Claimant on October 27, 1975. Clearly, Claimant's October 27 filing is not in accordance with §86.24, Code of Iowa, which requires that a petition for review be filed within ten days after such decision or findings of a deputy industrial commissioner, and hence must be deemed dismissable. See **Barlow v. Midwest Roofing Co.,** 249 Iowa 1358, 92 N.W. 2d 406 (1958). However, due to Defendants' diligence in following the provisions of §86.24, Code of Iowa, this proceeding may be brought before the industrial commissioner for review of all matters of the ruling entered.

The ruling entered October 15, 1975, determined and ordered in Division I that Claimant was not entitled to an award for attorney fees pursuant to Rules of Civil Procedure 134 (c) and Division II provided that Defendants pay Claimant's attorney pursuant to Rules of Civil Procedure 140 (c) (1) attorney fees and expenses in the amount of one hundred and fifty-five dollars ($155) in connection with the deposition of Dr. McMillan.

R.C.P. 140 (c) (1), as adopted by the supreme court of Iowa, is concerned with depositions upon oral examination and provides:

> **(c) Failure to attend or to serve subpeona--expenses.**
>
> (1) If the party giving the notice of the taking of a deposition fails to attend **and** proceed therewith and another party attends in person or by attorney pursuant to the notice, the the court may order the party giving the notice to pay to such other party the reasonable expenses incurred by him and his attorney in attending, including reasonable attorney's fees. (emphasis supplied)

On appeal, it is the position of the defendants that the award of attorney fees and expenses in the amount of one hundred and fifty-five dollars ($155) to Claimant pursuant to R.C.P. 140 (c) (1) is improper. Defendants contend that if R.C.P. 140 (c) (1) is applicable, the word "and" found in the phrase "fails to attend and proceed therewith" of R.C.P. 140 (c) (1) should be construed in a disjunctive sense.

It is the position of Defendants, that the requirements of R.C.P. 140 (c) (1) were satisfied by their attendance at the proposed deposition of Dr. McMillan; and hence the award of attorney fees and expenses was unwarranted.

A review of the record reveals a "notice of additional evidence" filed by Defendants July 18, 1975. The notice provided that the deposition of Dr. Thomas R. McMillian, M.D., Leon, Iowa, would be taken by Defendants at his office at the Leon Clinic, Leon, Iowa, on July 23, 1975, at 11:30 a.m. It is further found that both counsel for Claimant and Defendants appeared at the Leon Clinic on July 23, 1975, but that counsel for Defendants failed to proceed with the taking of the deposition of Dr. McMillan. Subsequently, on July 31, 1975, an application for attorney fees and reasonable expenses was filed by Claimant.

The proper construction and meaning of the phrase "fails to attend and proceed therewith", found in R.C.P. 140 (c) (1), is a question of first impression for this tribunal.

Webster's Seventh New Collegiate Dictionary, (1971), on page 33, defines the word "and":

> 1.--used as a function word to indicate connection or addition esp. of items within the same class or type; used to join sentence elements of the same grammatical rank or function

Generally, in construing a statute, words and phrases used are given their usual and commonly understood meaning. **Jefferson County Farm Bureau v. Sherman,** 208 Iowa 614, 226 N.W. 182 (1929); **Drazich v. Hollowell,** 207 Iowa 427, 223 N.W. 253 (1929). An exception exists, however, when it is plain from the statute that a different or peculiar meaning was intended by the legislature. **State v. Prybil,** 211 N.W. 2d 308 (Iowa 1973); **Patterson v. Iowa Bonus Bd.,** 246 Iowa 1087, 71 N.W. 2d 1 (1955); **Dailey Record Co. v. Armel,** 243 Iowa 913, 54 N.W. 2d 503 (1952).

A second common rule of statutory construction provides that in construing statutes, every part and all language used must be considered. **Drazich v. Hollowell,** supra, **In re Van Vechten's Estate,** 218 Iowa 229, 251 N.W. 729 (1934), the supreme court of Iowa stated that in construing statutes, every sentence, word and phrase must, if possible, be given effect.

Additionally, in construing statutes, words will never be construed as unmeaningful and surplusage, if a construction can be legitimately found which will give force to and preserve all the words of the statute. **Hartz v. Truckenmiller,** 228 Iowa 819, 293 N.W. 568 (1940); **Leversee v. Reynolds,** 13 Iowa 310 (1862).

Accordingly, with the previous rules of statutory construction as a guide, the word "and" as used in the phrase "fails to attend and proceed therewith" of R.C.P. 140 (c) (1) is held to function conjunctively. It is found that the usual and common meaning of the term, as provided by **Webster's Seventh New Collegiate Dictionary,** is to indicate connection

among items. Presumably, the words in the rule were used advisedly to convey an intended meaning; and if the word "and" was held to be of a disjunctive nature, the phrase "proceed therewith" would be rendered meaningless. Finally, it is found that R.C.P. 140 (c) (1), construed in its entirety, provides a remedy for the attendance of the notified party where the notifying party fails to attend and proceed therewith. If the position of Defendants were accepted, such remedial function would be frustrated.

THEREFORE, finding that R.C.P. 140 (c) (1) is applicable to a workmen's compensation proceeding, that Claimant's counsel (the notified party) appeared at the time and place appointed for the deposition of Dr. McMillan, and that Defendants although present failed to proceed with the deposition, the claimant's attorney is hereby awarded attorney fees and expenses in the amount of one hundred and fifty-five dollars ($155), pursuant to R.C.P. 140 (c) (1).

The second issue on appeal is the denial of an award of attorney fees pursuant to R.C.P. 134 (c). It is the contention of Claimant that such denial by the deputy industrial commissioner was in error.

R.C.P. 134 (c) provides:

> (c) **Expenses on failure to admit.** If a party fails to admit the genuineness of any document or the truth of any matter as requested under rule 127, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, he may apply to the court for an order requiring the other party to pay him the reasonable expenses incurred in making that proof, including reasonable attorney's fees. The court shall make the order unless it finds that
>
> (1) The request was held objectionable pursuant to rule 127, or
>
> (2) The admission sought was of no substantial importance, or
>
> (3) The party failing to admit had reasonable ground to believe that he might prevail on the matter, or
>
> (4) There was other good reason for the failure to admit.

A review of the record on appeal reveals that Claimant filed a request of admissions on December 23, 1974. Claimant requested Defendants make the following admissions:

> 1. Claimant's injury on June 3, 1974 was at the premises owned and operated by above named Employer and arose out of the course and scope of his employment by said Employer at said time and place.
>
> 2. The physical condition and disability for which Claimant was treated by Drs. Hayne and McMillan after June 3, 1974, were proximately caused by said injury on that date.
>
> 3. The medical expenses incurred by claimant under treatment by said Drs. Hayne and McMillan after June 3, 1974, were fair and reasonable.

January 15, 1975, Defendants filed a response to Claimant's request for admissions denying each statement.

At the pre-trial hearing the defendants agreed to stipulate that the medical expenses of Drs. Hayne and McMillan were fair and reasonable as requested by Claimant in his request for admissions.

R.C.P. 134 (c) (3) provides that the court shall make the order on application unless it finds as follows: "(3) the party failing to admit had reasonable ground to believe that he might prevail on the matter." This test is based on the foresight of the party requested to admit and cannot later be satisfied by hindsight. Defendants presented testimony at the arbitration hearing disputing Claimant's alleged work accident and presented by deposition of Dr. McMillian testimony showing the absence of any history of a work-related injury in the doctor's records. Thus, it is found that Defendants had reasonable ground to believe they might prevail on the matter when they failed to admit statements 1 and 2 in Claimant's request for admissions.

THEREFORE, it is found that Claimant is not entitled to an award for attorney fees pursuant to Rules of Civil Procedure 134 (c).

WHEREFORE, the deputy commissioner's order is affirmed.

Signed and filed this 26 day of April, 1976.

ROBERT C. LANDESS
Industrial Commissioner

Appealed to District Court; Pending

Irvin W. Sutcliffe, Claimant,

vs.

Clyde Black and Son Inc., Employer,
and
The Travelers Insurance Co., Insurance Carrier,
Defendants.

Review Decision

Mr. Larry D. Spaulding, Attorney at Law, 11th Floor Des Moines Building, Des Moines, IA 50309, For the Claimant.

Mr. Terry L. Monson, Attorney at Law, 920 Liberty Building, Des Moines, IA 50309, For the Defendants.

This is a proceeding brought by the defendants, Clyde Black and Son, Inc., employer, and The Travelers Insurance Company, insurance carrier, pursuant to Code §86.24, for review of an arbitration decision whereby Irvin W. Sutcliffe, claimant, was awarded benefits for an injury alleged to have arisen out of and in the course of his employment on March 26 and March 27, 1974. The record

consists of the depositions of Irvin W. Sutcliffe, Dr. Louis W. Banitt, M.D., and Dr. Paul From, M.D., which were presented at the arbitration proceeding. Additional depositions of Dr. Banitt and Dr. From were submitted to the commissioner at the review proceedings. Counsel also provided oral arguments and thereafter, submitted letter briefs.

The issue presented at this proceeding is whether Claimant received an injury arising out of his employment.

Irvin W. Sutcliffe, claimant, was married and fifty-nine (59) years old at the time of his injury. Claimant had been employed by the defendant employer as a general farmhand five years prior to April, 1974. In addition to an hourly wage, Claimant was provided an unfurnished rent-free house by the defendant employer.

Claimant sustained a myocardial infarction on July 21, 1972. According to the testimony of Dr. Banitt, the treating physician in 1972, after discharge from the hospital Claimant made excellent progress and was able to return to work approximately six weeks after his admission to the hospital. Dr. Banitt testified that he advised Claimant to gradually increase his activity to whatever degree he could tolerate without developing undue shortness of breath, tiredness or chest pain. When it became clear that his tolerance for activity was extremely good, Dr. Banitt did not caution Claimant to restrict his activity necessarily, but rather to heed the warning of chest pain. Dr. Banitt prescribed Coumadin, an anti-coagulant medication, and examined Claimant approximately every three months during the remainder of 1972 and 1973.

Upon returning to work at Clyde Black, Claimant's responsibilities entailed operating farm machinery, planting, plowing, cultivating and other general farm work. Specifically, during planting season Claimant was required to lift sixty-pound (60) bags to fill a planter. In the winter months Claimant operated a bagging machine.

On March 26, 1974, Claimant was stricken with the first episode of chest pain since his 1972 myocardial infarction. Claimant was winding up a grain auger when the chest pain occurred. Claimant testified that upon first experiencing the pain, approximately 8:00 a.m., he sat down for fifteen minutes until the pain subsided, finished setting up the auger, began unloading the bin, rested for about half an hour and continued to work the remainder of the day. Claimant did not inform anyone of his chest pain and throughout the day augered some beans out of another bin, which required Claimant to shovel the remaining beans at the bottom of the bin to the auger. That particular evening Claimant related to his wife the incident of chest pain, watched television and went to bed.

The next day, March 27, 1974, at approximately 11:30 a.m., while rolling a dual wheel from a storage shed to a tractor, Claimant experienced his second onset of chest pain. Claimant's testimony indicated that a dual wheel weighed six hundred pounds and ordinarily this activity involved rolling the wheel ten (10) feet. On March 27, 1974, Claimant was required to roll the wheel a distance of approximately fifty (50) feet. In Claimant's opinion the operation of mounting dual wheels was the most strenuous activity he had been required to perform. Claimant went home for lunch, rested, returned to work, and while tightening lug nuts to hold the dual wheel in place, Claimant again experienced chest pain.

Claimant returned to his home and later in the day of March 27, 1974, was examined by Dr. Banitt. An electrocardiogram was taken by Dr. Banitt on March 27, 1974, and the results did not demonstrate evidence of an infarction. Dr. Banitt prescribed two medications for the treatment of angina and instructed Claimant to go home and rest. On March 29, 1974, another electrocardiogram failed to demonstrate an infarction, and Dr. Banitt advised Claimant to continue to rest and to not work. Further examination was scheduled for April 8, 1974.

On April 4, 1974, Claimant was admitted to the hospital due to retro-sternal chest pain. The electrocardiogram performed at the time of Claimant's hospitalization did reveal a change from his previous tracing, which was suggestive of a myocardial infarction.

In his evidentiary deposition of October 8, 1974, Dr. Banitt, a specialist in internal medicine, testified in substance that the angina attacks on March 26 and March 27, as reported by Claimant, were symptomatic of a change in his coronary artery circulation. Although Dr. Banitt was unable to affirmatively state to a reasonable medical certainty whether or not the physical exertion as described by Claimant was the cause of the change in circulation which brought on the attack of angina of March 26, 1974, Dr. Banitt was of the opinion that Claimant's condition of coronary sclerosis and coronary insufficiency was aggravated by continuing to do work involving physical exertion after the onset of angina symptoms. Relying upon the findings of an examination of Claimant on September 10, 1974, Dr. Banitt testified Claimant had "chest wall pain at that time and in addition he had arteriosclerotic heart disease with severe disabling angina pectoris and diffuse coronary disease inoperatable." It was Dr. Banitt's belief that Claimant's condition of coronary sclerosis and angina pectoris was a permanent problem, and Claimant's continuing disability from active employment was directly related to his heart damage and to his diffuse coronary artery disease. The possibility of surgical intervention was rejected by Dr. Banitt, due to cardiological studies conducted at University of Iowa hospitals in Iowa City revealing a diffuse coronary sclerosis, which would prevent a successful by-pass operation.

Dr. From, a specialist in internal medicine, testified by way of evidentiary deposition on December 13, 1974. Dr. From did not personally examine or treat Claimant but testified on the basis of his qualifications as stated in the record and the factual information supplied by a lengthy

hypothetical question. It was the opinion of Dr. From that the development of angina pectoris in March, 1974, was not related to work, but was related to a natural progress of a disease process which preexisted the March, 1974, incidents. Specifically, during direct examination, Dr. From testified:

> Q. ...Doctor, do you have an opinion based upon a reasonable medical certainty and based upon the facts of the hypothetical as to whether this change of coronary circulation was caused or aggravated to the detriment of the patient's health by his exertions on March 26th and March 27th after periods of rest to allow the pain to subside?
>
> A. Yes, my opinion would be that the work did not cause, certainly did not cause and most probably did not aggravate the underlying heart disease. I believe that at that point in time his disease of coronary arteriosclerosis was naturally progressing to a point where the amount of oxygen able to get to the heart muscle was becoming insufficient because of narrowing of the blood vessels through a natural progress of a disease process over a period of time and at that time he began to have symptoms. It made no difference whether he was at work or sitting in a chair eating or watching television or what. At that time it would begin. The mere fact that he was working and this man – by the way – was used to heavy labor. It is the unusual kind of exertion that gets a person into trouble with coronary artery disease, not exertion to which his body and heart are accustomed so that he began to have a change in his circulation in that it was again becoming insufficient, but the mere fact that he simply rested for a little while restabilized it. Over a period of time then within the next two weeks the occlusion of his blood vessels gradually increased to the point where there was an absolute and final insufficiency of the heart muscle to meet demands and the heart muscle then died and that occurred on April 4th, I think when he had his severe episode of pain.

Dr. From further noted that the fact a patient's pain goes away very rapidly with rest is very indicative that it is angina, which is not of the magnitude that death of the tissue had occurred, but as the pain is prolonged and not relieved except by drugs, then that type of pain is associated with infarctic pain. Questioned as to Dr. Banitt's finding of coronary insufficiency in a preinfarction syndrome, Dr. From stated that Claimant's further work activities did not harm Claimant because he suffered from only angina pectoris and did not infarct at the moment.

After the April 17, 1975, filing of the deputy industrial commissioner's arbitration decision in which Dr. From's testimony and medical opinion were found to be based upon incomplete information and hence accorded little weight in the deputy's decision, a petition for review was filed by Defendant Employer and a second series of evidentiary depositions were conducted.

In a second deposition taken on October 8, 1975, Dr. From testified that he had had an opportunity to read in entirety the deposition of Dr. Banitt, the deposition of Claimant, his own prior deposition and the arbitration decision of the deputy industrial commissioner. Although Dr. From testified on the basis of a more extensive knowledge of the facts surrounding Claimant's physical activities, he expressed the same opinion as in his original deposition of December 13, 1974, that based upon reasonable medical certainty the work which Claimant performed on March 26 and March 27 had no connection with his subsequent myocardial infarction of April 4, 1974. This negated the reason offered by the deputy for according little weight to the opinion of Dr. From.

On November 18, 1975, Dr. Banitt was deposed for the second time in this proceeding. In response to the same hypothetical question as set forth in the original deposition, with the exception of the substitution of the findings of the deputy industrial commissioner for the term, "strenuous farm work", it was stated by Dr. Banitt that with reasonable medical certainty the extraordinary exertion on March 27 aggravated the whole process that began the day before, and this whole series of events led to the infarction demonstrated on April 4, 1974. Dr. Banitt further elaborated that it was his impression that the change in pattern of Claimant's angina, that is, the onset of angina where he had not had it before, signified a change in coronary circulation and that this subsequent series of events led to his infarction and the unusually heavy physical exertion Claimant was performing on March 27 aggravated the process.

The supreme court of Iowa in **Almquist v. Shenandoah Nurseries, Inc.,** 218 Iowa 724, 254 N.W. 35, arriving at a definition of "personal injury", held:

> ****The results of changes in the human body incident to the general processes of nature do not amount to a personal injury. This must follow, even though such natural change may come about because the life has been devoted to labor and hard work. Such result of those natural changes does not constitute a personal injury even though the same brings about impairment of health or the total or partial incapacity of the function of the human body.****
>
> A personal injury, contemplated by the Workmen's Compensation Law, obviously 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 a traumatic or other hurt or damage to the health or body of an employee.***

It is well documented in Iowa workmen's compensation case law that an employer hires an

employee subject to any active or dormant health infirmities sustained prior to employment. A Claimant, however, is not entitled to compensation for results of a preexisting injury or disease, but the existence of this alone is not a defense to the subsequent injury suffered. If the claimant had a preexisting condition or disability which is aggravated, worsened or "lighted up" so that it results in the disability found to exist, he is entitled to compensation to the extent of that resultant injury. **Yeager v. Firestone Tire & Rubber Co.,** 235 Iowa 369. 112 N.W. 2d 812.

However, the law has imposed upon the claimant the burden of proving by a preponderance of the evidence the causal relationship between the injury and the impairment to his health, on which he presently bases his claim. **Bodish v. Fisher, Inc.,** 257 Iowa 516, 133 N.W. 2d 867; **Lindahl v. L. O. Boggs,** 236 Iowa 296, 18 N.W. 2d 607. Under these particular facts, Claimant has the burden of proving by a preponderance of the evidence the causal relationship between his alleged injury of March 26 and March 27, 1974, and the impairment to his health on which he bases his claim--the myocardial infarcton of April 4, 1974, and subsequent disability. The incident or activity need not be the sole proximate cause if the injury is directly traceable to the incident or activity involved. **Langford v. Kellar Excavating & Grading, Inc.,** 191 N.W. 2d 667 (Iowa 1971).

Under the Iowa law, it is for the industrial commissioner to determine whether in a compensation action the claimant met such burden of proof by a preponderance of the evidence to establish that the injury sustained by the claimant was one arising out of and in the course of employment. **Lindahl v. L. O. Boggs,** supra. This burden is **not** discharged by creating an equipoise. It requires a preponderance. **Volk v. International Harvester Co.,** 252 Iowa 298. 106 N.W. 2d 649; **Griffith v. Cole Bros.,** 183 Iowa 415.

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. Causal connection is established when it is shown that an employee has received a compensable injury which materially aggravates or accelerates a preexisting latent disease which becomes a direct and immediate cause of his disability or death. **Yeager v. Firestone Tire & Rubber Co.,** supra The record on appeal consists of the observations, findings and testimony of Drs. Banitt and From. Such expert medical opinion, however, is not in agreement. Relying on the testimony of Dr. Banitt, Claimant proposes a sufficient causal connection between his work activities of March, 1974, and his subsequent myocardial infarction of April 4, 1974. However, Dr. Banitt's medical opinion as to causality is countered with the testimony of Dr. From, who finds **no** causal connection between Claimant's physical activities in March, 1974, and his myocardial infarction of April, 1974.

The problem presented this commissioner by such conflicting expert medical testimony is illustrated by the language of **Eisentrager v. Great Northern Railway Co.,** 178 Iowa 713, 724, a non-compensation case:

> We agree, of course, that, when facts and circumstances are such that reasonable men, unaffected by bias or prejudice, may disagree as to the inference or conclusion to be drawn from them, there is a case for a jury. But it is one thing to have a state of facts from which differing conclusions may reasonably be drawn; quite another, to hold that one who has the burden of proving a given conclusion has discharged the burden by showing that a theory which sustains him is a possible one, if it also appear that a theory upon which his adversary would not be liable is just as possible....We concede that, ordinarily, it is for the jury whether a claim is supported by a preponderance. But this is not so when all must agree that the case for him who has the burden is not as strong as, or at any rate is not stronger than, that of his opponent.

An equipoise situation exists if a party attempts to discharge his burden of proof by showing that a theory which sustains him is possible and another theory which discharges his adversary is equally possible. Thus, it is the opinion of this commissioner that Claimant's burden of proof was not discharged because, at best, the testimony was in equipoise; and, therefore, as a matter of law the one having the burden should not prevail because his evidence did not preponderate.

WHEREFORE, the arbitration decision is hereby reversed. It is found and held as findings of fact and conclusions of law:

That the expert medical testimony of Drs. Banitt and From creates an equipoise.

That such equipoise does not discharge Claimant's burden of proof by a preponderance of the evidence that Claimant's injury arose out of and in the course of his employment.

THEREFORE, Claimant's request for relief is denied.

The costs of both the arbitration and review proceedings are taxed to Defendants.

Signed and filed this 23 day of April, 1976.

ROBERT C. LANDESS
Industrial Commissioner

Appealed to District Court; Dismissed

Elmer Feuring, Claimant,

vs.

Farmers Hybrid Companies, Inc., Employer,
and
Travelers Insurance Company, Insurance Carrier,

Defendants.

Review Ruling

Mr. Roland K. Landsness, Attorney at Law, Four East Sixth Street, Atlantic, IA 50022, For the Claimant.

Mr. Charles W. Carlberg, Attorney at Law, 113 West Iowa Street. Greenfield, IA 50849, For the Defendants.

This is a proceeding to determine whether or not the motion of Claimant Elmer Feuring to dismiss the petition of Defendants Farmers Hybrid Companies, Inc., employer, and Travelers Insurance Company, insurance carrier, for review should be granted.

Review of the file indicates that the arbitration decision in the matter sub judice was filed August 15, 1975. On August 29, 1975, a petition for review was filed by the defendants. On the same date Claimant filed a motion to dismiss the petition for review. Resistance to the motion to dismiss was filed September 12, 1975, by the defendants.

Defendants did not act within the provisions of §86.24, Code of Iowa, which provides that any party aggrieved by the findings or decision of a deputy industrial commissioner must file a petition for review within ten days after such decision is filed. Although it would not alter the outcome of this ruling, it is noted that Defendants did not even deposit the petition for review in the mail within the ten-day period.

It is the contention of the defendants that §86.24, Code of Iowa, is inapplicable to this proceeding as it is superseded by the provisions of the Iowa Administrative Procedure Act effective July 1, 1975. Specifically, Defendants rely upon §17A.16 (2), Code 1975, which provides a twenty-day period for filing an application for rehearing, and the argument that it was the thrust and intent of the legislature upon passing the Iowa Administrative Procedure Act that such legislation would enable greater public access to the administrative agencies of Iowa.

The language of §17A.23 (2), Code 1975, expressly provides in part:

> The Iowa administrative procedure Act shall be construed broadly to effectuate its purposes. This chapter shall also be construed to apply to all agencies not expressly exempted by this chapter or by another statute specifically referring to this chapter by name; **and except as to proceedings in process on July 1, 1975,** this chapter shall be construed to apply to all covered agency proceedings and all agency action not expressly exempted by this chapter or by another statute specifically referring to this chapter by name. (emphasis supplied)

The Iowa Administrative Procedure Act fails to provide a definition of the phrase, "proceedings in process". This failure necessitates the examination of the IAPA in toto, in an effort to determine the meaning of the phrase.

Initially, several definitions promulgated in the IAPA must be noted: §17A.2 (1) "Agency", §17A.2 (9) "Agency action," and §17A.2 (10) "Agency member".

It is acknowledged that the Office of the Industrial Commissioner falls within the provisions of the IAPA and the industrial commissioner is the person defined in §17A.2 (10). Code of Iowa, §17A.11, provides for the appointment of administrative hearing officer(s) if necessary to conduct evidentiary hearings. The duties of a deputy industrial commissioner are commensurate with those of an administrative hearing officer in accordance with §17A.11, Code of Iowa.

Sections 17A.15 (1) and 17A.15 (2) distinguish "final decision" from "proposed decision". A proposed decision is one made by the hearing officer, when the agency did not preside at the reception of evidence in a contested case. A proposed decision becomes a final decision if not appealed to the agency. If appealed, the agency issues the final decision. Since the hearing officer in the first instance issues only a proposed decision, then the making of such decision final either by passage of time, appeal or review on motion is all a part of the same proceedings. Section 17A.19 (1) expressly provides for judicial review of any **final** agency action by a person or party who has exhausted all adequate administrative remedies.

Therefore, it is found that "proceedings in process" include the procedures of appeal within the agency and that it is not an independent proceeding.

Of additional note is Arthur Earl Bonfield's article, **The Iowa Administrative Procedure Act: Background, Construction, Applicability, Public Access to Agency, Law, The Rulemaking Process,** Vol. 60, Iowa Law Review, 758, construing the exemption of §17A.23, as to "proceedings in process on July 1, 1975".

> Furthermore, where such an exemption from the IAPA is found to exist, it should be construed narrowly by the agencies and the courts. Exemptions from a comprehensive code like the IAPA implementing very important public policies should always be read narrowly in order to maximize the underlying general legislative purposes. This is particularly so where those basic purposes are to secure as much uniformity of minimum administrative procedure as is feasible, and as much fairness in all administrative proceedings as is feasible, consistent with other important conflicting values. **In light of prior discussion, the section 23 exemption for "proceedings in process on [the IAPA's] effective date," which is July 1, 1975, should also be read narrowly.** It should, therefore, exclude from the IAPA only those particular rulemaking proceedings actually commenced prior to that date by submission of the rule under current Chapter 17A to the Legisla-

> tive Rules Review Committee and Attorney General, or actually commenced by taking the first prescribed formal step under another statute specifying additional or substitute rulemaking procedures for an agency. **Similarly, that section 23 phrase should be read narrowly to cover only those particular contested case proceedings actually commenced prior to July 1, 1975, by filing the equivalent of the section 12 (1) notice; and only those judicial review proceedings actually commenced prior to July 1, 1975, by the filing of notice adequate for that purpose under prior law.** (emphases supplied)

It is the position of the commissioner that Defendants' argument of the applicability of the broad construction language of §17A.23, Code of Iowa, lacks merit because of the narrow construction given to proceedings in process. The original application for arbitration was filed September 26, 1974. This filing and the notice given pursuant thereto was the equivalent of the §12 (1) notice. The arbitration hearing was held April 7, 1975, and after the submission of appropriate evidentiary medical depositions, the record was closed and submitted for decision on May 29, 1975. Logically, by providing for an exemption for "proceedings in process", it was not the intent of the legislature that the new law be applied to a proceeding initiated prior to the effective date of the IAPA.

Hence, after a finding that the broad construction provisions of §17A.23, Code of Iowa, are inapplicable to this proceeding, Defendants' failure to comply with §86.24, Code of Iowa, providing a party ten days to file a petition for review, requires dismissal. The supreme court of Iowa in **Barlow v. Midwest Roofing Co., Inc.,** 249 Iowa 1358, 92 N.W. 2d 406 (1958), held that this particular statute (§86.24) was jurisdictional, and failure to comply with this procedure would deprive the industrial commissioner of jurisdiction to hear the review. Specifically, on page 1360 of the opinion, the court held:

> The industrial commissioner can exercise only the powers and duties prescribed in the Workmen's Compensation Law. The legislature, of course, has the authority to create and restrict rights given workmen under the Act, as well as to prescribe the power and duties of the commissioner. It must be conceded that the commissioner himself cannot extend or diminish his jurisdiction to act under this law. Thus, defendants contend that, except for one and only one circumstance, the commissioner has no jurisdiction to entertain a petition for review filed after the ten-day period. Section 86.24, provides: "Any party aggrieved * * * may, within ten days after such decision if filed * * *, file * * * a petition for review * * *."

As a caveat, it is noted that even if this were a proceeding which was initiated after the effective date of the Iowa Administrative Procedure Act and the rules of the industrial commissioner adopted pursuant thereto that the provisions of §17A.16 (2) with regard to the time for requesting a rehearing would not be applicable to this case. The twenty days set out in §17A.16 (2) is for rehearing of a "final" decision. The decision of the deputy in this matter would be considered a "proposed" decision. The industrial commissioner has provided by rule for rehearing by the deputy of the proposed decision pursuant to Rule 500--4.24. Appeal to the agency of a proposed decision is provided in Rules 500--4.25, 500--4.26 and 500--4.27. These rules were adopted in accordance with §17A.15 (3). This proceeding since it was in the nature of an arbitration proceeding would have been appealable pursuant to 500--4.26, which refers back to the original time limitation in §86.24.

WHEREFORE, it is hereby held that the period for petition for review under §86.24, Code of Iowa, has passed, thus making the motion to dismiss valid.

THEREFORE, Claimant's motion to dismiss Defendants' petition for review is granted.

Signed and filed this 20 day of April, 1976.

ROBERT C. LANDESS
Industrial Commissioner

Appealed to District Court; Affirmed

Louis J. Kobliska, Claimant,

vs.

John Deere Waterloo Tractor Works, Employer, Self-Insured, Defendant.

Review Decision

Mr. John E. Behnke, Attorney at Law, Box F, Parkersburg, IA 50665, Pro se.

Mr. James Ritchie, Attorney at Law, P. O. Box 114, Cresco, IA 52136, For the Claimant.

Mr. Wirt P. Hoxie, Attorney at Law, P. O. Box 879, Waterloo, IA 50704, For the Defendant.

This is a proceeding pursuant to §86.24, Code of Iowa, brought by John E. Behnke, attorney, for review of that portion of an arbitration decision awarding attorney fees for his share of the representation of the claimant for a hand and arm injury allegedly received on May 25, 1972, at Defendant John Deere Waterloo Tractor Works.

The record reflects that Claimant injured his left hand and arm at Defendant's plant on May 25, 1972. A memorandum of agreement was filed and approved by this office on June 14, 1972. Pursuant to this memorandum, Claimant was paid three and four-sevenths (3 4/7) weeks of temporary disability compensation at the rate of sixty-four dollars ($64) per week.

An application for arbitration as prepared by William L. Wegman, attorney, was received in this office on March 1, 1973. Thereafter, on April 30, 1973, an appearance was filed on behalf of Claimant by John Behnke and attorney Wegman filed his withdrawal on May 7, 1973. Subsequently, on June 4, 1973, an arbitration decision was rendered which dismissed the application for arbitration as not the proper procedure in this matter and that Claimant should fiie an application for review-reopening.

Accordingly, as attorney for Claimant, Behnke proceeded to file a petition for review-reopening, secured the testimony of Dr. Bernard Diamond by deposition, prepared for trial and attempted to negotiate a settlement. At the request of Defendant, Claimant was examined by Dr. W. D. Stone, a psychiatrist, but refused to return for subsequent testing to complete the evaluation. A motion was filed March 8, 1974, by the claimant to relieve him from further examination by the psychiatrist. Subsequently, a ruling was entered on April 5, 1974, denying Claimant's motion.

Sometime later, the claimant discharged Behnke, filed a complaint with the Iowa State Bar Association and sought other counsel. It is not clear at what point in time this discharge was effectuated, but a review of the file reveals a letter dated August 20, 1974, in which Behnke refers to his discharge by Claimant.

On November 25, 1974, Behnke filed an Attorney's lien in the sum of three thousand one hundred forty-five and 10/100 dollars ($3,145.10) for services rendered Claimant and a withdrawal of appearance for Claimant. Later on June 11, 1975, James W. Ritchie, an attorney, filed an appearance for Claimant.

The reason for the discharge of Behnke was apparently a general dissatisfaction over the progress of the case. Nothing herein is intended to reflect upon the justification for Claimant's action or the diligence of Behnke's representation.

The Code of Iowa specificially provides in § 86.39:

> All fees or claims for legal...services rendered under this chapter and chapters 85 and 87 shall be subject to the approval of the industrial commissioner, and no lien for such service shall be enforceable without the approval of the amount thereof by the industrial commissioner.***

In allowing the award of attorney fees, consideration should be given but not limited to time spent, the nature and extent of the services, the amount involved, the difficulty of handling and importance of the issues, the responsibility assumed and the results obtained, as well as the professional standing and experience of the attorney. **Kirkpatrick v. Patterson,** 172 N.W. 2d 259 (Iowa 1969).

Applying these principles to the instant case, it is found that a fee in the amount of six hundred dollars ($600) plus reimbursement for unpaid expenses in the amount of twenty-five and 60/100 dollars ($25.60) as determined by the deputy industrial commissioner is reasonable for the services performed in the representation by Behnke of the claimant in his claim for disability benefits relating to an alleged hand and arm injury received on May 25, 1972.

On appeal to this commissioner, Behnke contended that the denial of the deputy industrial commissioner of a claim for reimbursement for the sum of forty-two and 60/100 dollars ($42.60) for the deposition of Dr. Diamond was in error. Behnke submitted that the sum of forty-two and 60/100 dollars ($42.60) paid to Kim McLaughlin, a court reporter, was not for the deposition of Dr. Diamond but the price for a copy of the transcript of Claimant's testimony. A review of the evidence presented reveals this to be the correct statement of facts and hence, the additional sum of forty-two and 60/100 dollars ($42.60) will be awarded as an expense reimbursement.

WHEREFORE, IT IS ORDERED that the reasonable attorney fee due and owing John E. Behnke by the claimant, Louis J. Kobliska, in this matter is six hundred dollars ($600) plus reimbursement for unpaid expenses in the amount of sixty-eight and 20/100 dollars ($68.20) ($25.60 and $42.60) for a total amount due of six hundred sixty-eight and 20/100 dollars ($668.20).

Signed and filed this 12 day of March, 1976.

ROBERT C. LANDESS
Industrial Commissioner

No appeal

Stephen L. Jacobsen, Claimant,

vs.

Iowa Paint Manufacturing Co., Employer,
and
Atlantic Mutual Insurance Co., Insurance Carrier,
Defendants.

Review Decision

Mr. Lee H. Gaudineer, Attorney at Law, 900 Hubbell Building, Des Moines, IA 50309, For the Claimant.

Mr. Larry Spaulding, Attorney at Law, 11th Floor Des Moines Bldg., Des Moines, IA 50309, For the Defendants.

This is a proceeding brought by the claimant, Stephen L. Jacobsen, pursuant to section 86.24, Code of Iowa, seeking review of an arbitration decision wherein Claimant was denied workmen's compensation benefits from his employer, Iowa Paint Mfg. Co., and its insurance carrier, Atlantic Mutual Insurance Co., for a back injury alleged to have been received arising out of and in the course

of his employment during July and August of 1972. The deputy industrial commissioner found that the limitation in section 85.26, Code 1973, did not apply to services under section 85.27, Code 1973, and held that the defendants should be required to pay specified medical bills which were fair, reasonable, and necessary.

The case for review was presented on transcripts of the evidence at the arbitation proceeding, the additional evidentiary deposition of Dr. E. F. Arns and the oral arguments of counsel.

The claimant was initially employed by the defendant, Iowa Paint Mfg. Co., in July of 1971. The claimant took a leave of absence for military service from November, 1971, to April, 1972. When the claimant returned to work for the defendant, he was employed as a mill operator. As a mill operator, the claimant worked Monday through Friday and frequently Saturdays at a base rate of $3.20 per hour.

As a mill operator, the claimant's duties consisted of making batches of paint. The claimant was required to bend over and lift fifty-pound sacks from a pallet off the floor to the edge of the machine (approximately four and half feet), cut them open and pour the paint powder into the machine.

Claimant was injured on July 18, 1972, while picking up a sack of powdered paint. The claimant notified his immediate supervisor, Carl Miller, of the incident. The incident of July 18, 1972, was corroborated by testimony of Miller, and Claimant's former wife, Vicki Jacobsen. On July 19, 1972, the claimant was examined by Dr. E. F. Arns. Claimant returned to work the next day and worked until July 28, 1972.

The claimant did not work the week of July 30 through August 5. There was conflicting testimony on what was the nature of this period of absence. Mr. Howard Hawbaker, production manager in July of 1972, testified that he did not recall any conversation with the claimant regarding his back injury. Hawbaker, however, did give the claimant time off with pay and testified that such was "sick pay". The claimant testified that he told Hawbaker he needed the time off because of his back and that there was no indication that it was going to be vacation pay or sick pay. During this week, Claimant was examined by Dr. Arns on July 31, 1972.

The claimant returned to work August 7 through August 20, 1972. The claimant was examined again by Dr. Arns on August 8, 1972. Claimant testified that his back pain worsened upon returning to work following the week of rest.

As a result of his back condition, Claimant decided that he would quit his job at Iowa Paint Mfg. Co. and start school at Grace Bible Institute in Omaha, Nebraska. He had been accepted at the college in May, 1972. Claimant testified that he indicated to Hawbaker of his plans to enter school and inquired as to the possibility of any type of insurance or medical coverage if he should be required to have an operation in the future. The claimant testified that Hawbaker said there was no type of insurance or medical coverage. Hawbaker, however, in his testimony indicated that he could recall no such conversation with the claimant about insurance or workmen's compensation.

After the claimant left the employ of Iowa Paint Mfg. Co. on August 20, 1972, he started school at Grace Bible Institute in Omaha, Nebraska. During this time, the claimant worked part-time at the Vogal Paint warehouse in Omaha.

On September 15, 1972, he was examined by Dr. Richard B. Svelka. Dr. Svelka saw the claimant again on October 16, 1972, and November 15, 1972. Dr. Svelka referred Claimant to Dr. Frank Iwersen, an orthopedic surgeon, who saw the claimant on December 8, 1972. Dr. Iwersen advised a myelogram and hospitalization. A myelogram was performed on December 22, 1972, and indicated a "Disc defect at L-4 L-5 interspace, primarily to the right and anterior." On December 26, 1972, a laminectomy was performed by Dr. Iwersen on the claimant.

Claimant was discharged from the hospital on January 2, 1973. On March 2, 1973, Dr. Iwersen dismissed Claimant from his care and instructed him that for a period of at least six months that he should be careful about lifting or straining and not to do any heavy work. Dr. Iwersen estimated Claimant's permanent partial disability to be ten percent (10%) of the body as a whole.

In April of 1973, Claimant began to work as a bank teller at Ames Plaza Bank in Omaha, Nebraska. His former wife, Vicki Jacobsen, while working for a doctor was exposed to workmen's compensation claims. She discussed the possibility that her husband's injury might be covered by workmen's compensation with a doctor, who referred her to an attorney in Omaha, Dave Cohen. Claimant and his wife contacted Cohen's office and spoke with Dan Cohen, who indicated that the time was running out. Two weeks later, July 27, 1974, Dave Cohen met with the claimant and referred the case to Claimant's present attorney. Claimant consulted with his present attorney on July 30, 1974, and that day filed an application for arbitration in the Office of the Industrial Commissioner.

The main issue to be determined on appeal is the applicability of the first paragraph of §85.26, Code 1973:

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

The date of the incident was July 18, 1972, and the application for arbitration was filed July 30, 1974. Although the application for arbitration was filed after the two-year statute of limitations period, arguments were advanced why Claimant was **not** barred by the statute.

Hawbaker testified that although Claimant did not work the week of July 30 through August 5, he did give the claimant time off with pay and that

such was "sick pay." Claimant contended that such pay by any name was compensation and the failure of the employer or its insurance carrier to file a memorandum of agreement, under §86.13, Code 1973, within thirty days after the payment of weekly compensation has begun shall stop the running of §85.26, Code 1973, as of the date of the first such payment. Therefore, Claimant argued that the July 30, 1974, filing of the application for arbitration was timely because the date of the first "sick pay" payment in August, 1972, would toll the statute of limitations provided in §85.26, Code 1973, for the reasons recited in §86.13, Code 1973.

The statute of limitations in the Iowa Workmen's Compensation Act has been strictly construed by the supreme court of Iowa in several decisions. **Mousel v. Bituminous Material & Supply Co.,** 169 N.W. 2d 763 (Iowa 1969); **Powell v. Bestwall Gypsum Co.,** 255 Iowa 937, 124 N.W. 2d 448 (1963); **Otis v. Parrott, et al.,** 233 Iowa 1039, 8 N.W. 2d 708 (1943). In **Mousel v. Bituminous Material & Supply Co.,** supra, the court dismissesd a claim filed in 1966 for a 1958 injury and cited with approval 100 C.J.S. Workmen's Compensation §468 (2), p. 64, which states:

> Further, it is held that the requirement as to the time within which a claim for compensation must be made or filed is a matter going to the right of compensation, and being a condition on the right...rather than on the remedy...it must be **strictly** complied with. (emphasis supplied)

Focusing on the problem of payment of wages to toll the statute of limitations, Professor Arthur Larson states, "...the majority rule apparently is that payment of wages to a disabled worker does not toll the statute unless the employer is aware or should be aware that it constitutes payment of compensation for the injury." 3 Larson's Workmen's Compensation Law, §78.43(c), p. 96. The Iowa industrial commissioner in **Smith v. Walnut Grove Products**, filed January 9, 1975, to be contained in the 32nd Biennial Report Iowa Industrial Commissioner, cited with approval a rule established in **Pacific Employers Ins. Co. v. Industrial Commission**, 127 Colo. 400, 257 P.2d 404 (1953), at Page 409:

> In order that the payment of wages during the absence of an employer may be held to be payment of compensation under the Workmen's Compensation Act, it must be established by competent evidence or reasonable inferences to be drawn therefrom that in making these payments the employer was doing so conscious of the fact that he was making the same as compensation, and it must be received by the employee with the knowledge or reasonable grounds for assuming that the payments made to him were being made as compensation for his injuries. The payment of wages to an employee while disabled, and particularly before he has filed any claim for compensation, does not, ipso facto, establish the payment of compensation tolling the statute of limitations provided in the Workmen's Compensation Act.

Thus, it was found in **Smith v. Walnut Grove Products,** supra, that no "agreement in regard to the compensation" was reached pursuant to §86.13, which would toll the statute of limitations for failure to file a memorandum thereof. On appeal to the district court this decision was affirmed and the decision of the industrial commissioner adopted. (Judge Antes, Black Hawk County, July 16, 1975)

Likewise, there was "no agreement in regard to compensation" reached between the claimant, Stephen L. Jacobsen, and defendant employer, Iowa Paint Mfg., Co. The testimony of the claimant is contrary to the existence of an intention that such "sick pay" was equivalent to compensation. The claimant testified:

> Q. Was there any talk about a week off for sick leave or what?
>
> A. I wasn't exactly sure whether it was going to be considered sick leave or vacation time or what. I knew I had some vacation time coming and that was fine if that is the way I had to take it, but I needed the time off.
>
> Q. What do you mean, if that is the way you had to take it?
>
> A. I needed the time off and if it couldn't be considered sick pay and it had to be vacation time I'd take it.

The testimony of Hawbaker reveals a similar lack of intention that these payments were to be equivalent to weekly compensation. He stated:

> Q. Did he, however, have some sick leave time accrued?
>
> A. Yes, Sir. We normally figure that they have five days a year.
>
> Q. Do you recall having any conversation with Mr. Jacobsen at all about giving him sick time off in lieu of Workmen's Compensation benefits?
>
> A. Never. We don't do that.

He further testified:

> Q. Did you and Mr. Jacobsen, did you ever discuss with him giving any benefits or giving him any time off to forget about any claim or any such thing as that?
>
> A. Never. We have nothing to gain by it. We pay a premium for that purpose.

The deputy industrial commissioner held that the claimant failed to establish a causal connection between the incident of July 18, 1972, and the claimant's absence of July 29, 1972, through August 7, 1972, and therefore, a ruling on the question as to whether or not the payments received by the claimant in August tolled the running of §86.26, Code 1973, was unnecessary. It is apparently on this basis, that the claimant by the introduction of the additional deposition of Dr. Arns, filed September 25, 1975, attempted to establish the causal connection, which the deputy

industrial commissioner found to be absent.

However, even if a causal connection were established by the testimony of Dr. Arns, which is found that it did not, the payments by any name received by Claimant did not toll the running of §85.26, Code 1973, because a mutual intent on behalf of the employer and employee is required that the payments received are being made as compensation for the employee's injuries. The testimony of the parties, as previously quoted, reveals a clear absence of such mutual intent. Therefore, the payments received by the claimant were not the equivalent to compensation under the Workmen's Compensation Act and thus did not toll the running of §85.26, Code 1973, which requires that original proceedings shall be commenced within two years from the date of injury.

In **Otis v. Parrott, et al.,** supra, an employee was injured January 4, 1939. In March, 1939, he developed tuberculosis and subsequently died on July 21, 1939. The petition for arbitration was filed February 5, 1941. Counsel for the widow argues that the death of the decedent was due to tuberculosis and that the calculation of time must begin at the time the disease was "lighted up" in March, 1939. Counsel contended that the date of an accident and the date of an injury are not necessarily the same and cited cases from several other jurisdictions.

The supreme court of Iowa, however, distinguished the Iowa statute from those relied upon by the claimant. The court focused on the statutory language, "within two years from the date of **injury causing** such death or disability." (emphasis supplied) The court reasoned that the legislature has designated the injury it means and it does not mean the compensable injury or the state of facts or conditions which first entitle the claimant to compensation. It is the **causal injury** without reference to whether it is compensable or not that is the starting date for the limitation period within which the proceedings may be maintained. Therefore, the court held that under §1386, Code 1939, the application not being filed within two years from "the date of the injury causing death" was not timely and should be dismissed.

The language of §85.26, Code, is essentially the same as §1386 in the 1939 Code. It provides that original proceedings shall be commenced within two years "from the date of the injury **causing** such death or disability for which benefits are claimed." (emphasis supplied)

Claimant asserts that upon resumption of his job in August, 1972, the continual bending and lifting of bags of powdered paint aggravated his back condition caused by the injury of July 18, 1972, and constituted repeated new injuries. Relying on this theory, Claimant's argument centers on the proposition that the two-year statute of limitations should commence to run from August, 1972, (the date of the alleged aggravations of Claimant's previous back injuries) and thus, the claimant is not barred by the statute of limitations because the application for arbitration was filed on July 30, 1974.

Although the subsequent job activities of the claimant might have aggravated his injured back, the clear language of the statute requires a causal connecton between the injury and death or disability for which benefits are claimed. The supreme court of Iowa in **Otis,** supra, determined that the legislature, by virtue of the plain statutory language, designated the **causal** injury was the proper measuring point and **not** later when the disease was "lighted up".

In **Langford v. Kellar Excavating & Grading, Inc.,** 191 N.W. 2d 667 (1971), the supreme court of Iowa held that a heavy equipment operator was entitled to additional compensation for a 1967 back injury, where undisputed testimony of a physician required a finding that disability arising out of injury to the claimant was directly traceable to an injury of April, 1967, and the occurrence of several incidents in 1968 and 1969 were not of great significance where a physician took such incidents into consideration but expressed the opinion that the present disability related back to the 1967 injury.

Dr. Iwersen, who examined Claimant and performed a laminectomy in December of 1972, during direct examination upon the basis of a lengthy hypothetical question stated that Claimant's continual lifting for another fourteen to nineteen days would probably increase his problems and could aggravate the herniated disc condition. Dr. Iwersen during cross examination further testified:

> Q. Doctor, Mr. Gaudineer asked you a hypothetical question and you recall that I made a couple of objections to the wording, one of the objections I made was that Mr. Gaudineer indicated that the condition of the patient after July 18, or I should say the complaints of the patient, continued to get worse. Now, in that hypothetical question if it were related to you that the patient's symptoms did not worsen and in fact lessened, or that during intervals there were no complaints at all, would it change your answer to the hypothetical question regarding the causation here?
>
> A. No, I don't think it would, because **disc problems are intermittent in character, and you can have symptoms completely subside for a week or ten days and then recur with minimal stress.** What I mean by that is that patients can be treated conservatively for a disc and have complete relief of symptoms and go home and he might be well for two weeks, three weeks, six months, or he might go home and bend over to wash his face the next morning and be right back, hit him right again and be right back. I cannot tell what is going to happen with discs. (emphasis supplied)

It is found after careful examination of the medical evidence presented (specifically the

testimony of Dr. Iwersen) and the reasoning of **Langford,** supra, that Claimant's alleged aggravation of his previous back injury of July 18, 1972, was nothing more than a showing of symptoms of the initial July injury; hence, the calculation of the two-year statute of limitations period must begin on July 18, 1972, the date of the injury causing such death or disability for which benefits are claimed.

The doctrine of equitable estoppel was raised by the claimant to prevent the running of the statute of limitations in §85.26, Code 1973. In **Paveglio v. Firestone Tire & Rubber Co.,** 167 N.W. 2d 636 (Iowa 1969), an employer, who sought review-reopening of a compensation award, attempted to counter the employer's defense of the statute of limitations with an equitable estoppel argument. The supreme court of Iowa held that Claimant failed to allege sufficient well-pleaded facts and outlined four essential elements required to establish equitable estoppel.

The second element specifically listed by the court was, "Lack of knowledge of the true facts on the part of the person to whom the misrepresentation or concealment is made," **Paveglio v. Firestone Tire & Rubber Co.,** supra, at page 638. The claimant testified that he was aware of the possibility of workmen's compensation covering his back injury prior to June 10, 1974. Claimant further testified that prior to July 18, 1974, he contacted Dan Cohen, an attorney, who indicated Claimant did not have a lot of time. Clearly, on the basis of Claimant's own testimony, he did not lack knowledge of the true facts of the situation. Therefore, Claimant has failed to establish one of the essential elements of equitable estoppel as outlined in **Paveglio,** supra. All of the elements must be established in order to invoke the doctrine of equitable estoppel.

The deputy commissioner dismissed Claimant's application for arbitration for disability benefits in accordance with §85.26, Code 1973, but found that the limitation in §85.26, Code 1973, does not apply to services under §85.27, Code 1973, and ordered the defendants to pay specified medical bills.

With the running of the limitation contained in §85.26 for commencement of an original proceeding for compensation, the issue of whether this tribunal is deprived of jurisdiction to award medical benefits is presented.

The supreme court of Iowa in **Secrest v. Galloway Co.,** 239 Iowa 168 30 N.W. 2d 793 (1948) interpreted §1457, Code 1939 (currently §86.34), which provided for the application to review an award or settlement. Factually, the claimant sustained compensable injuries in 1941 and a memorandum of agreement was entered into later in 1941, when full and final payment was made. In 1945, Claimant applied for a review under §1457, Code 1939, which provided that within five years from the date of the last payment of compensation, the commissioner, on application of either party, might review the award. Section 1457, Code 1939, was changed in 1945 (chapter 77, §6, Acts of the Fifty-first General Assembly) to provide for review within three years from the date of the last payment of compensation. Ruling on the question whether the amendment of 1945 reducing the time from five to three years applies to injuries that had taken place and an award made prior to such amendment, the court was unable to find any distinction between the enactment of §1386 (currently §85.26) and the amendment to §1457, Code 1939. The court specifically found at pages 173-174:

> We are unable to find any distinction between the enactment of section 1386 and the amendment to section 1457. In each case there is authority given the commissioner to hear and determine the questions involved. In each case the legislature saw fit to require claimant, in section 1386, and the employer or employee in section 1457, to act within the prescribed time or lose the benefits granted under these sections. It is not a limitation upon the jurisdiction of the commissioner but is rather upon the right of interested parties to receive the benefits of the sections.

The court further elaborated at page 174:

> It would seem that even though the section be retroactive, any alleged error upon the part of the commissioner in entertaining the complaint after the expiration of the time limit is merely an error committed in a hearing wherein and when he had the capacity to hear. It is vastly different than "the want of jurisdictional facts to hear."

In sum, the court in **Secrest v. Galloway Co.,** supra, disapproved that what is now §85.26, Code 1973, is also a limitation upon the exercise of jurisdiction of the industrial commissioner. The court held that the limitation in §1457, Code 1939 (currently §85.26) was a limitation upon the right of interested parties to receive benefits.

Subsequently, the court in **Mousel v. Bituminous Material & Supply Co.,** supra, affirmed the Industrial Commissioner's dismissal of a claim as not filed within two years from the date of claimant's injury. Claimant received thermal burns in 1958, but waited to see a skin doctor until June of 1966. The skin specialist diagnosed such spots on claimant's skin as malignant and surgery was subsequently performed. Claimant admitted that such spots caused him trouble from the fall of 1958 to the time of commencement of the action. Ruling that the injury causing disability for which compensation was claimed did not commence from the 1966 diagnosis of malignancy because claimant did not exercise reasonable diligence in the discovery of the condition, the court examined claimant's contention that §85.26, Code 1966, must be plead as a special defense in accordance with the provisions of §86.14, Code 1966.

Acknowledging provisions of Larson's treatise on Workmen's Compensation Law, C.J.S., Am.

Jur., and A.L.R. annotations, the court in **Mousel** at page 768 expressed the following:

> Without receding from what is said in Secrest, cited with approval in Paveglio, as to the question of the limitation on jurisdiction of the commissioner, we note the annotation in 78 A.L.R. 1294 cites numerous decisions for this: "The view taken in most of the jurisdictions that operate under workmen's compensation acts is that the limitation of time for filing a claim under the act is jurisdictional, and a condition precedent to the right to maintain an action thereunder."

Further in the opinion:

> 100 CJS Workmen's Compensation §468 (2), page 364, states the rule substantially as we have done: "Further, it is held that the requirement as to the time within which a claim for compensation must be made or filed is a matter going to the right of compensation, and being a condition on the right***rather than on the remedy***it must be strictly complied with."

The statutory language of §85.27, Code 1973, applicable to the case at bar, "...no statutory period of limitation shall be applicable thereto", was absent when the injuries in **Secrest,** supra, and **Mousel,** supra, occurred. The language quoted from **Mousel,** supra, seems to indicate that the better and favored position taken in most jurisdictions is the limitation of time for filing a claim under a Workmen's Compensation Act is jurisdictional. However, the court in **Mousel,** supra, refused to overrule **Secrest,** supra, which held that the limitation period refers to the right of the interested parties to receive benefits and not the jurisdiction of the industrial commissioner.

As indicated the limitation of §85.26, Code 1973, that "No original proceedings for compensation shall be maintained in any case unless such proceedings shall be commenced within two years from the date of injury..." is not jurisdictional but merely goes to the right to receive compensation. The word "compensation" includes benefits which are payable according to §85.27 [see **Youngs v. Clinton Foods, Inc.,** (D.C. Iowa) 188 F. Supp. 15]. The specific language of §85.27 that "no statutory period of limitation shall be applicable..." to benefits pursuant to that section would control as a specific later enacted limiting (or in this instance non-limiting) statute controlling over a prior enacted general statute. **Workman v. District Court,** 222 Iowa 364, 260 N.W. 27 (1936). The interpretation of §85.27 as providing for the unlimiting nature of this section has been affirmed by the district court in the case of **Fred B. Hager v. Employers Mutual Casualty Company** (Judge Bown, Polk County, October 6, 1972).

The evidence shows that the employer through Claimant's immediate supervisor had notice of the injury, although it may not have been communicated beyond the supervisor. Therefore, the proceeding for benefits pursuant to §85.27 may be maintained and an award for benefits made pursuant thereto. The expert evidence causally relating the health care services performed to the injury is ample.

As a caveat, it might be noted that the general assembly in 1973 changed the law with regard to the unlimited nature of benefits payable pursuant to §85.27 by deleting the provisions of that section referring to the unlimited statutory period of limitation (65 GA, Ch 144 §5) and adding language to §86.34 in which the maintenance of an action for benefits pursuant to §85.27 is unlimited provided there has previously been "an award for payments or agreement for settlement...where the amount has not been commuted..." (65 GA, Ch 144, §28). There is no indication that there was an intent that the provision was to be given retroactive effect and it does not affect the instant action as the cause of action arose prior to the effective date of the amendments. Actions for benefits as a result of injuries received subsequent to the effective date of the amendments (July 1, 1973) would be subject to the provisions, however.

WHEREFORE, it is found that Claimant's application for arbitration insofar as it pertains to disability benefits must be dismissed in accordance with §85.26, Code 1973. It is further found that there were no payments made by the employer to the claimant such as to toll the statute of limitations for failure to file a memorandum of agreement. It is further found the statute of limitations commences to run from the date of injury which is causally connected to the disability for which benefits are claimed. It is further found that this date is July 18, 1972. It is further found that Claimant failed to sustain his burden of proof necessary to establish equitable estoppel. It is further found that the following medical bills were found to be fair and reasonable and necessitated by Claimant's injury of July 18, 1972.

Richard B. Svelka, M.D.	$ 15.00
Frank J. Iwersen, M.D.	426.00
Lutheran Medical Center	60.00
Archbishop Bergan Mercy Hospital	1056.20

THEREFORE, the arbitration decision is hereby affirmed. Claimant's application for arbitration insofar as it pertains to disability benefits is dismissed. Defendants are ordered to pay the above medical bills.

The parties shall pay the costs of producing their own evidence except the costs of the review proceedings and arbitration proceedings, including the cost of the transciption of the evidentiary depositions, which are taxed to Defendants.

Signed and filed this 11 day of February, 1976.

ROBERT C. LANDESS
Industrial Commissioner

No appeal

Leo Sondag, Claimant,

vs.

Ferris Hardware, Employer,
and
Grain Dealers Mutual Insurance Co., Insurance Carrier, Defendants.

Review Decision

Mr. Michael R. Mundt, Attorney at Law, 203 North Main, Denison, IA 51442, For the Claimant.

Mr. Burns H. Davison II, Attorney at Law, 1040 Des Moines Building, Des Moines, IA 50309, For the Defendants.

This is a proceeding brought by the defendants, Ferris Hardware, and its insurance carrier, Grain Dealers Mutual Insurance Company, against the claimant, Leo Sondag, for review of an arbitration decision pursuant to section 86.24, Code of Iowa. The original arbitration decision, filed the 18th day of August, 1972, in the Office of the Industrial Commissioner, denied benefits. On review, the original arbitration decision was affirmed. On appeal to the district court, the original review decision was affirmed. On appeal to the supreme court, the district court decision was affirmed in part, reversed in part and remanded to the industrial commissioner with instructions. The portion of the district court decision which appears to have been affirmed is the decision of the district court refusing to hold, on expert testimony alone, that Claimant as a matter of law proved his injury arose out of and in the course of his employment. The portion that was reversed was failure of the district court to remand to the commissioner for a reconsideration of Dr. Louis Banitt's testimony, in light of a proper evidentiary rule or for supplemental decision showing the evidence relied on, standards applied and reasoning used in rejecting that testimony. The industrial commissioner explained his prior review of the evidence and remanded, with instructions, to the deputy industrial commissioner for further findings. The deputy industrial commissioner held a hearing taking further evidence and filed a decision on the 26th day of August, 1975, wherein the claimant was found to have sustained a compensable injury arising out of and in the course of his employment on August 20, 1971. A petition for review was filed and pursuant to agreement of the parties, formal hearing was waived and written briefs were submitted.

For the 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. L. O. Boggs,** 236 Iowa 296, 18 N.W. 2d 607 (1945). There is some discussion in the submitted briefs concerning whether the allegation of "aggravation" was properly pled and therefore available as a basis for satisfying the requirement that the claimant suffered a "personal injury." The supreme court of Iowa dealt with the concept of aggravation in **Farrow v. What Cheer,** 198 Iowa 922, 200 N.W. 625 (1924), and held that 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." Claimant's application for arbitration in paragraph twelve (12) recites that the dispute in this case is "(w)hether heart attach(sic), or aggravation thereof, was related to his employment." Section 86.18, Code of Iowa, provides this office shall not be bound by technical or formal rules of procedure. Therefore, this contention regarding lack of pleading of "aggravation" is dismissed.

The supreme court indicated that the evidence of Dr. Banitt, "that claimant's continuing to work after the coronary onslaught would have aggravated the effect of the obstruction in the heart artery," was uncontroverted. **Sondag v. Ferris Hardware,** 220 N.W. 2d 903 (Iowa 1974). However, it was the thinking of this commissioner that the testimony of Dr. Donald Soll that "this episode would have occurred regardless of the type of work" did to some degree controvert the opinion of Dr. Banitt. The record shows that on at least two occasions prior to the incident in question, the claimant, Leo Sondag, suffered from an attack of angina pectoris.

If a claimant has a preexisting 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,** 154 N.W. 2d 128. The sufficiency of aggravation of a preexisting condition is commented upon by the supreme court of Iowa in **Ziegler v. United States Gypsum Co.,** 252 Iowa 613, 620; 106 N.W. 2d 591.

> 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.
> (citation omitted - emphasis supplied)

In **Yeager v. Firestone Tire and Rubber Co.,** 253 Iowa 369, 375; 112 N.W. 2d 299, the court quotes with approval from C.J.S.:

> Causal connection is established when it is shown that an employer has received a compensable injury which **materially** aggravates or accelerates a preexisting latent disease which becomes a direct and immediate cause of his disability or death. (emphasis supplied)

It was the commissioner's opinion based upon the original record that on the basis of the testimony of Drs. Banitt and Soll and further evidence in the record that Claimant had a past history of heart trouble and a propensity for such in the future that the standard of "**more than slightly** aggravated" in **Ziegler,** supra, or "**materially** aggravated" in **Yeager,** supra, was not met by a

preponderance of the evidence.

However, at the second hearing by the deputy industrial commissioner, additional medical testimony of Dr. Louis Banitt was submitted in which Dr. Banitt testified, based on reasonable medical certainty, that continuing to work after symptoms of a heart attack materially aggravated his heart condition. It was with this additional medical testimony of Dr. Banitt that the deputy commissioner found that there was sufficient legal evidence to sustain a finding of "material aggravation" by the Claimant's continued exertions in accordance with the standard in **Yeager,** supra, and therefore, a compensable injury.

The claimant is not entitled to recover for the results of preexisting injury or disease, but only for the aggravation thereof which resulted in the disability found to exist. **Olson v. Goodyear Service Stores,** 255 Iowa 1112, 125 N.W. 2d 251. If a workman already has some disability and his disability is increased by a compensable injury, he is entitled to compensation to the extent of the increased disability. **DeShaw v. Energy Mfg. Co.,** 192 N.W. 2d 777. Accordingly, the question is the extent of the disability in terms of industrial and not merely functional disability, although it may be taken into consideration. **Dailey v. Pooley Lumber Company,** 233 Iowa 758, 10 N.W. 2d 569. In determining industrial disability, consideration may be given to the age, education, training and employment qualifications of the employee, as well as his loss of earnings.

The claimant if fifty-seven (57) years of age, married and has one ten-year-old son. Regarding formal education, the claimant completed the eighth grade and has not attended any trade schools. The claimant farmed until 1948, worked for a department store as a tire serviceman, ran a pool hall and was employed by the defendant, Ferris Hardware, for thirteen (13) years. While working for the defendant, Ferris Hardware, the claimant's duties required much in the nature of physical labor; that is, moving major home appliances. The claimant installed and serviced refrigerators, washers and dryers, which often required that the claimant move the appliance.

Dr. Soll, the personal physician of the claimant, testified that based on reasonable medical certainty, Sondag will have permanent disability. Dr. Soll testified that the claimant cannot go out and do manual labor with this heart condition and that he was under quite a bit of medication.

The claimant testified that with the several pills that he takes during the day that he can walk about a mile; but without the pills, he is fortunate to walk around the block.

Based upon the claimant's age (fifty-seven), lack of formal education or specialized training, previous work history which focused on manual labor and the testimony of Dr. Soll of permanent disability, it is determined that Claimant has suffered a permanent total industrial disability as a result of this injury.

THEREFORE, the arbitration decision is hereby affirmed.

It is found and held as finding of fact:

That the claimant sustained a personal injury arising out of and in the course of his employment with defendant, Ferris Hardware, on August 20, 1971.

That the industrial injury sustained aggravated the preexisting weak heart of the claimant.

That the aggravation was a material aggravation, in accordance with the standard in **Yeager,** supra.

That the claimant since August 20, 1971, the date of injury, has been unable to perform acts of gainful employment.

That the claimant, as a result is permanently and totally industrially disabled.

WHEREFORE, it is ordered that the defendants pay the claimant five hundred (500) weeks of benefits at fifty-nine dollars ($59) per week, accrued payments dating from the date of injury to be paid in a lump sum together with interest on all other payments running from the date of this decision in accordance with section 85.30, Code of Iowa.

It is further ordered that the defendants pay the claimant the following medical expenses, reimbursing the claimant for those amounts he has paid.

Pathology Center	$ 67.00
Nebraska Medical Hospital	1,276.95
D. D. Neis, M.D.	600.00
Crawford County Hospital	2,603.15
D. J. Soll, M.D.	108.00
D. J. Soll, M.D.	189.00
Nebraska Methodist Hospital	684.00
D. J. Soll, M.D.	24.00
Pathology Center	25.00
D. D. Neis, M.D.	225.00
James Flood, M.D.	5.00
Mayo Clinic	404.10
Denison Drug	356.12

Defendants are further ordered to pay the costs of the deputy industrial commissioner proceedings on remand, consisting of the transcription of the deposition of Dr. Banitt.

Signed and filed this 20 day of January, 1976.

ROBERT C. LANDESS
Industrial Commissioner

Appeal to District Court; Pending

LIST OF SELECTED ARBITRATION AND REVIEW-REOPENING DECISIONS

Barnett, Florence, v. Community School District and Iowa National Mutual Insurance Co.

Bixby, Leo M., v. Edwards Bakeries, Inc., and Liberty Mutual Ins. Co.

Bryson, Charles, v. Montgomery Ward and Company, Self-Insured

Cook, Shirley J., v. Wolverine Worldwide of Muscatine and Employer Insurance of Wausau

Cravatta, Charles, v. Ragan Plumbing & Heating, and Iowa Mutual Insurance Company

Crawford, Victor B., v. John Deere Waterloo Tractor Works, Self-Insured

Dachenbach, Lois, v. O'Bryan Brothers, Inc. and Insurance Company of North America

Davenport, Elmer B., v. Hallett Construction Co. and Liberty Mutual Insurance Co.

Davis, Thomas E., v. Firestone Tire & Rubber Co. and Liberty Mutual Insurance Co.

Doty, Bryan, v. Moorman Manufacturing Co. and Liberty Mutual Insurance Co.

England, Raymond, v. Western Materials, Inc., a/k/a Western Engineering Company, Inc. and Maryland Casualty Company

Engstrom, Carl D., v. Iowa Truck Center, Inc. and Royal-Globe Insurance Companies

Eversoll, Bernadine, v. Swift Dairy & Poultry Co. and Royal-Globe Insurance Company

Francis, Donald R., v. Chamberlain Mfg. Co. and Bronson-Dennehy-Ulseth, Inc.

Fulton, James Dennis, v. Nichols-Homeshield, Inc. and Insurance Company of North America

Gotto, William L., v. Grothaus Express and Westchester Fire Insurance Co.

Harmon, Charles T., v. Black Hawk Plumbing Co. and Dodson Insurance Group

Harris, Dennis J., v. Cal Harris, d/b/a Cal Harris Excavating & Trucking and Illinois National Insurance Co.

Hensley, Charles R., v. Meredith Corporation and Aetna Life & Casualty Co.

Huls, James D., v. American Oil Company, Self-Insured

Jeffrey, Michael L., v. Jack A. Schroeder, Inc. and Employers Insurance of Wausau

Kay, Gary W., v. Des Moines Register & Tribune and Employers Mutual Casualty Company

LaFollette, James, v. C.L. Carroll Construction Co., Inc. and Westchester Fire Insurance Co.

Lambert, Harley, v. E.A. Lange Co. and Employers Mutual Casualty Company

Langen, Freidrich M., v. Bethesda General Hospital and St Paul Insurance Co.

Lewis, Harold Leroy, v. Great Plains Bag Co., and The Travelers Insurance Co.

McDaniel, Guy O., v. Armstrong Rubber Mfg. Co., and American Mutual Liability Insurance Co.

Meyer, Jay Landon, v. Western Contracting Corporation and Employers Insurance of Wausau

Miller, Jon Charles, v. McGraw-Edison Company and Employers Insurance of Wausau

Mishler, Kenneth H., v. Nash Finch Company and Farmers Insurance Group

Morley, Viola M., v. St. Vincent's Hospital and Argonaut Insurance Cos.

Myers, (Richardson), Pauline, v. Henry County Memorial Hospital and Hawkeye-Security Insurance Company

Payne, Patrick F., v. Benevolent & Protective Order of Elks and United States Fire Insurance Co.

Roach, Elmer, v. Meier Body Shop & Towing Service and Maryland Casualty Co.

Roby, Robert, v. Iowa Sheet Metal Contractors, Inc., n/k/a Waldinger Corp. and United States Fidelity & Guaranty Company

Sater, James, v. Reppert Investment Company, d/b/a Retail Merchants Delivery and Fireman's Fund American Insurance Company

Schneider, Sylvan E., v. Brady Motor Freight and Carrier Insurance Co.

Scrivner, Gene, v. Rock Island Motor Transit Co., Self-Insured

Tracy, Jack, v. Farmegg Product, Inc., and Insurance Company of North America

LIST OF SELECTED ARBITRATION AND REVIEW-REOPENING DECISIONS

Utley, Eva, v. Treloar's Crossroads Restaurant and Western Casualty & Surety Co.
Wachsman, Stanley, v. Mason City Tile & Marble Co. and Liberty Mutual Insurance Co.
Walters, Edward J., v. Black Hawk Construction Company and Hawkeye-Security Insurance Company
Wieser, Arlene M., v. United States Gypsum Co., and American Motorists Co.
Witt, Carl M., v. Merchants Delivery, Inc., and Illinois National Insurance Co. & State of Iowa
Witt, Ronald Arthur, v. Henke Manufacturing Corporation and Bituminous Casualty Company

Michael L. Jeffrey, Claimant,

vs.

Jack A. Schroeder, Inc., Employer,
and
Employers Insurance of Wausau, Insurance Carrier, Defendants.

Review Reopening Decision

Mr. Donald E. Gartin, Attorney at Law, 117 East Monroe Street, Mt. Pleasant, Iowa 52641, For Claimant.

Mr. R. R. Beckman, Attorney at Law, 604 Farmers & Merchants Bank Bldg., Burlington, Iowa 52601, For Defendants.

This is a proceeding in Review-Reopening brought by the claimant, Michael L. Jeffrey, against his employer, Jack A. Schroeder, Inc., and its insurance carrier, Employers Insurance of Wausau, to recover benefits under the Iowa Workmen's Compansation Act on account of an injury sustained on October 7, 1969. The matter came on for hearing before the undersigned at the courthouse in Mount Pleasant, Iowa, on Wednesday, January 31, 1973, at 1 p.m. The record was left open for the submission of medical testimony. The record was completed in October of 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 sustained on October 7, 1969, while employed for the defendant employer. More specifically the issues appear to be whether or not Claimant has a scheduled injury to the left lower extremity or a body as a whole injury and whether or not certain medical expenses were authorized by the employer.

Claimant testified that on October 7, 1969, a corrugated culvert fell against his left thigh striking him in the front directly below the pocket of his pants. He indicated he was knocked back about fifteen (15) feet. Claimant's version of the severity of the incident is somewhat contradicted by the operator of the machine to which the culvert was attached. All are in essential agreement that the culvert struck the claimant in the location noted. In consequence of the following, the conflict as to severity is resolved against the claimant.

Claimant's testimony is somewhat lessened in weight as the credibility factor of a tendency to overstate matters appears. Dr. Harold Dudley Noble, M.D., notes no significant discoloration in Claimant's leg two months following the injury. Claimant indicated on one occasion that a significant discoloration existed for at least a year and a half following the injury. The claimant indicated in the history to Dr. S.J. De Vito in April of 1973, that back pain was present from the time of the injury. No other history of back pain was noted to Dr. Noble nor to Dr. William Catalona. Claimant's testimony at the hearing indicated back pain only at a point of time a year or more following the injury and after performing heavy labor in Colorado. These conflicts are resolved against the claimant.

Claimant's testimony indicates problems with weakness of the left leg, a shaking or trembling of the leg, and the above indicated back soreness.

With respect to the back soreness, it is noted that no history was given to Drs. Noble or Catalona. Dr. Catalona saw Claimant as recently as September of 1973. The presentation by the claimant of the back difficulty did not impress this deputy commissioner that Claimant's difficulty with his back was significant. The history given to Dr. De Vito was of continuous back pain since the time of injury. Dr. De Vito's opinion must give way in accordance with the previous resolution of conflict in the evidence leading to the finding that the back pain was not continuous since the date of injury. Accordingly, with respect to the back problems, Dr. De Vito's opinion concerning the source of the back problems is entitled to no weight as it is based upon an incorrect history. In fact, Dr. De Vito does not clearly indicate the back problem as having its origin in the October 7, 1969, incident. There is thus no expert testimony indicating a casual relationship of a back problem to the instant injury.

It should be noted that portions of Dr. De Vito's testimony tend to indicate the source of Claimant's problems to be in Claimant's back. This is not clear but certainly detracts from Claimant's case. In any event, Dr. De Vito finds little, if any, problem now exists in Claimant's back.

The claimant also testified to shaking in his leg. The shaking according to Claimant's testimony is limited to the leg. The shaking appears to be of insignificant disabling effect as claimant testified he could force the muscles through the shaking. Dr. Catalona finds no objective basis for the shaking. Dr. De Vito approached the shaking as a fatigue factor. It appeared to be noted to him historically in an insignificant manner. No mention of this problem was made to Dr. Catalona in September of 1973. The shaking is thus found to be of no significant disabling effect and does not extend beyond the scheduled member.

In accordance with the above findings, the injury of October 7, 1969, is limited to Claimant's left lower extremity. No physical impairment which is disabling and related to this injury is found to extend beyond the scheduled member. **Barton v. Nevada Poultry Co.**, 253 Iowa 285, 110 N.W. 2d 660; **Kellogg v. S. L. Coal Co.**, 256 Iowa 1256, 130 N.W. 2d 667. Accordingly, the factors bearing on ability to earn wages are irrelevent. See **Barton v. Nevada Poultry Co.**, supra.

Three doctors testified in this matter. Dr. Harold Dudley Noble, M.D., an orthopedic surgeon, and Dr. S. J. De Vito, D.O., an internist,

with a "subspeciality" in cardiovascular disease, testified on Claimant's behalf. Dr. William Catalona, M.D., an orthopedic surgeon, testified on Defendants' behalf. As all matters other than Claimant's left lower extremity difficulty have been discussed previously, only the lower extremity impairment will be approached. It should be noted that a reference to a torn quadriceps muscle in Claimant's left extremity by a doctor not testifying was made. However, all doctors testifying agree that in light of subsequent developments, no torn muscle existed.

Dr. Noble last saw Claimant in December of 1970. Claimant had full motion in his knee at that time. The knee gave way less than at prior times. Three problem areas were noted by Dr. Noble following surgery in July of 1970. The doctor removed a torn medial meniscus. An area of chondromalacia in the patella and a portion of the fat pad was removed. Except for the area of chondromalacia on the kneecap, no question seems to exist as to the relationship between the October 7, 1969, trauma and the difficulties noted. The chondromalacia may or may not be related to the trauma. However, comments of Dr. Noble tend to indicate that in his opinion a relationship between the instant injury and the subsequent chondromalacia does exist. Dr. Noble feels some permanent impairment existed in the knee. The extent of the impairment was unknown at the taking of Dr. Noble's deposition in January, 1973, due to his last seeing the claimant in December of 1970. The source of any difficulty is likely a tenderness in the area of removal of the chondromalacia. It should be noted that Dr. Noble felt Claimant had some laxity of ligaments on both sides apparently unrelated to this injury.

The diagnosis of Dr. Catalona is essentially in no conflict with that of Dr. Noble. Dr. Catalona places no permanent impairment on the claimant as he feels no limitation of motion exists. However, he does note a residual such as a crepitus under the kneecap. Laxity in the anterior cruciate ligament noted early in Dr. Catalona's examination had markedly improved as of the September, 1973, examination. He notes essentially no instability. The chondromalacia may be caused by trauma. In saying this, Dr. Noble's testimony is not significantly contradicted.

While Dr. De Vito is not an orthopedic specialist, his testimony concerning Claimant's knee is also essentially in no serious conflict with Drs. Noble and Catalona. A weak ligament due to the trauma is responsible for Claimant's difficulties. No mention is made of the patella tenderness. Some indication of subsequent aggravation of this condition in later employments is noted. This is apparently of only temporary significance. As a result of the October 7, 1969, injury, Dr. De Vito appears to attribute a five to ten percent (5-10%) permanent impairment to the lower extremity. Future developments discussed by Dr. De Vito are beyond the scope of this opinion.

The three doctors testifying appear to disagree primarily on the existence, extent and basis for finding permanent impairment of the lower extremity. Impairment must include factors other than range of motion. The tenderness of the patella area and minor weakness of the ligaments are such an impairment. Based on Dr. De Vito's rating, Claimant is found to have a ten percent (10%) permanent partial disability of the left lower extremity.

The claimant is referred to §85.27, Code of Iowa, and (OAG, May 17, 1962) 99 CJS Workmen's Compensation §273, for the construction of §85.27, Code of Iowa. The claimant appears to have gone to Dr. De Vito without the authorization of the employer or insurance carrier. While certain of the comments of the defendants' counsel in his letter of August 17, 1973, are not properly part of the record, the statements of counsel concerning the lack of authorization of Dr. De Vito's treatment, the furnishing of that letter by this office to Claimant's counsel and Dr. Catalona's treatment all following the hearing, indicate that competent medical care was tendered by the defendants at the time Claimant went to Dr. De Vito. Accordingly, Dr. De Vito's charges cannot be ordered paid by the defendants.

The parties were to submit a stipulation concerning medical and travel expenses. This stipulation was not forthcoming. The only evidence of medical expenses other than that referred to in the above paragraph is the lay testimony of the claimant concerning a Dr. Niehouse in Denver, Colorado. The claimant was justified in seeking treatment for difficulties arising suddenly and so far from home. While better evidence is preferred, the fifty dollar ($50) bill of the indicated doctor is found to be compensable.

The appropriate disability rate for the claimant is forty dollars ($40) per week for healing period disability compensation and forty-seven and 50/100 dollars ($47.50) per week for permanent partial disability compensation.

It should be noted that Defendants' counsel requested the sanctions of §85.39, Code of Iowa, for the suspension of benefits for Claimant's failure to appear at a scheduled examination sought by the defendants in accordance with that section. No ruling on this matter need be made for all benefits awarded in this decision have long accrued prior to the 1973 date of the examination. A subsequent examination was attended.

THEREFORE, Defendants are ordered to pay Claimant twenty (20) weeks of permanent partial disability compansation at the rate of forty-seven and 50/100 dollars ($47.50) per week. Defendants are further ordered to pay Claimant twelve (12) weeks of healing period disability compensation, that figure being sixty percent (60%) of the permanent partial award as provided in §85.34(1), Code of Iowa, in effect as of the date of injury. The twelve (12) weeks are payable at forty dollars ($40) per week. Credit is to be given to the defendants for disability compensation previously paid

pursuant to the first unnumbered paragraph of §85.34, Code of Iowa. The amount paid for temporary total disability compensation appears to exceed the amount due for healing period and permanent partial disability compensation awarded herein.

Defendants are to reimburse the claimant for the fifty dollar ($50) amount paid by the claimant to the Denver doctor, Dr. Niehouse.

Costs of the proceeding are taxed to the defendants.

Signed and filed this 20 day of August, 1974.

ALAN R. GARDNER
Deputy 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 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 in Review-Reopening brought by the claimant, Gary W. Kay, against his employer, Des Moines Register and 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 Commisioner'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 sacro-iliac 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

James LaFollette, Claimant,

vs.

C. L. Carroll Construction Co., Inc., Employer, and

Westchester Fire Insurance Co., Insurance Carrier. Defendants.

Review - Reopening Decision

Mr. Patrick H. Payton, Attorney at Law, 930 Grand Avenue, West Des Moines, Iowa 50265, For Claimant.

Mr. Burns H. Davision II, Attorney at Law, 1040 Des Moines Building, Des Moines, Iowa 50309, For Defendants.

This is a proceeding in Review-Reopening brought by the claimant, James LaFollette, against his employer, C.L. Carroll Construction Co., Inc., and its insurance carrier, Westchester Fire Insurance Co., to recover benefits on account of an injury sustained on May 9, 1973. The matter came on for hearing before the undersigned at the Offices of the Iowa Industrial Commissioner in Des Moines, Iowa, on Monday, June 10, 1975, at 1:30 p.m. The record was left open for the submission of further evidence. The record was completed on March 1, 1975.

The issue to be determined in this matter is whether or not the claimant sustained disability and medical expenses in addition to that previously paid as a result of an injury sustained on May 9, 1973, when a tractor Claimant was driving collided with another vehicle.

Also pending is Defendants' Motion to Dismiss for Claimant's failure to appear at a scheduled medical examination. The Motion is made pursuant to §85.39, Code of Iowa. §85.39, Code of Iowa, provides that the employee is to submit to examination at the request of the employer "as often as may be reasonably requested." In view of Dr. Donald W. Blair's recommendation for the electromyographic examination, the request is certainly reasonable.

Claimant failed to appear on several occasions for the requested examination. While perhaps earlier failures are on the border line of being improper, Claimant's failure to appear on December 26, 1974, is such a failure as to bring into play the sanctions of §85.39, Code of Iowa.

The sanction of §85.39, Code of Iowa, is a

deprivation of the right to compensation for the period of refusal to submit to examination. The sanction is **not** a dismissal as requested by Defendants. In view of the amount of compensation to be awarded in this decision, the suspension of rights to compensation after December 26, 1974, is of no significance at this time.

The defendants have paid the claimant a total of thirty (30) weeks of temporary total disability compensation. Twenty-two (22) weeks were paid voluntarily. An additional eight (8) weeks of temporary total disability compensation were paid at the time of the hearing following an Order of this office. Compensation was thus paid for the period from May 9, 1973, up to November 22, 1973. Claimant saw Dr. Robert C. Jones, M.D., a neurosurgeon, on July 10, 1973. Dr. Jones does not approach the matter of ability to return to work. He notes difficulties are present and returns the claimant to the care of Dr. Gordon M. Arnott, M.D. The diagnosis in the University of Iowa Hospital notes of October 29, 1973, includes a chronic myofacial strain of the cervical and lumbar spine. A wire loop collar was prescribed and Claimant was to return to University Hospitals at Iowa City in eight (8) weeks from October 29, 1973. This would be December 24, 1973. Dr. Donald W. Blair, M.D., an orthopedic surgeon, saw Claimant on July 11, 1974. At this time the diagnosis was "residuals" of a strain in the cervical region of the back, "questionable" cervical radiculitis, and spondylolysis at L5 with recurring back pain. The latter diagnosis of spondylolysis is considered congenital in origin. He appears to recommend some activity as benefiting Claimant. Dr. Gordon M. Arnott, M.D., appears to feel Claimant cannot return to work as a truck driver and must be retrained.

The doctors all agree that no objective signs are present. "Functional overlay" is mildly present apparently as a result of the injury. The doctors who approached the issue of causation have little dispute as to the cervical difficulties having origin in the accident of May 9, 1973. Dr. Arnott relates **all** of Claimant's difficulties to the May 9, 1973, injury. Dr. Blair does not relate the lumbar problems to the injury of May 9, 1973. Any conflict is resolved in favor of Dr. Blair. It should be noted that Dr. Arnott defers to the specialist. Of all the various doctors' opinions which indicate on going difficulties, no doctor expressed an opinion as to whether or not Claimant was capable of returning to **any** gainful employment. Based on the above, the additional compensation apparently due is four and five-sevenths (4 5/7) weeks. This is based upon the information contained in the University Hospitals' report previously noted. The presence of a wire loop collar for the eight (8) week period following the Iowa City examination or up to December 24, 1973, appears sufficient to establish the additional entitlement to temporary total disability benefits. Beyond this, however, the record appears void of sufficient evidence that Claimant was temporarily and totally disabled from all gainful employment. It should be noted that Dr. Arnott's indication of Claimant's inability to return to his former employment is based in substantial part on the spondylolysis. Dr. Blair's opinion that spondylolysis is not a result of the May 9, 1973, incident is accepted over Dr. Arnott's opinion. Accordingly, while Claimant's problems may be ongoing with the presence of functional overlay, it is found that Claimant was not totally incapacitated from all gainful employment after December 24, 1973.

The resolution of the conflict as to causation above noted would apply to the area of permanent disability as well. It can be noted summarily that Dr. Jones and Dr. Blair note no permanent condition as of the time of their examinations. Dr. Blair saw Claimant in July of 1974. Dr. Arnott's language indicates permanency may develop. By the use of leading questions, Claimant's counsel elicited an estimate as to future disability from Dr. Arnott. However, the disability is apparently not present at the time of the deposition of Dr. Arnott. In any event, any conflict in the opinions of the doctors concerning the possible presence of permanency is resolved in favor of the diagnosis of Dr. Jones and Dr. Blair and against the opinion of Dr. Arnott. It should be noted that should matters develop in the future, as is perhaps indicated by Dr. Blair and Dr. Arnott, nothing in this decision is intended to exclude the claimant's recovery upon a proper showing for any permanency present at that time. Claimant has not sustained his burden of proof by a preponderance of the evidence of the existence of permanent impairment at the present time.

It does not appear, except from Claimant's own conclusions, whether or not Dr. Arnott referred the claimant to University Hospitals in Iowa City, Iowa. Claimant's conclusions in this context are given no weight. Dr. Arnott does not explore this area. Defendants insist Claimant's presence at Iowa City, Iowa, is unauthorized. Again, Claimant has not sustained his burden of establishing that the defendants failed to tender proper care under §85.27, Code of Iowa, which entitles him to seek treatment elsewhere. Accordingly, the bill noted in Claimant's exhibit #3 from the University Hospitals at Iowa City, Iowa, is not allowed.

Claimant's exhibit #4, pharmaceutical charges, is allowed in part and denied in part. Dr. Arnott indicates Claimant had medication prescribed. The charge dated June 3, 1975, for $3.35 is the only bill indicating Dr. Arnott as the prescribing physician. Apparently, Dr. Arnott treated the claimant only for the condition noted. The charge of $3.35 is allowed. The remainder of the charges are not sufficiently identified as related to this injury.

Claimant's testimony and conclusions concerning the recommendations of a chiropractor by Dr. Jones is disregarded. No comments on this appear in evidence from any doctor. In fact, the contrary appears in that Dr. Jones refers the claimant back to Dr. Arnott.

THEREFORE, Defendants are ordered to pay

Claimant four and five-sevenths (4 5/7) weeks of temporary total disability compensation at the rate of sixty-eight dollars ($68) per week.

Defendants are ordered to pay or reimburse the claimant the sum of three and 35/100 dollars ($3.35) for the pharmaceutical charge noted.

Costs of the proceeding are taxed to the defendants.

Signed and filed this 29 day of April, 1975.

ALAN R. GARDNER
Deputy Industrial Commissioner

James LaFollette, Claimant,

vs.

C. L. Carroll Construction Co., Inc., Employer,
and

Westchester Fire Insurance Co., Insurance Carrier,
Defendants.

Supplemental Review - Reopening Decision

Mr. Patrick H. Payton, Attorney at Law, 930 Grand Avenue, West Des Moines, Iowa 50265, For the Claimant.

Mr. Burns H. Davison II, Attorney at Law, 1040 Des Moines Building, Des Moines, Iowa 50309, For the Defendants.

Now on this 1 day of May, 1975, a Supplemental Review-Reopening Decision correcting a typographical error is issued.

The date of the hearing of June 10, 1975, in the first paragraph of the Review-Reopening Decision should read June 10, 1974.

Signed and filed this 1 day of May, 1975.

ALAN R. GARDNER
Deputy Industrial Commissioner

No Appeal

Harley Lambert, Claimant,

vs.

E.A. Lange Co., Employer,
and

Employers Mutual Casualty Co., Insurance Carrier,
Defendants.

Review - Reopening Decision

This is a proceeding in review-reopening brought by the claimant, Harley H. Lambert, against E.A. Lange Company, his employer, and Employers Mutual Casualty Company, its insurance carrier, to recover benefits under the Iowa Workmen's Compensation Act by virtue of an industrial injury that occurred on November 25, 1969. This matter was submitted to the undersigned Deputy Industrial Commissioner upon the stipulation of the parties, the parties having waived an oral proceeding in this matter.

It is undisputed that the claimant sustained an injury on November 25, 1969, arising out of and in the course of his employment as evidenced by the filing of a Memorandum of Agreement and the payment of 8 2/7 weeks of compensation at the rate of $48 per week or a total of $397.74 by the defendant, Employers Mutual Casualty Company, on account of said injury. The issue in this case is whether or not the claimant has sustained his burden of proving a causal connection between his present disability and the injury of November 25, 1969.

After the initial injury to the claimant on November 25, 1969 and the temporary disability incident thereto, the claimant returned to his employment and continued in that employment until October 16, 1972, or a period of approximately three years. Although the record indicates that the claimant had intermittent difficulty subsequent to his injury of November, 1969, it is also clear that the claimant suffers from extensive degenerative arthritis of the cervical, dorsal and lumbar spine and had had symptoms of cervical and low back pain prior to the injury of November, 1969. The medical evidence presented in this case is in conflict although all of the physicians agree that the claimant has a substantial disability which essentially incapacitates him for industrial purposes. The reports of Dr. Webster B. Gelman indicate that the claimant is incapacitated from any full-time employment and further state that the onset of his symptoms occurred in November of 1969. Despite the opinion of Dr. Gelman, there is no evidence that he had the benefit of the records of the University Hospitals in Iowa City where the claimant has been treated extensively for multiple conditions and Dr. Donald W. Nibbelink of the Department of Neurology at the University Hospital in Iowa City is of the opinion that all of his disability is due to degenerative arthritis of the cervical, dorsal and lumbar spine. The conclusion of Dr. Nibbelink combined with the length of time between the initial injury and the ultimate surgery by Dr. Webster B. Gelman in September of 1974 would tend to negate causation between the injury of November 25, 1969 and the claimant's present condition.

The claimant must establish by a preponderance of the evidence that the employment incident in question 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**, 257 Iowa 516, 133 N.W. 2d 867.

THEREFORE, after taking all of the credible evidence contained in this record into account, the undersigned Deputy Industrial Commissioner finds that the claimant has not sustained his burden of proving a causal connection between the injury of November 25, 1969 and the claimant's present condition.

WHEREFORE, it is ordered that the claimant take nothing from this proceeding and that the defendants are hereby relieved from any and all liability for benefits under the Iowa Workmen's Compensation Act with respect to the claimant's injury of November 25, 1969, including all medical expense incurred by the claimant to date except for the amount already paid by the defendants as evidenced by the Form #5 currently on file in the

office of the Iowa Industrial Commissioner.

Signed and filed this 21 day of November, 1975, at the office of the Iowa Industrial Commissioner at Des Moines, Iowa.

HELMUT MUELLER
Deputy Industrial Commissioner

Appealed to District Court; Dismissed

Freidrich M. Langen, Claimant,

vs.

Bethesda General Hospital, Employer,
and
St. Paul Insurance Company, Insurance Carrier, Defendants.

Review - Reopening Decision

Mr. Robert L. Ulstad, Attorney at Law, P.O. Box 1377, Fort Dodge, Iowa 50501, For the Claimant.

Mr. Paul Moser, Jr., Attorney at Law, 207 Crocker Street, Des Moines, Iowa 50309, For the Defendants.

This is a proceeding in Review-Reopening brought by the claimant, Freidrich M. Langen, against his employer, Bethesda General Hospital, and their insurance carrier, St. Paul Insurance Company, for the recovery of benefits for injuries sustained by him on July 15, 1971. The case came on for hearing before the undersigned Deputy Industrial Commissioner as sole arbitrator at the courthouse of Webster County, in Fort Dodge, Iowa, on August 30, 1973. The record was closed on August 30, 1974.

The issue to be determined is the extent of compensable disability sustained by Claimant as a result of the injury of July 15, 1971.

A Memorandum of Agreement was filed and approved on August 9, 1971. Defendants paid Claimant temporary disability compensation for nine and five-sevenths (9 5/7) weeks at the rate of sixty-four dollars ($64) per week. In addition, Claimant was paid thirty-one and five tenths (31.5) weeks of permanent partial disability at the rate of fifty-nine dollars ($59) per week for an eighteen percent (18%) loss of his hand.

Claimant began work as chief painter for Defendant Employer during March of 1965. In addition to his painting duties Claimant performed carpentry work for Defendant Employer. During Claimant's employment Defendant Employer designated a number of locations within the hospital complex as his paint room/workshop. The last location designated by Defendant Employer was in the basement.

The room was 14' × 16' with one 4' × 3' window next to the ceiling. Near one corner of the ceiling of the room was a 12" fan which blew odors from the x-ray room immediately above the paint room/workshop into the paint room/workshop. Contents of the room included a 10" bench saw, an 18" band saw, a paint shaker, a compressor for spray painting, a planer and jointer, work benches, storage cabinets, a trash barrel, a transformer for the x-ray equipment and various paints and thinners.

Claimant painted with the compressor operated spray gun and with aerosol spray cans. Due to a complaint by the X-ray Department about paint dust filtering into their room when Claimant used the compressor spray gun, Claimant was restricted during his last year of employment to the use of aerosol spray cans. Contents of the paints and thinners utilized by Claimant included lead, xylene, toulene, xylol, toluol, propane, petroleum distillates and methyl ethyl betone. While spray painting, Claimant occasionally experienced spells of dizziness and sickness.

Claimant testified that he considered himself in good health prior to his employment with Defendant Employer. The only prior health problems he mentioned were an appendectomy in 1930 and a shrapnel wound in 1943 in his lower back.

On June 7, 1969, Claimant was hospitalized for the following complaints:

> This obese 56 year old hospital employee presented to the emergency room tonight with the complaint of severe anterior chest pain which came on suddenly approximately 8 PM this evening associated with this was the feeling of sweatiness. He noted irregular pulse and felt somewhat nauseated. He states that he has not felt well since the afternoon of June 5th when he felt sweaty and dizzy. Yesterday he was anorexic and slightly dizzy and occasionally had a sweaty episode but no pain. This morning he worked as usual but did not feel as good as he ordinarily does. He ate very little all day. When the pain came on it was associated with dizziness and did not radiate to the neck, shoulder or arms though his hands felt numb. He was having some hyperventilation in the emergency room and reported that the pain had left him spontaneously but was still present and felt like a "burned area" on the anterior chest. The pain also moved somewhat into the abdomen and he had a bloated feeling and was belching some. He was previously hospitalized here in January for similar complaint and lost 25 lbs. by dieting since then. He also was on anti-hypertensive treatment but stopped this spontaneously two weeks ago.

Upon discharge on June 20, 1969, D. E. Tyler, M.D., in his summary noted:

> Arteriosclerotic disease with angina with essential hypetension (sic). Obesity.
>
> The patient was admitted to the hospital with chest pain. It was felt he had acute infarction. Electrocardiogram showed some PVC's, some minor ST changes. The ectopic beats did improved (sic). The SGOT and LDH were normal. It was felt that he did fell (sic) some better and not having too

much pain. Because of this, he finally was discharged home on low-cholesterol diet and antaspasmotics (sic) and hypertensive medication.

Claimant was admitted to the hospital again on March 7, 1970. The following history was reported by Dr. Tyler:

> This middle aged white man stated he had been feeling fairly well until today at which time he developed some pain in his left arm and into his chest. He got sweaty and clammy and felt real bad. His wife got quite concerned and alarmed and because of this, he was brought to the emergency room where he was seen in my absence by Dr. Hutchinson who felt he might be having an acute myocardial infarction and admitted him to the hospital for further evaluation. Electrocardiogram was done, but did not show any evidence of any changes except occasional ventricular ectopic beats, no ST or T wave changes. No enzyme changes, but he was having considerable chest pain and apprehensive. Blood pressure was elevated to 250 and then gradually came down to about 150. He has been feeling more comfortable since then.

Dr. Tyler discharged Claimant on March 12, 1970, with the diagnosis of acute cellulitis of the hand with some angina.

Claimant's next admission to the hospital was on December 18, 1970, for complaints of chest pain. Upon discharge on December 24, 1970, Dr. Tyler in his summary noted:

> The patient was admitted to the hospital with chest pain, it was felt that he had arteriosclerotic heart disease with acute angina, mild hypertension. EKG showed some ventricular ectopic beats, minor T wave changes. Repeat EKG showed more frequent ectopic beats. The urinalysis was negative. Hemoglobin was 14.3. Red count was 4,430,000 and white count was 5,000. His CPK went up to 43 and LDH went up to 310. He was put on anticoagulants and it was felt that he was probably having some small myocardial infarction. He gradually did improve and he was able to be up and around he was finally moved to the floor and was discharged home.

On April 27, 1971, Claimant became dizzy with pain in his chest while at work. He was taken to the emergency room. After an electrocardiogram was performed, Claimant was sent home on the same day.

Claimant's next hospitalization was on July 15, 1971. He was treated by Roy O. Sebek, M.D., for lacerations of four fingers on his left hand resulting from an electric saw incident. Claimant testified that he became dizzy while using the saw and fell into it. Immediately prior to the saw incident Claimant testified that he had been spray painting.

Dr. Sebek's diagnosis at the time of Claimant's discharge from the hospital on July 20, 1971, was:

> Lacerations 2 3 4 5 fingers L hand c̄ skil saw. Lacerations complete Extensor mechanism 4 & 5 fingers L. hand c̄ los (sic) of substance of 5th middle phalange.

Claimant was examined by Dr. Sebek for the condition in his left hand on July 29; August 9, 16, 23 and 28; September 7, 14 and 27; October 4 and 25; and November 22, 1971.

At 10:45 a.m. on January 21, 1972, Claimant was once again treated at the emergency room of Defendant Employer for complaints of chest pain. An electrocardiogram was performed and was interpreted by Dr. Tyler to be normal. Dr. Tyler sent Claimant home.

On February 2, 1972, Dr. Tyler requested certain laboratory work from Bethesda General Hospital. William Sybers, M.D., a pathologist, was the director of the laboratories at the hospital. Dr. Sybers testified of behalf of Claimant. Dr. Sybers described the laboratory work requested by Dr. Tyler and the results as follows:

> ...the first request is for a serum for lead and then also a smear for basophilic stippling. These are two separate tests. The smear for basophilic stippling is done here in the laboratory, and I examined it, and my report says 1,000 red blood cells were examined and no stippling was noted or no stippling present. The other request was serum for lead, and this is written in underneath 45 milligrams per 100 milliliters with the normal lead level 15 milligrams. This test is not done locally. The blood is drawn locally, however, and then sent to a reference laboratory.

Claimant was hospitalized by Dr. Tyler from February 4, 1972, to February 10, 1972, for pain in his left chest and arm. In his discharge summary Dr. Tyler stated:

> This patient was admitted to the hospital with chest pains and it was felt he had arteriosclerotic heart disease with angina and possible pheochromocytoma and possible lead poisoning from the history and anxiety with depression. X-rays of the chest showed healthy chest. He had osteoarthritis of the cervical spine and normal functioning gallbladder and essentially normal barium enema with diverticula and had a normal stomach and minor non-specific T wave changes on the electrocardiogram. Frequent ventricular beats. CPK was 14 and the urinalysis was negative. Hemoglobin and red count were normal and white count was 7,000. The patient was examined for possible basophilic stippling, but none was found. His blood test for lead was 45 mg per hundred milligrams the normal being less than 15. Serology was negative. Sodium and potassium were normal. CPK was 12. the VMA was 4.1 normal being up to 6.8. 17

> Ketosteroid were 7.9 normal being 9 to 22 mg per 24 hours. The cholesterol was slightly elevated. The BUN was slightly elevated. The patient was treated with bedrest, Isordil, Aldactazide, Nitroglycerin. He did seem better and his pain was less and with no evidence of recent infarction. It was felt this was arteriosclerotic heart disease with angina pectoris and with essential hypertension and some elevation of the blood lead but no evidence of active lead poisoning. The possibility had to be considered, however, that he had some peripheral neuritis. He also had a deformity of his left hand post-injury.

Dr. Tyler subsequently saw Claimant as an outpatient at the emergency room of Defendant Employer on February 18 and 25, 1972. His impression on February 25, 1972, was "Angina Pectoris Obesity Lead Poisoning and injury of left hand."

During March of 1972, Claimant was referred by Dr. Tyler to University Hospitals in Iowa City, Iowa. No evidence was offered by Claimant concerning this treatment except for bills from Lofty Basta, M.D., in the amount of twenty-five ($25) and University Hospitals in the amount of twenty dollars ($20).

Claimant was examined by Roy M. Hutchinson, M.D., of Fort Dodge, Iowa, on June 14, 16 and 28, 1972. Dr. Hutchinson, referred Claimant to the Mayo Clinic. From July 5, 1972, to July 21, 1972, Claimant was treated at the Mayo Clinic.

On July 31, 1972, while vacationing in Chicago, Illinois, Claimant was hospitalized at the Swedish Covenant Hospital. He received treatment from Surgeon Associates of Evanston, Illinois and from Winona Medical Group of Chicago, Illinois.

Following Claimant's return to Fort Dodge, Iowa, Dr. Hutchinson saw Claimant on August 4 and 28; October 6; and November 8, 1972. On January 22, 1973, Claimant was examined by D. G. Bock, M.D., F.A.C.P., F.A.C.C., of Fort Dodge, Iowa. Dr. Bock subsequently referred Claimant to the Mayo Clinic.

Other than the medical bills and Claimant's testimony, no evidence was offered as to the treatment of Claimant by University Hospitals, Dr. Hutchinson, Mayo Clinic (7-5-72 to 7-21-72), Swedish Covenant Hospital, Surgeon Associates, Winona Medical Group and Dr. Bock.

From April 17, 1973, to April 27, 1973, Claimant was hospitalized at the Mayo Clinic. The only evidence offered as to the treatment during this hospitalization was a "Hospital Discharge Summary" signed by Sidney D. Williams, M.D. Dr. Williams described Claimant's "Present Illness, Date of Onset and Symptoms" as follows:

> SOB, 2 pillow orthopnea and chest pain which is described by fist gesture, sometimes lasting all day, sometimes c diaphoresis and radiation to left arm, sometimes awakening pt. from sleep. He dates the onset of these symptoms plus occasional syncope to 1968-69 when he was apparently lead intoxicated.

His diagnosis was:

> (1) CHF and Angina 2° CAD
>
> (2) Lead cardiomypathy - rare and probably not the etiology in this pt but the onset of symptoms dates back to time of documented lead intoxication. ECHO may be useful.

Dr. Williams recommended the following treatment:

> Treatment of congestive failure c digoxin, dyazide, and lasix. Symptomatic treatment of his angina c TNG prin and Nitrospen BID.

On August 25, 1972, Claimant consulted Edward R. Wafful, D.D.S. During the period from August 25 to October 3, 1972, Dr. Wafful extracted twelve (12) teeth. A full upper and lower denture was given to Claimant by Dr. Wafful on November 24, 1972. Claimant testified that he had good teeth prior to 1969. Except for the twelve (12) teeth extracted by Dr. Wafful, Claimant removed the rest of them after they loosened.

A "Medico-Legal Report and Opinion" dated May 12, 1973, by Gerrit W.H. Schepers, M.D., D.Sc., was admitted as evidence in this proceeding. Dr. Schepers' opinion was based on the data recorded in the following records:

1: Paint Labels
2: Letters to Robert Ulstad by Donald E. Tyler, M.D. - 5/26/72, 12/4/72
3: Letters to Robert Ulstad by Roy M. Hutchinson, M.D. - 8/8/72
4: Letters to Roy M. Hutchinson, M.D., by W. L. White, M.D. - 7/26/72
5: Hospitalisation (sic) Record Bethesda General: 3/7/70: 31 pages
6: Hospitalization Record Bethesda General: 12/18/70: 31 pages
7: Hospitalization Record Bethesda General: 7/20/71: 24 pages
8: Hospitalization Record Bethesda General: 2/4/72: 29 pages
9: Hospitalization University of Iowa Hospital 3/22/72: 16 pages
10: Hospital Discharge Summary, Mayo Clinic 4/17/1973: 1 page

Dr. Schepers noted the following history from the information furnished him:

> It is clearly established through the above records that Mr. Langen is a 60 year old carpenter who was exposed to paint vapors which proved toxic to multiple organs of his body with the result that he has been disabled progressively since 1969.
>
> The paint which he used contained at least three known poisons namely lead, xylol and toluol. It is reported that (he) was exposed to the paint and therefore to these toxic substances while working in a poorly ventilated room. It is reported that he developed symptoms while working under these circumstances and lost neuromuscular coordination to the

extent that he fell down and on another occasion cut his hand by means of an electrical saw.

The following abnormalities were noted by Dr. Schepers as being uncovered during Claimant's five episodes of hospitalization between 1970 and 1973:

Cardiomyopathy manifested by arrhythmia, ST changes, enzyme elevation
Labile hypertension
Incipient arteriosclerosis
Encephalopathy manifested by seizures, 3rd and 8th nerve impairment, anxiety attacks
Peripheral neuropathy
Loss of 11 teeth and lead line
Mild hyperlipidemia
Laceration of hand and incapacitation of this member
Elevated blood lead levels
Osteoarthritis of the spine
Colonic diverticulosis

Dr. Schepers' interpretation of the information was as follows:

My interpretation of the available information is that Mr. Langen has been seriously and permanently disabled through poisoning by the combined and separate toxic actions of lead, xylol and toluol. Except for the last two listed abnormalities all the remainder are consistent with poisoning by lead, xylol (and) toluol acting separately and in conjunction. I found no other disease processes which can serve as an alternative etiological explanation.

At the request of Defendants, Claimant was examined by Thomas B. Summers, M.D., a neurologist, on July 13, 1973. His testimony was offered by Defendants. After taking a history from Claimant and examining him, Dr. Summers arrived at the following conclusion:

Well, after I had completed by examination, it was my feeling that there wasn't any objective clinical evidence of chronic lead poisoning at that time. The findings of significance, in my opinion, were those due to the injuries, the old shrapnel wound in the lower back, which resulted from the injury in World War II, and the injury to the left hand, which took place back in--more recently, that is, 1969. I did feel that Mr. Langen might have angina pectoris, and this condition would be the most significant condition leading to disability in his situation.

Dr. Summers stated that the most common symptom of lead poisoning in adults is "...one of peripheral neuritis, and this takes the form of numbness and tingling and a loss of feeling or sensation usually in the extremities, and loss of coordination." Dr. Summers opined that Claimant did not manifest any of the signs or symptoms ordinarily associated with lead poisoning.

On cross-examination Dr. Summers testified that the Mayo Clinic records were not available to him for his examination. He did indicate that he was furnished a copy of the Bethesda General Hospital Records. He testified as follows concerning familiarity with petroleum distillates:

Q Now, Doctor, are you familiar with the effect of certain kinds of petroleum distillants (sic) on the human system, such as are used in spray paints?
A I am really not.
Q You are not. Have you heard of such petroleum dissilants (sic) as zyloul (sic) and tuloul (sic)?
A No.

Mark D. Raverby, M.D., a specialist in internal medicine, also testified on behalf of Claimant. Dr. Raverby did not examine Claimant but did review and study certain records pertaining to Claimant. Dr. Raverby testified he reviewed the following records:

1. Report of Dr. Donald E. Tyler of May 26, 1972
2. Bethesda General Hospital Records through February, 1972
3. University of Iowa Hospitals and Clinics of March, 1972
4. Mayo Clinic Discharge summary of April, 1973
5. Blood serum test of February 2, 1972
6. Dr. Gerrit W.H. Schepers' report of May 12, 1973
7. Paint labels

Concerning Claimant's exposure to lead, xylol and toluol, Dr. Raverby testified:

I feel it is clearly established that Mr. Langen has been chronically exposed to lead, xylol, and toluol, and that certain abnormalities in his past and present physical incapacity are strictly and solely due to these poisons, such as encephalopathy, anxiety, peripheral neuropathy, probable loss of teeth, and probably the lacerations that he suffered secondary to loss of neuro-muscular coordination.

He further stated that the injuries to Claimant's hand were the result of "...an acute intoxication at this time caused loss of coordination, and he fell causing the damage."

Dr. Raverby testified that the condition of congestive heart failure, coronary artery disease, hypertension, and coronary arteriosclerosis were not caused by the inhalation of toxic vapors but were aggravated by them. He testified:

Q Doctor, do you have an opinion as to the relationship of these toxic vapors, lead, xylol, and toluol, with Mr. Langen's cardiac abnormalities as shown in these records?
A Yes. I feel that the established cardiac disability was aggravated by the exposure, particularly of lead, and certainly and probably of xylol and toluol.

Dr. Raverby excluded the findings of osteoarthritis and chronic diverticulosis in Claimant as not being caused or aggravated by Claimant's exposure to lead, xylol and toluol.

Dr. Raverby testified that Claimant is one

hundred percent (100%) disabled. He estimated Claimant's permament disability due to his exposure to lead, xylol and toluol to be "...probably between 30 and 40 per cent, with more emphasis toward the 40 per cent...."

On cross-examination Dr. Raverby was asked to recite the symptomatology which led him to the conclusion that Claimant was damaged by his exposure to lead, xylol, and toluol. Dr. Raverby stated:

> Yes. The longstanding history of exposure, the findings of a toxic level of lead in the blood, the acute symptomatology that I ascribed to encephalopathy and peripheral neuropathy, and physical exhibition of a lead line and loss of neuro-muscular coordination led me to beleive that these toxic vapors, lead, xylol and toluol were acutely involved and chronically involved in the physical disability of Mr. Langen.

The Iowa Supreme Court has defined "personal injury" to be any impairment of health which results from employment. The Court in **Almquist v. Shenandoah Nurseries, Inc.**, 218 Iowa 724, 254 N.W. 35, at page 732, stated:

> A personal injury, contemplated by the the Workmen's Compensation Law, obviously 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 a traumatic or other hurt or damage to the health or body of an employe. ***The injury to the human body here contemplated must be something, whether an accident or not, that acts extraneously to the natural process of nature, and thereby impairs the health, overcomes, injures, interrupts or destroys some function of the body, or otherwise damages or injures a part or all of the body.***

Claimant has the burden of establishing by a preponderance of the evidence that the injury of July 15,1971, 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 Rubber Company,** 253 Iowa 369, 112 N.W. 2d 299. **Nicks v. Davenport Produce Co.**, 254 Iowa 130, 115 N.W. 2d 812.

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.

The testimony of Claimant, Dr. Raverby and Dr. Sybers plus the report of Dr. Schepers established that Claimant, as a result of his exposure to lead, xylol, and toluol at Defendant Employer's hospital sustained a permanent partial disability to his body as a whole. Dr. Raverby testified that Claimant's problems of encephalopathy, anxiety, peripheral neuropathy, loss of teeth, and hand lacerations were due to his exposure to lead, xylol and toluol. He further testified that Claimant's conditions of congestive heart failure, coronary artery disease, hypertension and generalized coronary arteriosclerosis were aggravated by the same chemicals.

Dr. Schepers in his report stated that the conditions of cardiomyopathy, labile hypertension, incipient arteriosclerosis, encephalopathy, peripheral neuropathy, loss of teeth, lead line, mild hyperlipidemin, laceration of hand and elevated blood levels were consistent with poisoning by lead, xylol and toluol acting separately and in conjunction. He added that he found no other disease processes which would serve as an alternative etiological explanation.

Both Dr. Raverby and Dr. Schepers made a causal connection between Claimant's hand injury of July 15, 1971, and his exposure to lead, xylol and toluol. Dr. Raverby testified that an acute intoxication from the above chemicals caused Claimant to loose his coordination and fall into the saw.

Little weight was given to the testimony of Dr. Summers. Dr. Summers testified that he was not familiar with the effects of petroleum distillates as used in spray paints on the human system. He further indicated that he had not heard of xylol and toluol. Dr. Summers did state that Claimant did not manifest any of the symptoms normally associated with lead poisoning.

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.**, 253 Iowa 285, 110 N.W. 2d 660.

Claimant is married and sixty (60) years old. He was born in Germany and lived there until 1960 when he migrated to this country. After graduating from high school in 1932, Claimant began work for the government-owned railroad. He worked for the railroad until he was drafted into the military in 1939. In 1943 Claimant received a

shrapnel wound of the lower back while serving at the Russian front. This injury resulted in his discharge from military service in 1944. Following his discharge, Claimant returned to his work for the railroad. In 1946 he was transferred to Berlin and worked in the East Berlin sector until 1953. In 1953 Claimant fled from East Berlin and migrated to Munich where he once again worked for the railroad of West Germany.

After Claimant migrated to this country in 1960, he worked as a painter and construction laborer in Laurens, Iowa, until 1964. Claimant testified he was unable to use his experience with the railroad in Germany in obtaining a job in the United States because the railroad systems are different. In 1964 he became caretaker for the First Presbyterian Church in Fort Dodge, Iowa. The following year he began work for Defendant employer and worked for them until February, 1972. Claimant testified that he has not worked for any employer since that date.

Dr. Raverby testified that Claimant was one hundred percent (100%) disabled. However, he limited Claimant's disability due to his exposure to lead, xylol, and toluol to be between thirty and forty percent (30-40%).

Dr. Schepers stated only that Claimant has been seriously and permanently disabled as a result of his exposure.

Claimant's primary industrial assets as a laborer, carpenter and painter have been reduced as a result of the employment incident of July 15, 1971. The functional disability of Claimant as estimated by Dr. Raverby to have been caused or aggravated by his exposure to toluol, xylol and lead limits the amount of physical labor Claimant is able to perform. Applying the evidence offered in this case to the considerations outlined in **Olson**, supra, and **Yeager**, supra, Claimant has proved a forty percent (40%) permanent partial disability to the body as a whole.

A number of medical and drug bills were offered by Claimant. Both Dr. Raverby and Dr. Schepers indicated that the conditions of osteoarthritis and colonic diverticulitis were not caused or aggravated by his exposure to toluol, xylol and lead. Additionally, Dr. Raverby testified that Claimant's exposure aggravated certain preexisting conditions. No medical testimony was offered by Claimant as to which bills were necessary as a result of Claimant's exposure to xylol, toluol and lead or whether the changes were fair and reasonable.

Claimant testified that he made six trips to the Mayo Clinic in Rochester, Minnesota, a distance of three hundred sixty-six (366) miles round trip, and one round trip to Iowa City, Iowa, of four hundred (400) miles. At the Mayo Clinic Claimant also had the expense of nine nights lodging. No testimony was offered as to the cost of the lodging.

WHEREFORE, it is found that Claimant on July 15, 1971 sustained an injury which arose out of and in the course of his employment and which resulted in a forty percent (40%) permanent partial disability to the body as a whole. The permanent partial disability is compensable at the rate of fifty-nine dollars ($59) per week. It is further found that Claimant was incapacitated from working for at least one hundred twenty (120) weeks and is entitled to maximum healing period compensation at the rate of sixty-four dollars ($64) per week.

It is further found that Claimant failed to sustain his burden of proof that the medical bills were fair, reasonable, and necessitated by Claimant's exposure to xylol, toluol and lead.

It is further found that Claimant should be reimbursed for his travel expenses to the Mayo Clinic and Iowa City at the rate of ten cents (10c) per mile for two thousand five hundred ninety-six (2596) miles and ten dollars ($10) per night for lodging expense of nine nights.

THEREFORE, Defendants are ordered to pay Claimant permanent partial disability compensation for two hundred (200) weeks at the rate of fifty-nine dollars ($59) per week. Defendants are further ordered to pay Claimant one hundred twenty (120) weeks of healing period compensation at the rate of sixty-eight dollars ($68) per week.

Defendants are further ordered to reimburse Claimant for travel expenses in the amount of one hundred fifteen and 96/100 dollars ($115.96).

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

Costs of the court reporter in transcribing the depositions of Dr. Raverby and Dr. Summers and of this hearing 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 6 day of November, 1974.

DENNIS L. HANSSEN
Deputy Industrial Commissioner

Appealed to District Court; Dismissed

Harold Le Roy Lewis, Claimant,

vs.

Great Plains Bag Co., Employer,
and
The Travelers Insurance Co., Insurance Carrier, Defendants.

Review - Reopening Decision

Mr. Roger L. Ferris, Attorney at Law, 10th Floor Hubbell Building, Des Moines, Iowa 50309, For the Claimant.

Mr. Terry L. Monson, Attorney at Law, 920 Liberty Building, Des Moines, Iowa 50309, For the Defendants.

This is a proceeding in Review-Reopening brought by the claimant, Harold LeRoy Lewis,

against Great Plains Bag Co., his employer, and The Travelers Insurance Co., the insurance carrier, to recover additional benefits under the Iowa Workmen's Compensation Act by reason of an industrial injury that occurred on May 30,1972. This matter came on for hearing before the undersigned Deputy Industrial Commissioner on September 19, 1974, at the Office of the Iowa Industrial Commissioner at Des Moines. At the conclusion of the hearing counsel were given leave to file brief and argument. The last of these having been filed on October 4, 1974, the record was closed at that time.

An examination of the commissioner's file reveals an appropriate Employers First Report of Injury and a Memorandum of Agreement calling for a temporary disability rate of $64 per week. It was further found that the claimant has been paid a healing period of 37 1/2 weeks and continues to be paid permanent partial disability at the rate of $59 per week. On stipulation of the parties it was agreed that the only issue to be resolved is the percentage of industrial disability that the claimant has experience by reason of the industrial injury in question.

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

Claimant, age 61, married, is currently residing in Indianola, Iowa. The claimant is currently unemployed. His formal education ceased at the eighth grade. He has never been in the military service nor attended any special schools. The claimant began his adult work record at age 16. The record discloses that he has had varying work experience. He has worked for John Deere in cornpicker assembly, in the stockroom for C.P. Brown, and also sold storm windows for C.W. Humphrey Co.

The claimant began his duties for Great Plains Bag Co. in 1961 as a night watchman during the construction period. He then also assisted in the installation of the restroom and lunchroom plumbing at the plant on Bell Avenue. On May 30, 1972, the claimant injured his spine while descending from a ladder which had been placed in proximity to a plastic bin. The claimant was in a supervisory capacity at the time of his injury. His duties consisted of planning the work to be done as well as supplying the workers with sufficient material to meet their requirements. The claimant sought medical assistance from Dr. Sidney H. Robinow, M.D., on May 30, 1972. Dr. Robinow continued to treat the claimant until May 30, 1973. The x-rays taken at the direction of Dr. Robinow disclosed abnormalities of the low back consisting of spondylolisthesis and spondylolysis at the lower lumbar area as well as L-4 and L-5. The spondylolysis was in the opinion of Dr. Robinow a congenital condition. The spondylolisthesis, which is the medical description of the slippage of the vertebrae because of the unstable congenital condition. Dr. Robinow expressed the medical opinion that the injury sustained by the claimant aggravated these conditions. Dr. Robinow feels that the claimant's condition is of a permanent nature and that the permanent partial physical impairment equates to 25% of the body as a whole. Dr. Robinow is not aware of any kind of work that the claimant would be qualified to perform. The claimant was dismissed by Dr. Robinow a year later. Dr. Robinow concluded there was no more medical attention that he could prescribe that would improve the claimant's physical condition.

On June 7, 1973, Dr. Joe F. Fellows, M.D., examined the claimant at the request of the defendant insurance carrier. Dr. Fellows confirms the existence of a spondylolysis of the lumbar spine at L5-S1 and a spondylolisthesis at L4 and L5, together with a muscular ligamentous injury of the lower back. Further, he expressed the medical opinion that the industrial trauma in question aggravated the spine abnormalities and is the cause of Claimant's complaints of pain. Dr. Fellows feels that the claimant has a 20% permanent impairment of the body as a whole.

Dr. John T. Bakody, M.D., saw the claimant on February 5, 1974, and was of the opinion that the claimant was suffering from a lumbar disc syndrome. He admitted the claimant to Mercy Hospital for six days and while there employed transcutaneous electrical stimulation for the relief of pain. This resulted in some relief of the claimant's pain. Dr. Bakody also performed a radial facet rhizotomy. No improvement of the claimant's condition resulted from this procedure.

The claimant sought further medical assistance by consulting with his family physcian, Dr. J.W. Hatchitt, D.O., beginning June 23, 1973. Dr. Hatchitt prescribed Percodan as an analgesic for the relief of pain. This is strong medication, and the claimant was instructed to take one or two a day as the need indicated. The claimant found that his need for Percodan increased in that the pain he experienced had not diminished. His approved current usage of the medication Percodan is now between four and five tablets a day.

The defendants offered the claimant employment, which he has refused. He testified that his reasons for such refusal are twofold, primarily the amount of disabling pain that is present, as well as the adverse effects of his use of Percodan on his ability to concentrate. The claimant feels that he is unable to sit or stand or walk for any lengthy period of time, and that he must lie down and take his medication in order to be relatively free from pain.

The Claimant contends that his physical condition has deteriorated to such a degree that he could not perform the "light duty" offered by the defendants. He does admit that he has not made the attempt to determine if he could tolerate this activity. Based upon the state of this record, the claimant's refusal to attempt to comply with the advice of the attending physicians is improper. The claimant's position seems to suggest that the medical opinions expressed in this case be disregarded in their entirety. By

failing to agree to the suggested experiment concerning the resumption of employment, the claimant substitutes his judgment in place of the medical opinions without taking the opportunity to test the appropriateness of the medical opinions. To do so is improper and runs contrary to the spirit and intent of the Workmen's Compensation Act. Therefore, it is concluded that the claimant is not entitled to the healing period which would be in excess of the 37 weeks voluntarily paid by the defendants.

"Disability" as defined by the Compensation Act means industrial disability, although functional disability is an element to be considered. **Martin v. Skelly Oil Co.**, 252 Iowa 128, 106 N.W. 2d 95. 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. The evidence supports the finding that the claimant is not able to perform his normal duties, and as such is entitled to appropriate consideration as to the amount of industrial disability he has sustained. It is found that the claimant has sustained an industrial disability of 50% of the body as a whole.

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 May 30, 1972, and that this injury arose out of and in the course of his duties for his employer.

2. That the claimant has sustained an industrial disability in the amount of fifty percent (50%) of the body as a whole.

3. That the claimant, having been paid a healing period of thirty-seven and one-half (37½) weeks and having refused to accept an offer of return to employment, is not entitled to any further healing period.

WHEREFORE, the defendants are ordered to pay the claimant two hundred fifty (250) weeks permanent partial disability at fifty-nine dollars ($59) per week less credit for those payments previously made. The defendants are further ordered to pay the cost of the continuing medical treatment as required by Dr. J. W. Hatchitt, D.O.

Defendants are further ordered to pay the costs of these proceedings as well as the cost of the transcription of the five (5) evidentiary depositions heretofore filed.

Signed and filed this 2 day of December, 1974, at the office of the Iowa Industrial Commissioner at Des Moines.

HELMUT MUELLER
Deputy Industrial Commissioner

Harold Le Roy Lewis, Claimant,

vs.

Great Plains Bag Co., Employer,
and
The Travelers Insurance Co., Insurance Carrier,
Defendants.

Amended Review - Reopening Decision

Mr. Roger L. Ferris, Attorney at Law, 10th Floor Hubbell Building, Des Moines, Iowa 50309, For the Claimant.

Mr. Terry L. Monson, Attorney at Law, 920 Liberty Building, Des Moines, Iowa 50309, For the Defendants.

BE IT REMEMBERED on this 19 day of December, 1974, the matter of claimant's Motion to Amend and Enlarge Findings came on for hearing before the undersigned Deputy Industrial Commissioner and having heard arguments of counsel for claimant and defendants and being fully advised in the premises, claimant's motion is approved and the Review-Reopening Decision filed by the undersigned is amended by striking therefrom everything after paragraph one of the findings of fact and by substituting therefor the following:

1. That the claimant sustained an industrial injury on May 30, 1972, and that this injury arose out of and in the course of his duties for his employer.

2. That as a result of this injury the claimant is permanently and totally disabled from gainful employment.

3. That at age 61 the claimant is approaching retirement age and that on account of his approaching retirement the duration of his inclusion in the work force absent this injury is 250 weeks from the conclusion of healing period heretofor paid by the employer and that his industrial disability is fifty percent of that of a man not approaching retirement age, all other things being equal.

4. That on account of the claimant's permanent and total disability from gainful employment and on account of the expected duration of his inclusion in the work force, the claimant has sustained an industrial disability in the amount of fifty percent of the body as a whole.

5. That the claimant, having been paid a healing period of thirty-seven and one-half (37 ½) weeks and having refused to accept an offer of return to employment, is not entitled to any further healing period.

WHEREFORE, the defendants are ordered to pay the claimant, in addition to healing period heretofor paid, two hundred fifty (250) weeks permanent partial disability of Fifty-Nine Dollars ($59.00) per week, less credit for those permanent partial disability payments previously made. The defendants are further ordered to pay the cost of

the continuing medical treatment as required by Dr. J. W. Hatchitt, D.O.

Defendants are further ordered to pay the costs of these proceedings as well as the cost of the transcription of the five (5) evidentiary depositions heretofore filed.

Signed and filed this 19 day of December, 1974, at the office of the Iowa Industrial Commissioner at Des Moines.

HELMUT MUELLER
Deputy Industrial Commissioner

Appealed to District Court; Dismissed

Guy O. McDaniel, Claimant,

vs.

Armstrong Rubber Mfg. Co., Employer,
and
American Mutual Liability Ins. Co., Insurance Carrier, Defendants.

Review - Reopening Decision

Mr. James A. O'Callaghan, Attorney at Law, 821 Savings & Loan Bldg., Des Moines, Iowa 50309.

Mr. Paul Moser, Jr., Attorney at Law, 407 IBM Building, Des Moines, Iowa 50309, For the Claimant.

Mr. W. N. Bump, Attorney at Law, 222 Equitable Building, Des Moines, Iowa 50309, For the Defendants.

This is a proceeding in Review-Reopening brought by the claimant, Guy O. McDaniel, against his employer, Armstrong Rubber Mfg. Co., and its insurance carrier, American Mutual Liability Ins. Co., to recover benefits on account of an injury sustained on June 30, 1970. The matter came on for hearing on two occasions at the Office of the Iowa Industrial Commissioner. The first hearing was held on Friday, March 1, 1974. The remaining testimony was taken on August 14, 1974. The record was left open for the submission of medical testimony. The record was completed on September 17, 1974

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 30, 1970. No claim is apparently being made for problems other than psychiatric difficulties.

It should be noted that Claimant testified as to difficulties with his feet. No medical testimony relates this problem to the injury of June 30, 1970. The problem predated the June 30, 1970, injury. The problems with Claimant's feet are found to be unrelated to the June 30, 1970, injury.

Two psychiatrists testified. Dr. W. Wayne Sands, M.D., testified on Claimant's behalf. Dr. Joseph A. Heaney, M.D., testified on Defendants' behalf. Both psychiatrists are in agreement that the June 30, 1970, incident aggravated a chronic depression. While Dr. Heaney changed his mind as to the cause of many of Claimant's current problems after being made aware of a convulsive disorder which predated the June 30, 1970, injury, his testimony indicates the presence of an aggravation of the chronic condition by the June 30, 1970, injury. The psychiatrists do not agree as to the qualitative and quantitative effects of the aggravation.

Dr. Sands seems to say that the effect on the claimant of the June 30, 1970, incident was that of an atypical depression expressing itself in various ways such as fatigue and interference with the enjoyment of Claimant's retirement and marriage. He anticipates Claimant could eventually return to work. He seems to feel Claimant could not return to work at present. He tends to interpret the positive factors noted in the lay testimony as a cover-up of Claimant's real feelings. On other occasions he equivocates concerning Claimant's ability to return to work.

Dr. Heaney does not describe the characteristics of the aggravated depression. He does indicate that such aggravation is treatable. It is not permanent. He feels that the depression can spontaneously improve. He does not indicate with any probability whether or not the condition, if untreated, would prevent Claimant from returning to work. Dr. Heaney seems to indicate in a report that no matter what the source of Claimant's difficulties, he is capable of some gainful employment. He does not feel that the majority of observed problems of the claimant had an origin in the June 30, 1970, incident. Dr. Heaney is unable to say how much depression, if any, is now present as a result of the accident.

In examining the testimony of both psychiatrists this deputy commissioner is led to the conclusion that the psychiatric problems resulting from the June 30, 1970, injury are not permanent. Any conflict concerning whether or not the psychiatric problems as a result of the June 30, 1970, injury are temporary or totally incapacitating is resolved in favor of Dr. Heaney's opinion that Claimant could perform some type of gainful employment. This is so although Dr. Heaney does not recommend a return to Claimant's regular job. There is not direct testimony concerning Claimant's actual mental condition in 1970, 1971,and 1972. While Claimant may have had psychiatric disability at this period of time, it is not the finding of this deputy commissioner that it was totally incapacitating.

It should be noted that as of January 1, 1971, Claimant voluntarily placed himself in retirement. While some conflict in testimony exists concerning whether or not the claimant was forced to retire or retired voluntarily, it is the finding of this deputy commissioner that retirement was voluntary and at a time when the claimant may well have retired had he not had an injury.

The instant case appears to present a situation

where psychiatric disability is present as a result of the injury. However, it does not appear to be permanent in nature. It does not appear to be totally incapacitating. Accordingly, no disability benefits in excess of that previously paid are due.

However, as the psychiatric disability brought about by the instant injury appears to require and has required treatment in the past, the services of Dr. Sands to date are compensable. Any conflict concerning the necessity of treatment following the injury is resolved in favor of requiring that treatment be furnished by the employer. While the full bill of Dr. Sands was never presented in evidence, Dr. Sands' testimony indicates charges of at least five hundred forty and no/100 dollars ($540). The defendants in good faith should pay additional charges if any were incurred. No other charges are apparently outstanding.

THEREFORE, Defendants are ordered to pay the five hundred forty and no/100 dollars ($540) bill of Dr. Sands.

Defendants are further ordered to hold open a tender for psychiatric care to the claimant for a period of sixty (60) days from the filing of this decision. Claimant must accept such tender within the designated time. The care is to run until no longer necessitated by the June 30, 1970, injury.

Costs of the proceeding are taxed to the defendants.

Signed and filed this 12 day of February, 1975.

ALAN R. GARDNER
Deputy Industrial Commissioner

Appealed to District Court; Decision Pending

Jay Landon Meyer, Claimant,

vs.

Western Contracting Corporation, Employer, and

Employers Insurance of Wausau, Insurance Carrier, Defendants.

Review-Reopening Decision

Mr. James M. Redmond, Attorney at Law, 420 Paramount Building, Cedar Rapids, Iowa 52401, For the Claimant.

Mr. John M. Bickel, Attorney at Law, 1120 Merchants National Bank Building, Cedar Rapids, Iowa 52401, For the Defendants.

This is a proceeding in Review-Reopening brought by the claimant, Jay Landon Meyer, against his employer, Western Contracting Corporation, and their insurance carrier, Employers Insurance of Wausau, for the recovery of benefits for injuries sustained by him on October 23, 1974. The case came on for hearing before the undersigned Deputy Industrial Commissioner on September 18, 1974. The case was fully submitted on October 29, 1975.

A Memorandum of Agreement was filed by Defendants and approved by this office on November 15, 1974. Pursuant to this memorandum, Claimant was paid 15 2/7 weeks of temporary disability compensation at the rate of $97 per week.

There is support in the record for the following statement of facts:

On September 18, 1974, Claimant was injured when he fell off a tractor and was dragged approximately 25-30 feet. He was examined by David C. Naden, M.D., an orthopedic surgeon, at the Trauma Center of Mercy Hospital on September 19, 1974. Dr. Naden treated Claimant until December 30, 1974.

On December 30, 1974, Claimant was examined by L. C. Strathman, M.D., an associate of Dr. Naden. Dr. Strathman testified that his examination of December 30, 1974, as follows:

> I first saw this gentleman on that date and he gave me a history of having injured his knee the 23rd of October as documented in his chart, and there is an emergency room record in the chart verifying that. He was seen at that time by Doctor Naden.
>
> He tells me that he has continued to have discomfort in his left knee, bothers when he squats or twists the knee.
>
> * * *
>
> Our impression on that examination was that this gentleman had sustained partial injury of the medial collateral ligament and possible damage to the medial meniscus. It was our opinion that he was recovering at this time and we elected to continue to treat him conservatively with quadriceps exercises, and planned to see him a few weeks later.

Claimant was next examined by Dr. Strathman on January 8, 1975. Dr. Strathman described his examination as follows:

> On that examination he told us that he had been sitting playing cards and developed some spasm in his low back, and on that examination he had evidence of low back strain. This was treated with exercises, muscle relaxants and analgesics. He was instructed to continue with the exercises for the left knee, and we planned to see him then later in the month.

On February 7, 1975, Claimant was released to return to work by Dr. Strathman. Dr. Strathman noted that Claimant exhibited a full range of motion in his left knee with no effusion and was asymptomatic. However, Dr. Strathman advised Claimant to continue with his quadriceps exercises. Claimant testified that his knee bothered him some at this time but not to the extent that he could not perform construction work.

During the evening of March 25, 1975, Claimant stopped his car on a road to look at some horses he was interested in purchasing. After stepping

from the car, Claimant walked toward the back of the car. When he reached the taillight of his car, his "left knee gave way." Immediately after the incident, Claimant thought he slipped on a rock. At the hearing on September 18, 1975, Claimant testified that he didn't think he slipped on a rock since the road was blacktop.

The next day Claimant was examined by Dr. Strathman. His examination was as follows:

> At which time he stated that in the previous week he had stepped on a clod and twisted his knee. He was able to walk on the knee but it was painful, and at the time we saw him, there was marked effusion or swelling of the knee and acute pain. It was difficult to examine him because of the effusion and the pain. There was no increased motion to strain suggestive of ligamentous injury, but he did lack a few degrees of extension. X-rays of the left knee on that date showed no bony change. It was our impression that he had reinjured the underlying meniscal problem that had been referred to earlier. He was fitted with an immobilizer, given a prescription for Darvon compound, and was to continue with his quadriceps exercises.

Claimant was seen again by Dr. Strathman on April 3, 1975. He described his examination as follows:

> We saw him again on the 3rd of April. At this time his knee was less painful, less swollen. Tenderness at the joint line, both medially and laterally. He would not extend the knee completely, lacking some few degrees, and would flex it to ninety degrees. Rotation at this time increased the pain medially but there was also some discomfort over the lateral joint line.
>
> It was our impression at that time that he probably would require an arthrotomy.

An arthrotomy was again recommended by Dr. Strathman on April 17, 1975.

Claimant's wife on April 3, 1975, wrote Defendant Carrier and inquired about the reinstatement of her husband's workmen's compensation claim. On April 28, 1975, Claimant was advised by Defendant Carrier that the

> ...episode of March 25, 1975, while you were walking around your car on a gravel road and had an onset of trouble once again, is not related to your incident of October 23, 1974, and, therefore, we must consider this an intervening cause and the proximate cause of your trouble now present. Therefore, compensation benefits are not warranted and we will not be able to make any payments to you for any medical expenses incurred from that date on.

On May 29, 1975, Claimant filed an Application for Review-Reopening.

Claimant was examined by Dr. Strathman on September 22, 1975. Dr. Strathman noted effusion, soreness within the joint line medially with forced flexion and rotation, and a clicking sensation. An arthrotomy was once again recommended by Dr. Strathman.

Surgery was performed on Claimant's knee by Dr. Strathman on October 13, 1975. Dr. Strathman estimated the healing period from the surgery to be 6-8 weeks and the permanent partial disability to the knee to be 10-12%. He also stated that "...it's a bit too early to be giving a final evaluation, because there has not been sufficient time for recovery."

The issue to be determined is the extent of compensable disability sustained by Claimant as a result of the injury of October 23, 1974.

The claimant has the burden of proving by a preponderance of the evidence that the injury of October 23, 1974, was the cause of the disability on which he bases his claim. **Lindahl v. L. O. Boggs**, 236 Iowa 296, 18 N.W. 2d 607. When a claimant sustains an injury and receives another injury and seeks to reopen an award or agreement for compensation based on the first injury, he must prove one of two things: (a) that the disability for which he seeks additional compensation was proximately caused by the first injury, or (b) that the second injury and ensuing disability were proximately caused by the first injury. **DeShaw v. Energy Manufacturing Company**, 192 N.W. 2d 777 (Iowa 1972). 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.

Dr. Strathman testified as follows about the relationship between the injury on September 18, 1974, and the incident of March 25, 1975.

> As stated in previous correspondence, it's my medical feeling that this gentleman had sustained damage to his medial collateral ligament, a stretching type of injury, with concomitant damage to the medial meniscus. This occurred in October, as noted in the documentary of his medical history. This quieted somewhat and became relatively asymptomatic, and we allowed him to return to work. However, within a week, with a very minimal insult, this gentleman returned with obvious evidence of internal derangement of the knee, and it's my feeling that the second injury was an exacerbation or an extension of his previous injury that occurred on the 23rd of October.

On cross-examination, Dr. Strathman expanded his testimony about the relationship.

> Q. Had it not been for this incident, then he would not have been in to see you on the 26th of March, is that not a fair statement?
>
> A. It's not a fair statement. And, John, I think that I would like to state to the record at this time that this is a very difficult question for us medically, and this man had sustained an injury of significant degree, and his symptoms had quieted down. If I had had to make disposition of that case in February or March, prior to or excluding that second

injury, I would have had to have alluded to the possibility of injury to that knee and he would have had to have been rated.

The testimony of Dr. Strathman sustained Claimant's burden of proof that the second injury on March 25, 1975, was proximately caused by the first injury on October 23, 1974. When Dr. Strathman released Claimant to return to work on February 7, 1975, he instructed Claimant to continue with the quadriceps exercises prescribed by him. The injury to Claimant's knee on March 25, 1975, was the result of walking around the back of his car. This activity was certainly within the limits of the quadriceps exercises prescribed by Dr. Strathman. The above testimony by Dr. Strathman revealed that prior to the injury on March 25, 1975, he "...would have had to alluded to the possibility of injury to that knee and he would have had to have been rated."

The next issue to be determined is the length of temporary disability or healing period due Claimant.

Since the incident of March 25, 1975, and until the hearing on September 18, 1975, Claimant worked only on a part-time basis for a friend. He assisted his friend in hooking weeds out of bean fields and in harvesting some grain. Dr. Strathman testified on October 22, 1975, that he performed surgery on October 13, 1975, and that Claimant is presently recuperating from this surgery. The above evidence is determinative that Claimant is entitled to temporary disability or healing period compensation from March 26, 1975, to October 22, 1975, less the period of time Claimant worked for his friend. Dr. Strathman also testified that Claimant will have additional temporary disability or healing period compensation.

The evidence in this case revealed that it is too early to assess the amount of permanent partial disability in Claimant's leg. Dr. Strathman attempted to project the amount of permanent partial disability in Claimant's knee. His attempt to rate the knee was inappropriate for workmen's compensation purposes since §85.34, Code of Iowa, does not provide for a permanent partial disability to a knee. Dr. Strathman's rating in the future should be based on the permanent partial disability to claimant's leg.

WHEREFORE, it is found that Claimant on October 23, 1974, sustained an injury which arose out of and in the course of his employment and resulted in temporary disability from October 24, 1974, to February 7, 1975, and from March 26, 1975, to October 23, 1975, less the period of time worked by Claimant for his friend. It is further found that the injury on March 25, 1975, was proximately caused by the injury of October 23, 1974. No finding is made as to permanent partial disability or temporary disability after October 23, 1975.

THEREFORE, Defendants are ordered to pay Claimant temporary disability compensation at the rate of $97 per week from October 24, 1974, to February 7, 1975, and from March 26, 1975, to October 23, 1975, less the period of time worked by Claimant for his friend. Defendants' attorney and Claimant's attorney are ordered to verify within fifteen (15) days of the date of this decision the period of time worked by Claimant for his friend.

Costs of the court reporters for the hearing and the deposition of Dr. Strathman 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 fifteen (15) days from the date of this decision.

Signed and filed this 14 day of November, 1975.

DENNIS L. HANSSEN
Deputy Industrial Commissioner

No Appeal

Jon Charles Miller, Claimant,

vs.

McGraw-Edision Company, Employer,
and
Employers Insurance of Wausau, Insurance Carrier,
Defendants.

Review - Reopening Decision

Mr. Kenneth Keith, Attorney at Law, 211 E. Fourth Street, Ottumwa, Iowa 52501, For the Claimant.

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

This is a proceeding in Review-Reopening brought by the claimant, Jon Charles Miller, against McGraw-Edison Company, his employer, and Employers Insurance of Wausau, the insurance carrier, to recover additional benefits under the Iowa Workmen's Compensation Act by reason of an industrial injury that occurred on February 5, 1974. This matter was submitted on the pleadings to the undersigned sitting as sole arbitrator and the last pleading so filed was submitted on February 27, 1976.

An examination of the commissioner's file reveals that an appropriate First Report of Injury was filed. The commissioner's file also reveals that a Memorandum of Agreement was filed on March 18, 1974.

The sole issue to be determined in this case is the method of determining the permanent partial disability to which the claimant is entitled.

The claimant has apparently lost the first and middle fingers of both hands. In addition, he suffered a five percent loss to the ring finger on the left hand.

The claimant insists that the loss should refer to the impairment to the body as a whole. The

defendants insist that the loss should be to the fingers individually.

As can be seen, then, the entire issue in this case centers on an interpretation of §85.34, Code of Iowa. The law in regard to the payment of benefits for the loss of scheduled members under the laws of this state was enunciated in **Barton v. Nevada Poultry Co.**, 253 Iowa 285, 110 N.W. 2d 660, as follows:

> Section 85.35, supra, in addition to providing generally that the compensation for permanent partial disability shall be determined by the extent of the disability, goes further and provides that, where, as a result of an injury, the claimant has sustained the loss of specified **parts** of his body, such loss shall be compensable only to the extent therein provided. (emphasis added)

The emphasis on the use of the word "parts" in this quote is extremely pertinent in this case. The Code of Iowa, at section 85.34(s) provides for payment for loss to the body as a whole in the loss of specified members of the body. This section provides for compensation for "the loss of both arms, or both hands, or both feet, or both legs, or both eyes, or any two thereof...." It would therefore appear that the claimant in the instant case must relate the finger losses on both hands to both hands in order to recover under the provisions of §85.34(s).

This deputy is aware of the trend as noted in 2 Larson, **the Law of Workmen's Compensation**, §58.20, wherein a new approach is given to multiple-loss accidents involving scheduled members. The law of this state, however, is clear wherein it allows payment based upon injury to the body as a whole only in cases where the loss is to both arms, or both hands, or both feet, or both legs, or both eyes, or any two thereof.

It would appear then, that the injury herein would be related to the loss of fingers on the right hand, as no metacarpal loss is noted. However, the loss to the left hand should be noted as such since metacarpal damage is noted there. This is noted in the report of Stephan Fox, M.D., dated June 25, 1974, which was admitted into evidence by stipulation of the parties. The injury and the **result** on the right hand is limited to the fingers and no injury is noted to any other portion of the hand. Therefore, the correct finding in the instant case would allow recovery to the loss of fingers on the right hand and to the loss to the left hand.

The next question to be addressed is the application for payment of nursing services submitted by the claimant. Admittedly, these services were rendered by the claimant's mother. 2 Larson, **The Law of Workmen's Compensation**, §61.13, states that the test in cases such as this that if the wife (or mother) takes over duties in addition to regular housework and does exactly what a hired nurse would have to do the charge is proper. Since Dr. Fox released the claimant to the care of his mother, the charge is allowed in the amount prayed for, $15,000.

WHEREFORE, Claimant has estabished a complete loss to the first and second fingers of the right hand. Claimant has also established a loss to the left hand. Since the loss is to the left hand and fingers on the right hand, this case does not fall within the purview of §85.34 (s). Claimant has established his claim for nursing services.

THEREFORE, Defendants are ordered to pay the claimant one hundred fifty-two and one-half (152 ½) weeks of permanent partial disability payments at the rate of sixty-three and 83/100 dollars ($63.83) based as follows:

100% of right index finger	35 weeks
100% of right second finger	30 weeks
50% of left hand	87½ weeks
	152½ weeks

Defendants are further ordered to pay one thousand five hundred dollars ($1,500) in reimbursement for reasonable nursing services.

Defendants are further ordered to pay healing period benefits for sixteen (16) weeks and two (2) days.

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.

Costs are taxed to the defendants.

Signed and filed this 30 day of April, 1976.

JOSEPH M. BAUER
Deputy Industrial Commissioner

Jon Charles Miller, Claimant,

vs.

McGraw-Edison Company, Employer,
and
Employers Insurance of Wausau, Insurance Carrier,
Defendants.

Amended Decision

Mr. Kenneth Keith, Attorney at Law, 211 E. Fourth Street, Ottumwa, Iowa 52501, For the Claimant.

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

NOW on this 19th day of May, 1976, a clerical error having been committed, the undersigned amends his Review-Reopening Decision filed on April 30, 1976, in the above captioned matter as follows:

In the last sentence of the first full paragraph on page 3 the phrase "the charge is allowed in the amount prayed for, $15,000" should read "the charge is allowed in the amount prayed for, $1,500."

The remainder of the decision shall stand as in the original decision filed on April 30, 1976.

Signed and filed this 19 day of May, 1976, at the office of the Iowa Industrial Commissioner at Des Moines.

JOSEPH M. BAUER
Deputy Industrial Commissioner

No Appeal

Kenneth H. Mishler, Claimant,

vs.

Nash Finch Company, Employer,
and
Farmers Insurance Group, Insurance Carrier,
Defendants.

Review - Reopening Decision

Mr. D.J. Ibeling, Attorney at Law, 404 1st Street S.W., Cedar Rapids, Iowa 52404, 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, Kenneth H. Mishler, against his employer, Nash Finch Company, and Farmers Insurance Group, the insurance carrier, to recover additional benefits under the Iowa Workmen's Compensation Act by reason of an industrial injury which occurred on May 19, 1971. This matter came on for hearing before the undersigned Deputy Industrial Commissioner on February 18, 1976, at the courthouse in and for Linn County located in Cedar Rapids, Iowa. At the conclusion of the evidence the claimant was given leave to file appropriate medical evidence. This evidence was received by this office on May 5, 1976, and the record was closed at that time.

An examination of the commissioner's file reveals that a First Report of Injury was filed on June 11, 1971, along with a Memorandum of Agreement. A Form Five was filed on February 25, 1972.

The issue in this case is whether or not the claimant has a permanent partial disability and whether any disability which the claimant possesses is related to the industrial injury suffered by him.

Claimant, age 51, cut and bruised his left ankle on May 19, 1971, while in the course of employment at Nash Finch Company. The mechanics of the accident reveal that the claimant was struck by a crate in the left ankle.

The claimant was apparently off work as a result of this accident from May 20, 1971, until July 5, 1971, and from October 11, 1971, until January 24, 1972. He was apparently kept on the payroll until 1974 or 1975.

The claimant readily admits the existence of prior problems. Some 20 or 30 years ago, the claimant was involved in an automobile accident and developed "milk leg" on the left. Wade H. Smith, M. D., and Richard L. Zuehlke, M.D., state in their report dated April 26, 1976, that this term usually connotes chronic lymphedema. Over the years the claimant has had intermittent swelling in the left leg. In 1968 he apparently injured his left lower leg with a nail and this was healed with conservative treatment. The site of the injury in the instant case is below the site of the 1968 injury.

Dr. Zuehlke, in a report dated June 29, 1973, indicates that the patient was suffering from a post-traumatic and statis ulcer.

The evidence indicates that the claimant had the distal portion of his saphenous vein removed and pinch grafts on at least three occasions by a Dr. Netolicky in Cedar Rapids. In June of 1973 the claimant sought out the services of the Dermatology Clinic of the University of Iowa. At that time he had an ulcer measuring approximately one inch by one-half inch in the area of the left medial malleolus.

He was next seen by the clinic on October 15, 1975, and was hospitalized from that date until November 4, 1975. This hospitalization revealed a recurrent ulcer. After his dismissal from the hospital, he was seen by the physician at the University of Iowa on four more occasions, during which time the ulcer had completely healed. The claimant was directed to wear an elastic bandage and was wearing it at the hearing. He was last seen by the University Hospitals on April 19, 1975, when the graft site seemed well-healed. The recommendation of the University was that the claimant work on a job where there is no increased risk of trauma to the area.

Copious medical information was offered as Defendants' Exhibit 1. This consists of virtually all the medical information available concerning the claimant. Earl L. Keyser, M.D., in a letter dated August 13, 1975, states that the claimant had obvious incompetent varicosity in the area.

William R. Basler, M.D., in a letter dated September 20, 1975, gave a relatively complete history of the claimant from 1961 until the present time. In 1965 the claimant saw Dr. Basler for a superficial phlebitis of the inferior epigastric veins. In 1966 the claimant reported to Dr. Basler with complaints related to the right ankle. In 1968 the claimant developed a varicose ulcer of the left lower leg which ultimately healed.

In 1971 the claimant again reported to Dr. Basler where he related a history of dropping a wire roll or case on his left shin. This ulcer healed and later recurred in October, 1971, resulting in hospitalization. A skin graft of the area was performed. In both 1972 and 1973 he was again rehospitalized. In August 1975 another ulceration occurred.

Dr. Basler is of the opinion that the claimant has a chronic recurring stasis ulcer of the left lower extremity secondary to varicose veins. This has been present for ten to twelve years. The injuries to the left lower extremity have in part aided in the development and recurrence of the

ulcers. Dr. Basler states that there is some permanency involved but refuses to put a percentage thereon.

John R. Huey, M.D., an orthopedic surgeon, noted that he saw the claimant in 1965. The x-rays performed on the claimant's left knee were negative.

Claimant apparently keeps reinjuring the ulcer since its location on the inside of the shin about two inches above the ankle is vulnerable to injury.

The claimant has the burden of proving by a preponderance of the evidence that the injury of May 19, 1971, was the cause of the disability on which he now bases his claim. **Lindahl v. 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 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 record contains much medical information, none of which deals with the degree of impairment. The causal relationship between the injury and the disease is never clearly set out. The physicians who have examined the claimant since the date of the accident are in agreement that the claimant did indeed sustain an industrial injury on the date alleged. The history given, coupled with the relative success that the claimant had with his leg prior to the 1971 accident, indicates that the incident was the cause of the injury. The commissioner is permitted to consider the experts' opinions along with the other facts and inferences to determine whether there was the necessary causal connection between the injury and the disability to permit a recovery. See **Burt**, supra.

Causal connection is established when it is shown that an employee has received a compensable injury which materially aggravates or accelerates a preexisting latent disease which becomes a direct and immediate cause of his disability. **Yeager v. Firestone Tire & Rubber Co.**, 253 Iowa 369, 112 N.W. 2d 299. Dr. Basler states that the injuries to the left lower extremity have aided in the development and recurrence of his ulcers. The physicians at the University of Iowa note that the 1968 ulcer had healed. The claimant has been hospitalized six times since the accident complained of. It is therefore determined that the inference drawn from the medical reports is that the injury of May 19, 1971, materially aggravated the preexisting condition.

No evidence was presented that the claimant's injury was not limited to his left leg. Since the left leg is a scheduled member, the ability to earn wages is not a factor in determining disability. **Barton v. Nevada Poultry**, 253 Iowa 285, 110 N.W. 2d 660. It is unfortunate that no evidence has been submitted to the commissioner to assist in making an evaluation of this case. Therefore, based upon personal observation of the claimant's gait, the site of injury and reports of the University of Iowa, it is determined that the claimant is suffering a fifteen percent permanent partial disability of the left leg.

No information was given in regard to the hospital bills which may or may not have been borne by the defendants herein. Accordingly, no allowance therefor will be allowed.

WHEREFORE, based on all the evidence contained in the record, the following findings of fact are made, to wit:

1. That the claimant sustained an injury arising out of and in the course of his employment with Nash Finch Company on May 19, 1971.

2. That as a result of said injury, the claimant has suffered a fifteen percent (15%) permanent partial disability to his left leg.

3. That the claimant was disabled from working from May 20, 1971, until July 5, 1971, and from October 11, 1971, until January 24, 1972, for a total of twenty-one and six-sevenths (21 6/7) weeks.

THEREFORE. Defendants are ordered to pay the claimant thirty (30) weeks of permanent partial disability benefits at the rate of fifty-six dollars ($56) per week.

Defendants are further ordered to pay the claimant twenty-one and six-sevenths (21 6/7) weeks healing period benefits at the rate of sixty-one dollars ($61) per week.

Defendants shall receive credit for amounts previously paid.

Costs are to be paid by the defendants.

Interest on this award shall commence from the date of this decision in accordance with the provisions of §85.30, Code of Iowa.

Signed and filed this 23 day of June, 1976.

Joseph M. Bauer
Deputy Industrial Commissioner

No Appeal

Viola M. Morley, Claimant,

vs.

St. Vincent's Hospital, Employer,
and
Argonaut Insurance Companies, Insurance Carrier.

Review - Reopening Decision

Mr. Raymond B. Johansen, Attorney at Law, 508 Davidson Building, Sioux City, Iowa 51101, For Claimant.

Mr. Joe Cosgrove, Attorney at Law, 813 Frances Building, Sioux City, Iowa 51101, For Defendants.

This is a proceeding in Review-Reopening brought by the claimant, Viola M. Morley, against her employer, St. Vincent's Hospital, and their insurance carrier, Argonaut Insurance Companies, on account of an injury on June 2, 1973. The case came on for hearing before the undersigned

Deputy Industrial Commissioner at the courthouse of Woodbury County in Sioux City, Iowa, on April 30, 1974. The record was closed on May 14, 1975.

The issue to be determined is the extent of compensable disability sustained by Claimant as a result of the injury of June 2, 1973.

A Memorandum of Agreement was filed on August 28, 1973. Pursuant to the Memorandum, Claimant was paid 16 weeks of temporary disability compensation at the rate of $54.46.

On June 2, 1973, Claimant was injured while performing housekeeping duties for Defendant Employer. H. N. Hirsch, M.D., examined Claimant on this date. After his examination, Dr. Hirsch recommended immediate surgery. Dr. Hirsch described the surgery performed by him as follows:

> "The patient was prepared in the usual hospital manner for surgery, and I made an incision over the mass--correction, made an incision in the skin over the mass. After opening the skin, I found some bleeding in the fatty tissue just under the skin. This was cleaned up, and then I got down to the anterior rectus fascia, found there was a hole in the fascia. Through this hole blood was oozing, so I opened the fascia and then found a large hematoma in the rectus muscle of the abdominal wall and did not find a hernia. I transected the rectus muscle, dissected the area, found the bleeding vessel, stopped the bleeding and cleaned up the general area of hematoma. Still wanting to make sure that this was the sole problem and she didn't have a hernia, I went on and opened the abdomen and checked the abdominal wall from the inside, and there was no hernia. Then I closed the abdominal wall in the usual manner, and my post-operative diagnosis was 'ruptured epigastric vessel, anterior abdominal wall.'"

He discharged Claimant from the hospital on June 9, 1973.

On June 14, 1973, Claimant was examined by Dr. Hirsch for complaints of drainage through the incision. Antibiotics were prescribed by Dr. Hirsch. Dr. Hirsch hospitalized Claimant from June 18, 1973, to June 23, 1973, for treatment of her post-operative wound infection. When she was discharged, Dr. Hirsch noted no drainage from the incision and that the incision was healing.

Dr. Hirsch testified that the incision was healed by August 9, 1973. Although Claimant did on this occasion complain of tenderness in the general area of the incision, Dr. Hirsch released her to return to work on August 15, 1973. She was examined again by Dr. Hirsch on August 24, 1973, for complaints in and around the incision. Dr. Hirsch at this time believed "...the incision was perfectly normal."

Claimant was hospitalized by Dr. Hirsch from September 6, 1973, to September 15, 1973, for a hiatus hernia. Dr. Hirsch testified that the hiatus hernia was not causally connected to the injury of June 3, 1973. Dr. Hirsch testified that Claimant made no complaints about her incision during this hospitalization or during his follow-up examinations of September 27, 1973, and March 21, 1974.

Dr. Hirsch last examined Claimant on April 22, 1975. On that occasion, Claimant complained about tenderness in and around the surgical scar. Dr. Hirsch testified that the surgical scar was well healed and that he observed no abnormal findings. He further testified that he is familiar with the requirements of the job performed by Claimant at the time of her injury and that Claimant has no disability from the injury to prevent her from performing her job for Defendant Employer.

Claimant was also examined by Vernon G. Helt, M.D., on April 9, April 25, July 15, November 15 of 1974 and April 8 and April 25 of 1975. On each occasion Claimant was treated for complaints of problems separate from her surgical scar complaints. On April 9, 1974, Dr. Helt noted a well healed operating scar with a finger size hole. He prescribed an abdominal support. Dr. Helt estimated Claimant's functional disability as a result of the June 2, 1973, incident to be 25%. He testified that his rating was based on minimal physical findings and no demonstrative tests.

Claimant testified that she attempted to return to work for Defendant Employer during August or September of 1973 but was unable to perform the work. Since that attempt, Claimant has not returned to any type of gainful employment. She also testified that she has constant pain in the area of the incision, which prevents her from working. Both Claimant's son and daughter testified that Claimant was no longer able to do her own housework.

The claimant has the burden of proving by a preponderance of the evidence that the injury of June 2, 1973, was the cause of her disability on which she bases her 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 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.

The testimony of Claimant and Dr. Helt sustained Claimant's burden of proof that the employment incident of June 2, 1973, resulted in permanent partial disability.

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 her inability because of the injury

to engage in employment for which she if 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 is a widow and 71 years old. She began work for Defendant Employer nine years ago. Prior to working for Defendant Employer, she worked at a manufacturing plant, a hospital, and a packing plant. She has a tenth grade education.

A conflict in the medical evidence as to permanent partial disability is apparent in this case. Dr. Hirsch testified that Claimant "has no disability to prevent her from the occupation that she was engaged in prior to the surgery." With minimal physical findings and no demonstrative tests, Dr. Helt estimated Claimant's functional disability as a result of the surgical scar to be 25% of the body as a whole. Since little evidence was elicited from Dr. Helt to support his rating of 25%, this arbitrator considered his rating to be high.

Applying the evidence offered in this case in respect to Claimant's industrial disability to the considerations outlined in **Olson**, supra, and **Barton**, supra, Claimant proved a 5% permanent partial disability to the body as a whole. As a result of the incident of June 2, 1973, Claimant's industrial asset of performing physical labor was minimally reduced.

The parties stipulated that one half of Dr. Helt's bill in the amount of $51 was related to the treatment of Claimant's surgical scar. Additionally, the following bills were offered by Claimant:

St. Vincent Hospital 6/2/73 to 6/9/73	$962.00
St. Vincent Hospital 6/18/73 to 6/23/73	465.75
Dr. Hirsch	309.00

The testimony of Dr. Hirsch revealed that the charges at St. Vincent's and his charges were necessary for the treatment of Claimant's injury of June 2, 1973.

WHEREFORE, it is found that Claimant on June 2, 1973, sustained an injury which arose out of and in the course of her employment and resulted in permanent partial disability to the body as a whole in the amount of five percent (5%) at the rate of fifty-four and 46/100 dollars ($54.46). It is further found that Claimant was incapacitated from working for at least fifteen (15) weeks and is entitled to maximum healing period compensation at the rate of fifty-four and 46/100 dollars ($54.46) per week. It is further found that Defendants should pay the following medical and hospital bills:

Dr. Helt	$ 25.50
St. Vincent Hospital	962.00
St. Vincent Hospital	465.75
Dr. Hirsch	309.00

THEREFORE, Defendants are ordered to pay Claimant twenty-five (25) weeks of permanent partial disability compensation at the rate of fifty-four and 46/100 dollars ($54.46). Defendants are further ordered to pay fifteen (15) weeks of healing period compensation at the rate of fifty-four and 46/100 dollars ($54.46).

Defendants are further ordered to pay the following medical bills:

Dr. Helt	$ 25.50
St. Vincent Hospital	962.00
St. Vincent Hospital	465.75
Dr. Hirsch	309.00

Defendants shall reimburse Claimant for any of the above bills paid by her.

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

Interest on the award is to be accrued pursuant to Section 85.30, Code of Iowa.

Signed and filed this 2 day of June, 1975.

DENNIS L. HANSSEN
Deputy Industrial Commissioner

No Appeal

Pauline Myers (Richardson), Claimant, by Alanson R. Elgar, her legal representative and Administrator of her Estate,

vs.

Henry County Memorial Hospital, Employer,
and
Hawkeye-Security Insurance Company, Insurance Carrier, Defendants.

Review - Reopening Decision

Mr. William Bauer, Attorney at Law, P.O. Box 517, Burlington, Iowa 52601, For the Claimant.

Mr. R.L. Fehseke, Attorney at Law, 621½ Seventh Street, Fort Madison, Iowa 52627, For the Defendants.

This is a proceeding in Review-Reopening brought by the estate of Pauline Myers (Richardson) against her employer, Henry County Memorial Hospital and its insurance carrier, Hawkeye-Security Insurance Company, to recover benefits on account of an injury sustained on November 17, 1967.

The sole issues to be determined in this matter by agreement of counsel are whether or not the decedent's estate is barred from further proceeding in this action because of the claimant's nonwork-related death; whether or not a review-reopening is an appropriate proceeding in this matter; and whether or not returning to work prevents recovery for permanent partial disability. The parties have agreed that the above issues can be separately adjudicated and that in the event further proceedings are necessary to determine extent of disability, further evidence may be presented in addition to the medical reports and matters stipulated to at the hearing.

Does the language in §85.31(5), Code of Iowa,

prevent the making of a claim for compensation which is or may be due for the periods of time between the date of a work-related injury and a nonwork-related death? The answer is no. The right to any compensation which may be payable for the periods following the nonwork-related death ceases as of the date of death. The decedent's estate is entitled to compensation which is or may be due for periods preceding the date of a nonwork-related death. It is so held.

The benefits sought are not for a death due to an occupational injury under §85.31, Code of Iowa. Benefits are for workmen's compensation benefits which may be due the claimant prior to death. §86.34, Code of Iowa, is the only division creating a proceeding available to pursue such workmen's compensation benefits as opposed to death benefits. It is so held.

Does returning to work prevent a claimant from obtaining permanent partial disability compensation? The answer is also no. If an injury is to a scheduled member, permanent partial disability compensation based upon functional impairment may be payable. If the injury causes permanent partial industrial disability, the fact of a return to work is only one factor to be considered in evaluating the effect on Claimant's ability to earn wages. It is so held.

SO ORDERED.

Signed and filed this 2 day of July, 1974.

ALAN R. GARDNER
Deputy Industrial Commissioner

Appealed to District Court; Affirmed

Patrick F. Payne, Claimant,

vs.

Benevolent & Protective Order of Elks, Employer, and

United States Fire Ins. Co., Insurance Carrier, Defendants.

Review - Reopening Decision

Mr. James A. Pratt, Attorney at Law, 201 First National Bank, Council Bluffs, Iowa 51501, For Claimant.

Mr. Melvin C. Hansen, Attorney at Law, 1904 Farnam Street, Omaha, Nebraska 68102, For Defendants.

This is a proceeding in Review-Reopening brought by the claimant, Patrick F. Payne, against his employer, Benevolent & Protective Order of Elks, and their insurance carrier, United States Fire Insurance Co., for the recovery of benefits for injuries sustained on January 3, 1969. The case was submitted by stipulation of the parties. The record was closed on December 2, 1974.

The issue to be determined is whether Defendant should be estopped from asserting the statute of limitations contained in §86.34, Code of Iowa.

A Memorandum of Agreement was filed by Defendants and approved by this office on September 4, 1969. Pursuant to this Memorandum, Claimant was paid fifteen (15) weeks of temporary disability compensation at the rate of forty-four dollars ($44) per week. The date of the last compensation draft was October 31, 1969. Claimant filed his Application for Review-Reopening with the Industrial Commissioner on December 27, 1973.

On January 3, 1969, Claimant fell while performing maintenance work at Defendant Employer's facility. After the fall Claimant experienced pain in his chest and back. Following treatment by several doctors, a myelogram was performed by M.P. Margules, M.D. On August 7, 1969, Dr. Margules removed a herniated disc at L4-L5. Another myelogram was performed by Dr. Margules in November of 1970. The myelogram revealed to Dr. Margules that Claimant required further back surgery. Surgery was tentatively scheduled for Claimant on January 24, 1971. However, Claimant did not have the surgery recommended by Dr. Margules until January 22, 1973, due to the moving of the Elks Club and his not wanting to put himself through another surgical procedure.

On July 6, 1970, Claimant came in contact with Robert E. Reynolds, an adjuster for the General Adjustment Bureau. General Adjustment Bureau was handling the case for Defendant Carrier. Reynolds testified about his discussion with Claimant at this time as follows:

> Q What did you discuss at that time?
>
> A Well, we had an open file which means that we were expecting additional expenses for treatment and I met with him to find out what his condition was; whether everything had been in proper perspective up to that time.
>
> Q And what was done after that meeting?
>
> A Well from our discussion I recall he indicated he was still having some pain and discomfort and was going to have another examination with his physician.
>
> Q What did you tell him, if anything, if you can recall?
>
> A I believe I would have told him--I wasn't controlling, you know, his treatment. I just told him to let me know if he had to go back to the doctor and keep me informed of what he was going to have in the way of treatment.

Claimant also stated about this meeting that they "discussed whether or not he had been off work at any time that he hadn't been compensated for and reached an agreement that he had been paid for all his disability that he felt he was due."

The next meeting between Claimant and Reynolds was on October 16, 1970. Reynolds described this meeting as follows:

> Q When was the next time you saw Mr.

Payne?
A On about October 16, 1970.
Q What was the purpose of that visit?
A Just to follow up on his progress. It's our usual procedure to make periodic contact with the individual who has a claim if we are handling it.
Q What did you actually do at that time?
A He had some bills for, I believe, for a doctor's examination or hospital, physician, that were--I can't recall exactly and I took some bills and submitted them to the company for payment.
Q And did you tell him anything at that time?
A Well, again, I think he indicated he was going to be going back to the doctor and I indicated to just keep me informed as to how he was going to recover.

On November 25, 1970, Claimant called Reynolds. Reynolds testified that he was informed by Claimant of the myelogram by Dr. Margules and the possibility of surgery. Claimant also informed Reynolds that he had been in the hospital three or four days.

Reynolds contacted Claimant on December 29, 1970, as to whether or not he had scheduled the surgery. He was informed that the surgery was scheduled on January 24, 1971. Claimant was told to let Reynolds know when he went into the hospital.

On January 30, 1971, Reynolds called Defendant Employer's club in an attempt to learn whether Claimant had been hospitalized for the surgery of January 24, 1971. He was informed that Claimant had not.

Reynolds next contacted Claimant on March 18, 1971. The substance of this conversation was as follows:

Q When was the next time that you actually had a conversation with Mr. Payne?
A On March 18, '71 I called Mr. Payne.
Q What was the purpose of that call?
A As a regular follow up on my diary system I have to make periodic reports to the company on progress and I made this call to see what had transpired since our last visit.
Q And what did you find out?
A He indicated that he had been busy. They had moved the Elk's Club and he just hadn't had time to schedule the surgery. His work apparently required his presence and he didn't want to take the time off.

Reynolds' next contact with Claimant was on August 16, 1971. Reynolds testified as follows concerning his conversation with Claimant:

Q What was the purpose of that call?
A To follow up to see whether or not he had ever had his surgery or had scheduled it yet.
Q And you found out that he had not had it?
A He hadn't, no.
Q Did you find out any other information at that time?
A He indicated he was still going to have surgery because his injury was still bothering him although he was able to continue working and such with the condition.
Q When was the next time you saw him then?
A Well after that conversation, on that time I told him that if he ever had this additional treatment or surgery to let me know. I was sure he knew how to get ahold of me and at that time I retired my file as far as putting it on diary to contact him again.

On October 31, 1972, Claimant sent a letter to the Industrial Commissioner. The letter was prepared for Claimant by Eddie Tyler of Insurance Associates. The contents of the letter were as follows:

October 31, 1972

Industrial Commission
East 6th & Des Moines Street
Des Moines, Iowa 50319
Dear Sir:
I am writing to request a ruling on my eligibility for indemnity payments for an anticipated back operation.
I was paid indemnity by the United States Fire Insurance Company. The last payment was on October 31, 1969. I now find I must have a second operation connected with the original injury. I still qualify for medical payments, but there seems to be a question concerning indemnity payments.
Would you please advise me as to my qualifications.
Sincerely,
Patrick Payne, Manager
Council Bluffs Elk's Lodge 531
38 Pearl Street
Council Bluffs, Iowa 51501

During the last two months of 1972, Reynolds received a letter from Insurance Agents Incorporated that Claimant was making claim for additional indemnity payments. Reynolds' actions after receiving the letter were as follows:

Q And what did you do then after receiving that letter in October of 19--or in the latter part of 1972?
A I at first didn't do anything immediately. I did later report to the company the situation in about January.
Q That would be January of 1973?
A Yes
Q And what happened then?
A In the meantime I had talked to Mr. Payne. I believe he had called me and I advised him that I would have to submit this information to the U.S. Fire Insurance Company and determine what their position was.
Q And this would have been at what time?
A January or February of '73.

Reynolds subsequently told Claimant that the insurance company would only pay his medical expenses.

Claimant also testified concerning his conversations with Reynolds about his workmen's compensation claim. Claimant described the nature of his conversations with Reynolds as follows:

> He was very cooperative and we discussed what was going to happen. In fact, one time that I had some extra work that had to be done and this and that and we went over that situation as far as what extra money was being cost and then I advised him that I was going to have to have more surgery and he said, Don't worry, when you get set up right and when you have to have it, he says, Go right ahead.

Claimant testified as follows of a discussion with Reynolds as to weekly workmen's compensation.

> He asked me--I'm thinking out loud. I think that's the way it went. He asked me about compensation and I said, Well, at the present time I was still under contract drawing a salary from the Elk's and I didn't feel I was entitled to compensation under both circumstances as long as I could operate the job from the hospital, home or whatever. It was when I had the help and as I understand it if there was extra expense or anything involved there this would be taken care of. This in general was the conversation with Bob.

Claimant further testified that he had no discussions with Mr. Reynolds concerning any time limitation.

As to his concern about weekly compensation after the surgery of January, 1973, Claimant stated:

> Q To summarize your testimony, after your January 1973 operation that would be when you first became concerned about obtaining weekly compensation?
>
> A Yes. I felt that I had to hire a new man to take my place over there so my compensation was stopped as of January the 1st so I felt then I was entitled to receive compensation for my accident, so that's when I started looking into that because there would be no other compensation coming and I had always been under the idea from our conversations that when my time did come that I go through with this it would be taken care of in a routine manner.
>
> Q When your medical treatment was completed then you felt you would be at that time entitled to compensation?
>
> A I felt I was entitled to compensation from the time I had to go in; the compensation, and my salary stopped at the Elk's Club. I couldn't apply for anything else. I had no other alternative.

Surgery was performed on Claimant by Dr. Margules on January 22, 1973. Dr. Margules excised scar tissue around the L5 root and removed fragments of disc at this level. On March 28, 1973, Dr. Margules estimated Claimant's permanent partial disability to be fifteen percent (15%) of the body as a whole.

Section 86.34, Code of Iowa, provides in part:

> 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.*** (Emphasis added)

The Application for Review-Reopening of December 27, 1973, was not filed within three years of October 31, 1969, the date of the last payment of compensation. Defendants urged that the Application for Review-Reopening be dismissed since the application was not filed within three years from the date of the last payment of compensation. Claimant urged that Defendants should be estopped from asserting the three year limitation contained in §86.34, Code of Iowa.

In the case of **Paveglio v. Firestone Tire and Rubber Company**, 167 N.W. 2d 636, (1969), the Supreme Court construed §86.34, Code of Iowa. In **Paveglio** the claimant was paid compensaton benefits for a period of seventy-five (75) weeks, from August 18, 1959, to July 14, 1961. On August 10, 1964, the claimant filed an Application for Review-Reopening under the provisions of §86.34, Code of Iowa. Claimant, as in the present case, asserted that the employer and insurance carrier were estopped from raising the limitation contained in §86.34, Code of Iowa.

The Supreme Court in **Paveglio** listed the following four essential elements of estoppel:

> 1. False representation or concealment of material facts;
> 2. Lack of knowledge of the true facts on the part of the person to whom the misrepresentation or concealment is made;
> 3. Intent of the party making the representation that the party to whom it is made shall rely thereon;
> 4. Reliance on such fraudulent statement or concealment by the party to whom made resulting in his prejudice.

The opinion quotes the following from **Stookesberry v. Burgher**, 220 Iowa 916, 262 N.W. 820:

> In order to constitute equitable estoppel, or estoppel in pais, false representation or concealment of material facts must exist; the party to whom it was made must have been without knowledge of the real facts; that representations or concealment must have been made with the intention that it should be acted upon; and the party to

whom it was made must have relied thereto to his prejudice and injury. There can be no estoppel in any event, if any of these elements are lacking.

Considering the evidence offered in light of the foregoing principles, Claimant failed to sustain his burden of proof that Defendants should be estopped from asserting the statute of limitations contained in §86.34, Code of Iowa.

Claimant informed Reynolds of the possibility of a second surgical procedure on November 25, 1970. Subsequently, Reynolds contacted Claimant on December 29, 1970; January 30, 1971; March 18, 1971; and August 16, 1971, as to whether the surgery had been performed. On each occasion Reynolds was informed by Claimant that the surgery had not been performed. Reynolds testified that he told Claimant on August 16, 1971, "that if he ever had this additional treatment or surgery to let me know. I was sure he knew how to get ahold of me and at that time I retired my file as far as putting it on diary to contact him again." Seemingly, a question existed as to whether Claimant was ever going to permit further surgery to his back. Claimant testified that the reason he put off the surgery was due to his work commitments and his reluctance to undergo a second surgical procedure. During this period from November 25, 1970, to August 16, 1971, there was no discussion between Claimant and Reynolds of any time limitation. The next contact with Defendants by Claimant after the August 16, 1971, discussion was more than three years from the date of the last compensation draft. The testimony by Reynolds and Claimant of the conversations between them failed to reveal any false representations by Reynolds or any concealment of material facts by him with the intention that it should be acted upon by Claimant.

The letter of October 31, 1972, from Claimant to the Industrial Commissioner was exactly three years from the date of the last payment of compensation and suggests that Claimant had some knowledge as to the three year limitation contained in §86.34, Code of Iowa. Additionally, since the three year limitation of §86.34, was contained in the Code of Iowa, it was available not only to Defendants but also to Claimant.

By stipulation of the parties, the following medical bills were offered as necessary treatment resulting from the injury of January 3, 1969:

Maurice P. Margules, M.D.	$ 720.00
Jennie Edmondson Memorial Hosp.	$1337.15

Section 85.37, Code of Iowa, "Professional and hospital services-prosthetic devices" provides that no statutory period of limitation shall be applicable thereto. Pursuant to this statutory provision, Defendants are obligated to pay the above medical bills.

WHEREFORE, it is found that more than three years have elapsed between the date of the last compensation draft of October 31, 1969, and the filing of Claimant's Application for Review-Reopening on December 27, 1973. It is further found that Claimant failed to sustain his burden of proof that Defendants should be estopped from asserting the limitation contained in §86.34, Code of Iowa. It is further found that the limitation in §86.34, Code of Iowa, does not apply to services provided under §85.27, Code of Iowa.

THEREFORE, Claimant's Application for Review-Reopening as it pertains to permanent partial disability and temporary disability or healing period is dismissed as not being timely filed within three years from the date of the last payment of compensation. Defendants are ordered to pay the following medical bills:

Maurice P. Margules, M.D.	$ 720.00
Jennie Edmondson Memorial Hosp.	1337.15

Costs of the reporter for this hearing are taxed to Defendants.

Signed and filed this 21 day of January, 1975.

DENNIS L. HANSSEN
Deputy Industrial Commissioner

No Appeal

Elmer Roach, Claimant,

vs.

Meier Body Shop & Towing Service, Employer, and

Maryland Casualty Company, Insurance Carrier, Defendants.

Review - Reopening Decision

Mr. Richard McCoy, Attorney at Law, 222 Davidson Building, Sioux City, Iowa 51101, For the Claimant.

Mr. William J. Rawlings, Attorney at Law, 273 Orpheum Electric Bldg., Sioux City, Iowa 51101, For the Defendants.

This is a proceeding in Review-Reopening brought by the claimant, Elmer Roach, against his employer, Meier Body Shop & Towing Service, and its insurance carrier, Maryland Casualty Company, to recover benefits under the Iowa Workmen's Compensation Act on account of an injury sustained on May 6, 1973. The matter came on for hearing before the undersigned at the courthouse in Sioux City, Iowa, on Thursday, May 2, 1974, at 12:30 p.m. The record was left open for the submission of medical testimony. The record was completed on August 9, 1974.

The issue to be determined in this matter is whether or not the claimant sustained compensable disability and medical expenses as a result of the injury sustained May 6, 1973, when he fell from a ladder and landed on his back. More specifically, the issues are whether or not the treatment of Dr. Horst G. Blume, M.D., a neurosurgeon, was reasonable and necessary and whether or not such treatment by Dr. Blume was

authorized by the employer.

It should be noted that while some indication exists that Claimant's back complaints did not appear until some time following the injury, the history given the doctors and Claimant's testimony indicate complaints of back and leg pain shortly after the incident. It is so found.

It should also be noted that mention is made of an injury to Claimant's back a year or so prior to the instant episode. Dr. David Paulsrud, M.D., an orthopedic surgeon, notes this episode and states it was resolved with conservative measures. Claimant denies problems between the earlier episode and the instant injury. The employer testified that Claimant complained frequently but that complaints were not necessarily in Claimant's back. The prior injury was also noted to Dr. William M. Krigsten, M.D., an orthopedic surgeon. Dr. Krigsten's opinion as to causation seems to be based in part upon the existence of a "chronic" back strain which in part predated the instant injury. The basis appears to be that Claimant has a "sacralization" or congenital fusion on one side of the lumbosacral joint and the prior injury. However, the claimant's testimony and the observations of the employer and history to the other doctors negate the existence of a significant back difficulty prior to the instant injury. This finding is to be considered in evaluating the weight to be given to Dr. Krigsten's opinion.

Based on the above discussion as to the onset of back symptoms, it is found that the onset of the significant lumbar difficulties occurred shortly after the injury of May 6, 1973. The first note of lumbar complaint to a doctor appears to be that given to Dr. H. H. Burroughs, M.D., on June 1, 1973.

Dr. Burroughs treated the claimant initially for the instant injury. His reports are of little aid in establishing a causal relationship between the May 6, 1973, injury and subsequent problems. He notes injuries to other parts of Claimant's body for which no permanent claim is made. His diagnosis with reference to the lumbar spine is "traumatic fibromyositis of dorsal and lumbosacral area with questionable lumbar disc syndrome." His last notation of caring for the claimant is September 5, 1973. His opinion is valuable primarily in determining history and course of Claimant's condition during the summer of 1973. His diagnosis is in no serious conflict with those doctors who find a problem with a lumbar disc. He appears to defer to Dr. Paulsrud.

Dr. Paulsrud saw the claimant from a period beginning June 7, 1973, and ending August 27, 1973. Dr. Paulsrud saw Claimant for an examination on June 17, 1974. Dr. Paulsrud gives a very lucid description of disc pathology. The disc is a "hydraulic cushion that has a gristly or jellylike substance in the center surrounded by a tough membrane." The discs wear out in people. The wearing out is the degeneration. The degenerated disc will produce back pain. A disc may protrude into the spinal canal and encroach on vital nerve structures. Leg pain in addition to the lower back pain is a result of the latter difficulty. Dr. Paulsrud characterizes the latter occurrence as a "bulging" disc as opposed to a "degenerated" disc. The term "ruptured" disc may mean that the membrane surrounding the center of the disc has a hole in it. Such a disc is not necessarily a "bulging" disc. "Ruptured disc" may also mean that the center or "nucleus pulposus" has pressed through the hole and is pushing on a nerve. This latter situation is the "bulging" disc in Dr. Paulsrud's frame of reference. There is some indication in Dr. Paulsrud's testimony as a whole that degeneration can be initiated by a trauma.

In applying the above principles and terminology in the instant case, Dr. Paulsrud feels Claimant had a degenerative lumbar disc which was bulging. This was shortly following the injury. The findings on physical examination, x-rays, and complaints of leg pain were the basis for this diagnosis. Due to improvement in findings on examination, a negative myelogram and lessening of complaints, Dr. Paulsrud felt the degenerated disc was no longer bulging in August and September, 1973. It should be noted that Dr. Paulsrud strongly indicates a degenerative disc which was not bulging indicates surgery is not to be performed.

Dr. Paulsrud states at one point that the episode in May of 1973, cannot be related with any certainty to the degenerative disc. However, he does say that assuming the history was relatively free of preexisting symptoms and that assuming onset of symptoms following the injury, that the injury "if not causative at least aggravated the condition." The above assumptions on which the opinion was based are in accordance with previous findings in this decision as to the onset of symptoms. While the congenital problems previously noted were also found by Dr. Paulsrud, he later states that a disc injury did occur in the May, 1973, incident. Dr. Paulsrud's testimony is thus interpreted to mean he felt a disc injury did occur in May of 1973.

The incident of May, 1973, resulted according to Dr. Paulsrud, in a five percent (5%) permanent partial disability of the body. However, surgery has been performed since the rating. Dr. Paulsrud indicates the disability rating, assuming a satisfactory result, would be the same following surgery as before. He does state that it is a little early to define the result of surgery. Permanent impairment will exist. Perhaps the congenital defect would have a contribution to disability. Dr. Paulsrud does not include this factor in the five percent (5%) rating.

Dr. Paulsrud indicates he has no way of knowing Claimant's condition at the time of Dr. Blume's surgery. Perhaps the bulging disc did recur. In history to Dr. Paulsrud Claimant denied leg pain just prior to surgery.

Dr. Krigsten examined the claimant on one

occasion, February 7, 1974. The history appeared to have noted mention of significant leg difficulty following the injury. Back and leg complaints were noted in September of 1973. Emphasis in late 1973 was on left leg pain. The back problem of the previous year was noted. Difficulty was of a week's duration. Complaints to Dr. Krigsten in February of 1974 were noted as somewhat bizarre. Dr. Krigsten felt Claimant perhaps had reacted voluntarily in indicating pain and limitation of motion on a leg raising test. He noted the congenital anomaly in Claimant's lumbar spine. He attributes Claimant's problems to a congenital defect. Some impairment as a result of this will exist. He does not feel Claimant had a disc problem. Dr. Krigsten does feel it is difficult for the claimant to have a disc injury as a result of the fall Claimant sustained without more pain immediately following the injury. However, he does concede he was not present at the operative time. He appears to defer to the discovery at the time of surgery of a bad disc. He does not feel the disc is severely ruptured.

Dr. Krigsten's opinion as to the circumstances requiring surgery is the same as that of Dr. Paulsrud. He did not feel surgery was indicated in February of 1974. His description of any possible disc condition at that time would correspond to the condition described by Dr. Paulsrud as a "nonbulging" but "degenerated" disc.

Dr. Blume first saw Claimant in September of 1973. Dr. Blume's history is not drastically different than that taken by Dr. Paulsrud. Complaints of leg pain are perhaps given greater emphasis but not significantly greater than those indicated to Dr. Paulsrud. The congenital sacralization was noted. A "ruptured" disc at L4 was found following a discogram. It should be noted that Dr. Blume's diagnosis at this point in time appears to be in line with Dr. Paulsrud's as that of a "nonbulging" disc. Contrary to the views of Drs. Paulsrud and Krigsten, Dr. Blume apparently recommends surgery for such a disc. Dr. Blume's diagnosis as to the status of the disc appears to have been the same prior to February, 1974, as after February, 1974. Note is made of this fact as Dr. Krigsten saw Claimant in February of 1974. The surgical findings of Dr. Blume were that the claimant had a ruptured lumbar disc at L4. The disc was removed. Whether or not the disc was "bulging" at this time may be in conflict. However, in view of later rulings concerning the authorization of Dr. Blume's medical treatment, whether or not surgery was necessary becomes irrelevant to a determination of a defendant's responsibility in the instant case. As the necessity of surgery becomes irrelevant, whether or not the disc was bulging or nonbulging is not significant in determining Claimant's entitlement to medical benefits now that the disc has been removed.

Dr. Blume attributes all difficulties relevant to the ruptured disc to the May, 1973, incident. No disability rating is given by Dr. Blume as it is too soon following surgery.

It should be noted that no essential conflict is indicated in the doctor's testimony concerning the general principles applicable to the pathological condition of discs of the lumbar spine. The potential conflict arises in diagnosing which pathological state is in existence at a given point of time, what caused the condition and how to treat the condition.

Treatment of the condition is the greatest area of conflict. A great deal of testimony is elicited concerning whether or not the surgery of Dr. Blume was reasonable and necessary as bearing on payment for the surgery and related expenses by the defendants. The applicable principle which is determinative dictates a converse focus. Under §85.27, Code of Iowa, the employer is to furnish the reasonable and necessary services so listed. The section has been interpreted to mean that when the employer in the first instance tenders and continues to tender adequate medical treatment, the claimant may not go elsewhere without authorization. (Op. Atty. Gen., 1962, page 271). The employer tendered the care of Drs. Paulsrud and Krigsten. Dr. Krigsten was available at the time of surgery. Such tender of licensed practicing orthopedic surgeons is certainly adequate. A difference in medical philosophy without more is not a basis for determining adequacy. Claimant's excursion to Dr. Blume was thus unauthorized and noncompensable. Thus all expenses incident to his treatment are unauthorized. It should be noted that while apparently contrary to the indications of Drs. Paulsrud and Krigsten, the surgical necessity determined and thus rendered by Dr. Blume, a licensed practicing neurosurgeon, cannot be considered such a treatment as to negate any right to disability benefits as distinguished from authorized payment of medical expenses.

Any conflict in the medical opinions is resolved in favor of finding that disc pathology does exist which is the result of the injury of May 6, 1973. The disc pathology originating at the May 6, 1973, episode is a degenerative disc. This finding is based upon the testimony of Drs. Paulsrud and Blume as well as the findings with respect to history. The conflict is resolved against Dr. Krigsten. Whether or not the disc now removed was "bulging" at the time of surgery seems significant at present only in determining the advisability of surgery. The advisability of surgery was in issue solely to determine whether or not the defendants were financially responsible for the surgical costs. As the financial responsibility issue has been resolved on other bases, the question of the "bulging" of the disc need not be reached.

While the testimony of Dr. Paulsrud indicates a permanent impairment due to the disc injury prior to surgery as well as after, he does indicate that it is now too early to define a result of the surgery. Permanency will exist. Dr. Blume also does not indicate the degree of permanency at present, but does state permanency will exist. Accordingly, it is the finding of this deputy commissioner that

while a permanent impairment will exist from the May, 1973, incident and resultant surgery, the percentage of impairment and physical limitation as a result of the impairment cannot yet be determined in such a manner to be relevant in reaching a percentage of industrial disability. Accordingly, no percentage of permanent industrial disability is given in this opinion.

It should be noted that the testimony of all three doctors refers to the existence of the congenital defect in Claimant's back. Based upon the testimony of Drs. Krigsten and Paulsrud, a small amount of funtional impairment exists as a result of the congenital defect. This is to be a factor in determining the industrial disability of this claimant when the result of the surgery is such that impairment can be determined.

The remaining issue to be determined is the duration of temporary total disability. While history given to Dr. Blume indicates Claimant worked for some time following the injury, it appears from the remaining testimony that the claimant was temporarily and totally incapacitated from working from the date of the injury up to September 10, 1973, when Claimant worked one day. Following this, Claimant was off work until he returned to work part time for a gas station in November of 1973. He worked to February, 1974. The last indication of a date when Claimant was able to work was February 7, 1974, the date of the examination by Dr. Krigsten. How long following the most recent opinion by any doctor that Claimant's temporary total incapacity from work will continue is not clear. Dr. Paulsrud saw Claimant on June 17, 1974. While he does not address the matter of returned to work specifically, he does state that he is unable to determine the result of the surgery at that time. The surgery was only two months prior. The testimony of Dr. Blume also indicates that no determination as to Claimant's surgical result can yet be determined. Claimant indicated ongoing problems. It is thus the finding of this deputy commissioner based on the above factors that Claimant was temporarily and totally disabled from working from May 6, 1973, to September 10, 1973, a period of eighteen (18) weeks. Claimant was again temporarily totally disabled from September 10, 1973, up to November 1, 1973, a period of seven and two-sevenths (7 2/7) weeks. Claimant was subsequently temporarily and totally disabled from February 7, 1974, through June 17, 1974, a period of eighteen and four-sevenths (18 4/7) weeks. The total time incapacitated from working is forty-three and six-sevenths (43 6/7) weeks.

THEREFORE, Defendants are ordered to pay the claimant forty-three and six-sevenths (43 6/7) weeks of temporary total disability compensation at the rate of sixty-eight dollars ($68) per week. Credit is to be given for amounts previously paid.

Costs of the proceeding are taxed to the defendants.

Signed and filed this 8 day of November, 1974.

ALAN R. GARDNER
Deputy Industrial Commissioner

Appealed to District Court; Affirmed

Robert Roby, Claimant,

vs.

Iowa Sheet Metal Contractors, Inc., n/k/a Waldinger Corp., Employer,
and
United States Fidelity & Guaranty Company, Insurance Carrier, Defendants.

Review - Reopening Decision

Mr. Paul Moser, Jr., Attorney at Law, 207 Crocker Street, Des Moines, Iowa 50309, For the Claimant.

Mr. Oscar Jones, Attorney at Law, 1205 East 33rd Street, Des Moines, Iowa 50317, For the Claimant.

Mr. Ross H. Sidney, Attorney at Law, 900 Hubbell Building, Des Moines, Iowa 50309, For the Defendant.

This is a proceeding in Review-Reopening brought by the claimant, Robert Roby, against his employer, Iowa Sheet Metal Contractors, Inc., n/k/a Waldinger Corp., and their insurance carrier, United States Fidelity & Guaranty Co., for the recovery of benefits for injuries sustained by him on November 22, 1968. The case came on for hearing before the undersigned Deputy Industrial Commissioner on June 13, 1974, at the Industrial Commissioner's Office in Des Moines, Iowa. The record was closed on November 5, 1974.

A Memorandum of Agreement was filed and approved on February 6, 1969. Pursuant to the memorandum, Claimant was entitled to temporary disability or healing period compensation at the rate of $44 per week and permanent partial disability compensation at the rate of $47.50.

The issue to be determined is the extent of permanent partial disability sustained by Claimant as a result of the injury of November 22, 1968.

On November 22, 1968, Claimant fell from a scaffold to a cement floor, a distance of 25 feet, while working for Defendant Employer. As a result of the fall, Claimant sustained injuries to his back, right leg, and left leg.

Marvin Dubansky, M.D., an orthopedic surgeon, examined Claimant on July 20, 1972. The following history was taken by Dr. Dubansky:

> "He stated that he fell and fractured his right hip, pelvis, and injured the left knee. His left knee was pinned by Dr. Vanden Brink, who did an open reduction and pinning. The hip got along satisfactorily and the pin was removed. His knee, however, gave him trouble. Subsequently the two Knowles' pins were removed from the knee. On April

8th, 1972, his left knee was operated on. Well, it was a prothesis -- hemiprothesis inserted. He had some pus in his knee and it started draining. He was put in a long cast and it was removed in June of '72. He then went to some other doctors, given antibiotics, and at the time I saw him he had pain as well in his left lower leg and had a lot of drainage in the knee. It would close for a few days and then open up again."

After failing to clear up Claimant's problem with antibiotics, Dr. Dubansky recommended removal of the prosthesis and a knee fusion. A knee fusion was performed on March 5, 1973.

A culture report on July 20, 1973, identified the infection as "gram negative bacillus with cultural and biochemical characteristics of a proteus species and a staphylococcus species." On July 24, 1973, the culture report was "proteus mirabilis and staphylococcus." Another report described the infection as "staphylococcus epidermis, coagulase negative."

Dr. Dubansky causally connected the disability to Claimant's left lower extremity of 60% to the incident of November 22, 1968. On cross-examination Dr. Dubansky indicated that psoriasis usually doesn't cause an infection in a wound.

On April 9, 1974, Claimant was examined by Thomas B. Summers, a neurologist. An extensive history was taken by Dr. Summers. Dr. Summers noted the following injuries sustained by Claimant as a result of the fall of November 22, 1968:

"He told me that he had suffered a fracture of the right thigh, and this had required open reduction and internal fixation. A metal pin was used for fixation. He told me that when he did strike the pavement with his buttocks, his pelvis was fractured and presumably in several places. He told me that a small 85-pound B-tank used for soldering had fallen from the scaffolding and this machine struck Mr. Roby on the left knee right at the knee joint."

Claimant reported to Dr. Summers that he suffered a heart attack in January of 1973. He also stated that the condition of psoriasis which he has been afflicted with since childhood flared up in February, 1974. He attributed the increased severity of the psoriasis which led to the flare-up to the accident of November 22, 1968. Claimant also gave a history of impotence since the accident.

Dr. Summers' physical examination was as follows:

"PHYSICAL EXAMINATION: Physical examination revealed a sixty-seven year old Caucasian male of medium-heavy build who weighed 184.5 pounds. The blood pressure was 160/80 mm. Hg. in sitting position. Mr. Roby was observed to be moderately dyspneic even at rest.

The entire body possessed a 'flushed-like' appearance with some suggestion of livido-reticularis involving the lower limbs. Scaling lesions characteristic of psoriasis were present. These were maximum about the trunk and also the palmar surface of the hands.

The antero-posterior diameter of the chest was increased. The breath sounds were diminished throughout both pulmonary fields. The cardiac sounds were muffled and indistinct. The basic cardiac rhythm was regular, however.

The face was symmetrical. The mouth and throat were normal. The tongue and palate moved normally. The external auditory canals contained a large amount of cerumen. The ocular rotations were normal. The pupils measured 5/5 mm. in diameter. The light reflexes were normal. On funduscopic examination the optic discs appeared normal. Minimal sclerotic change was evident involving the retinal arteries. No hemorrhages or exudates were present in either ocular fundus, however.

The neck was fairly supple. The carotid pulses were palpable. No bruit was audible over either carotid artery.

The abdomen was obese. A vertical and somewhat oblique appendectomy scar was present in the right lower abdomen. The external genitalia were normal in appearance. On rectal examination, sphincter tone was reduced and estimated as being 50 to 75% of normal. There was some benign enlargement of the prostate gland.

Strength and coordination in the upper extremities were within normal limits. Motions of the lower spine were restricted.

A long operative scar measuring 22 cm. in length was present on the lateral aspect of the right thigh. The left knee was completely ankylosed with the leg in full extension on the thigh at this level. Atrophy involved the left leg. Furthermore, the left lower extremity was shorter than the right. Specifically, the lower extremities measured 91.0/87.5 cm. in length respectively from the anterior-superior iliac spine to the inferior margin of the corresponding medial malleolus. The legs measured 32.5/29.0 cm. in circumference respectively at the mid-calf level. Flexion and extension of either foot at the ankle level was considered normal. All vestiges of the alleged foot-drop deformity on the left side were no longer apparent. Hip joint motion was considered normal. I could not palpate either posterior tibial arterial pulse. The dorsalis pedis pulse was palpable on the left side but not on the right side.

There was no sensory deficit present on examination objectively.

The biceps reflexes were 1—2+/1—2+. The abdominal reflexes were ±/±. The patellar reflexes were 2+/−. The achilles reflexes were ±/±. The plantar responses were of a

flexor type.
The gait was of a stiff-legged, short-legged variety on the left side rendering a hobbling-like disturbance. Mr. Roby was noted to be wearing a one and one-half inch lift on the sole of the left shoe and, furthermore employed two crutches for assistance when ambulating."

X-ray examination of Claimant's chest, lumbosacral spine, pelvis, hips, right femur, and left knee was performed by Radiology, P.C. Their interpretation read as follows:

"**CHEST**: The heart, lungs and bony thorax are normal.

LUMBOSACRAL SPINE: Minimal degenerative arthritic changes are present. The bone and joint structures are otherwise normal. There is no evidence of recent or old injury.

PELVIS, HIPS AND RIGHT FEMUR: There is an old healed fracture through the neck of the right femur without residual deformity. This appears to have been transfixed by an intramedullary pin which has been removed. The bone and joint structures are otherwise normal.

LEFT KNEE: Surgical fusion has been carried out. Union appears to be solid."

Dr. Summers' clinical impression following his examination and review of the x-rays was:

1. Multiple skeletal injuries with orthopedic and neurologic deficit.
2. Psoriasis, generalized, chronic, severe.
3. Vascular insufficiency involving the lower extremities.

Based on his clinical impressions, Dr. Summers estimated Claimant's permanent partial disability to the body as a whole to be 50%.

Dr. Summers testified that it is possible for nervous tension brought about as a result of injury to cause an aggravation of a chronic skin disorder as psoriasis. On cross-examination, Dr. Summers stated:

"Q. All right. Would it be a fair statement, Dr. Summers, to say that the possibility of this accident aggravating his psoriasis some six years later, in other words, from 1968 until 1974 when he went to University of Iowa Hospital, that delay would substantially reduce the possibility of one being associated with the other.

A. I suppose that would be true unless he feels that because he was injured and couldn't work, that this is what aggravated his state of mind, and I considered that possibility too."

As to the vascular insufficiency noted by Dr. Summers, he testified as follows:

"Q. What was your observation concerning the extent of the vascular insufficiency that you found in Mr. Roby?

A. Well, I did find on occasion that the arterio pulses in the lower extremities were diminished. In fact, I could find only one pulse in the feet and ankles, and customarily four all together will be felt or palpated, and it is true that he indicated to me that he had been rendered sexually impotent as a result of the injury. I felt that possibly that was in part due to the circulatory disturbance, but if so, that was further evidence to support circulatory impairment of the lower part of the body.

Q. Did you have any conclusions concerning the vascular insufficiency or circulatory impairment as it related to the multiple skeletal injuries that he had received in the accident.

A. I really didn't."

On redirect examination, Dr. Summers testified:

"Q. All right, Doctor. Now, as I understand your response to my earlier question, it was that injuries of this nature would exacerbate and cause an increasing development in any vascular insufficiency that already existed in the man, would that be correct?

A. This is possible in that the enforced inactivity brought about as a result of injury would only serve to hasten the advance of such a disease process."

Dr. Summers stated that Claimant's back problem was probably related to the accidental fall.

The testimony of A. W. Dennis, M.D., was offered by Defendants. Dr. Dennis treated Claimant for acute psoriasis during February of 1962. Claimant was hospitalized for four days. Dr. Dennis also has treated Claimant for a number of minor ailments which do not relate to the present claim.

Claimant has the burden of establishing by a preponderance of the evidence that the injury of November 22, 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 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.

The testimony of Claimant, Dr. Dubansky, and Dr. Summers established that Claimant sustained a permanent partial disability to his body as a whole as a result of the November 22, 1968, incident. Dr. Dubansky testified that Claimant sustained a 60% permanent partial disability to his left lower extremity. Dr. Summers attributed Claimant's complaints of back pain to the injury of November 22, 1968. Other than the testimony of Claimant and the histories given by Claimant to Dr. Summers and Dr. Dubansky, no evidence was offered of the treatment of Claimant from November 22, 1968, to July 20, 1972.

Claimant failed to establish that the pre-existing conditions of psoriasis and vascular insufficiency were aggravated, accelerated, worsened, or "lighted up" by the accident of November 22, 1968. Dr. Summers merely stated it is possible for nervous tension brought about as a result of injury to cause aggravation of psoriasis. No evidence was offered establishing Claimant's nervous tension. In respect to the condition of vascular insufficiency and Claimant's injury, Dr. Summers again raised a possibility. He stated, "This is possible in that the enforced activity brought about as a result of injury would only serve to hasten the advance of such a disease process." Such evidence does not meet the burden of **Burt**, supra.

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.**, 253 Iowa 285, 110 N.W. 2d 660.

Claimant is married and 67 years old. He began in the refrigeration business in 1935. Since the accident of November 22, 1968, Claimant has not worked.

Dr. Dubansky estimated Claimant's permanent partial disability to the left lower extremity to be 60%. Additionally, Dr. Summers estimated Claimant's permanent partial disability to be 50% to the body as a whole. However, Dr. Summers' estimate included the conditions of vascular insufficiency and psoriasis.

Applying the evidence offered in this case to the considerations outlined in **Olson**, supra, and **Yeager**, supra, Claimant has proved a permanent partial disability to the body as a whole in the amount of 35%.

WHEREFORE, it is found that Claimant on November 22, 1968, sustained an injury which arose out of and in the course of his employment and which resulted in a thirty-five percent (35%) permanent partial disability to the body as a whole. The permanent partial disability is compensable at the rate of forty-seven and 50/100 ($47.50) per week. It is further found that Claimant was incapacitated from working for at least one hundred five (105) weeks and is entitled to maximum healing period compensation at the rate of forty-four dollars ($44) per week.

It is further found that Claimant failed to sustain his burden of proof that the pre-existing conditions of psoriasis and vascular insufficiency were aggravated, accelerated, worsened, or "lighted up" by the November 22, 1968, incident.

THEREFORE, Defendants are ordered to pay Claimant permanent partial disability compensation for one hundred seventy-five (175) weeks at the rate of forty-seven and 50/100 dollars ($47.50). Defendants are further ordered to pay Claimant one hundred five (105) weeks of healing period compensation at the rate of forty-four dollars ($44).

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

Costs of the court reporter in transcribing the depositions of Drs. Dubansky, Summers, and Dennis and of this hearing 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 19 day of November, 1974.

DENNIS L. HANSSEN
Deputy Industrial Commissioner

No Appeal

James Sater, Claimant,

vs.

Reppert Investment Company, d/b/a Retail Merchants Delivery, Employer,
and
Fireman's Fund American Insurance Company, Insurance Carrier, Defendants.

Arbitration and Review - Reopening Decision

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

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

These are proceedings in Review-Reopening and in Arbitration brought by the claimant, James R. Sater, against his employer, Reppert Investment Company, d/b/a Retail Merchants Delivery, and Fireman's Fund American Insurance Company, the insurance carrier, to recover additional benefits under the Iowa Workmen's Compensation Act by

virtue of an industrial injury that occurred on July 31, 1971, and further to recover benefits under the Iowa Workmen's Compensation Act by virtue of an alleged industrial injury that occurred on January 10, 1973. These matters came on as a consolidated hearing before the undersigned Deputy Industrial Commissioner sitting as sole arbitrator on June 11, 1974, at the offices of the Iowa Industrial Commissioner at Des Moines. Counsel were given leave to provide additional evidentiary medical depositions. The last of these having been filed on April 11, 1975, the record was closed at that time.

An examination of the Commissioner's files reveals that a Memorandum of Agreement together with a First Report of Injury were filed and approved. The incident covered by this Memorandum of Agreement and First Report of Injury was July 31, 1971. The Commissioner's files fail to reveal that an Employer's First Report of Injury was filed in connection with the alleged industrial episode of January 10, 1973.

The claimant, age 49 and married, had been employed by the defendant employer as a driver and deliveryman since 1966. On Saturday, July 31, 1971, the claimant was doing mechanical maintenance work for his employer. He was involved in the installation of a front spring on a truck. To facilitate the removal and replacement of the spring, the truck had been jacked up on its front axle. The claimant was holding onto the axle at the time that the truck slipped off the jack, resulting in an immediate onset of severe pain in the back, neck and left arm. The claimant was allowed the appropriate medical services of Dr. Walter B. Eidbo, M.D. Dr. Eidbo prescribed a back brace and instructed the claimant to refrain from work for the next 11 weeks. Upon claimant's return to work, the doctor prescribed light duty with a limitation of 50 pounds when lifting. The claimant was unable to work until October 17, 1971. He was paid temporary total disability at the rate of $64 per week, or a total of $704. The remainder of the calendar year 1971 and continuing well into 1972 the claimant was having periods of substantial discomfort. Upon request, he was referred to Dr. Donald W. Blair, M.D., who examined the claimant on September 18, 1972. The claimant was next seen by Dr. Frank M. Hudson, and in February, 1973 Dr. Hudson performed surgery which removed the cervical spondylosis and relieved the nerve root compression. The claimant was unable to perform acts of gainful employment from February 22, 1973, until May 7, 1973. The claimant saw Dr. Blair again in July of 1973. It should be noted at this point that Dr. Blair's report of July 13, 1973, fails to note that the claimant disclosed to Dr. Blair the existence of the January 10, 1973, injury that is the subject of that portion of this controversy involving the Application for Arbitration. It should also be noted at this point that the claimant did not advise Dr. Frank Hudson of the January 10, 1973, episode. No mention thereof was made in either Dr. Hudson's report or in his evidentiary deposition.

One of the issues in this matter is determining the nature and extent of the claimant's industrial disability as a result of the industrial injury of July 31, 1971.

The claimant had a preexisting condition diagnosed as a posterior osteophyte formation at C6-C7 interspace. This diagnosis was made by Dr. Marshall Flapan, M.D., as early as March of 1970. In October of 1970 the claimant was in an automobile accident, sustaining a "whiplash" injury to the cervical spine. Claimant also fell on the ice in January of 1971, again aggravating the cervical difficulty. On July 31 an episode occurred which resulted in 11 weeks temporary total disability.

Dr. Frank M. Hudson, M.D., a neurosurgeon and a certified member of the American Board of Neurological Surgery, gave his evidentiary medical deposition. He saw the claimant for the first time February 15, 1973, the claimant having been referred to him by Dr. Eidbo. A myelogram disclosed the existence of cervical spondylosis with a nerve root compression. His examination further disclosed a decreased triceps reflex together with an increase of pain and discomfort. Cervical spondylosis is defined as a ridge of calcium which forms transversely at the level of a disc in the neck. This ridge of calcium can and does interfere with the nerve as it passes through the appropriate section of the cervical spine. The claimant withstood surgery well and returned to work May 7, 1973.

Did the July 31, 1971, industrial injury aggravate the preexisting condition that was found by Drs. Flapan, Blair and Hudson? The record supports the proposition that the claimant's discomfort and pain increased after the July 31, 1971, industrial injury, but no medical opinion is contained in this record which supports the claimant's position that the July 31, 1971, episode aggravated the cervical spondylosis.

A claimant must establish by a preponderance of the evidence that the employment incident in question 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. The record fails to support the claimant's contention that the July 31 episode aggravated the preexisting condition.

On March 11, 1974, the claimant filed an Application for Arbitration alleging that an industrial injury occurred on January 10, 1973. This Application for Arbitration is under consideration in this opinion. The claimant testified that on January 10, 1973, while sorting a load of boxes, he experienced an onset of additional symptoms and pain. The claimant, upon resting, was able to finish the loading operation which he had begun. Then, while Claimant was driving a truck later that day, the load shifted and part of the contents in the form of boxes fell and struck him on his neck.

The claimant advised his immediate supervisor, Chester Morland, of the incident. He came under the care of Dr. Shirley at the Iowa Lutheran Hospital. He was in the intensive care ward under the care of Dr. Reed, an internist. He was then discharged and received additional treatment beginning February 8, 1973,from Dr. Eidbo for his neck complaints. Dr. Eidbo in his report of June 21, 1973, fails to mention as part of the claimant's history the two alleged work connected episodes of January 10, 1973.

The claimant also failed, when answering the appropriate interrogatory, to reveal the existence of the second episode involving the "falling boxes" which is alleged to have occurred on January 10, 1973. This crucial flaw in the claimant's version of this January 10, 1973, industrial episode requires this deputy to give his direct testimony very little weight.

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 July 31, 1971, and that said injury arose out of and in the course of the claimant's duties for the defendant employer.

2. That the claimant was unable to attend to his normal duties for 11 weeks.

3. That the claimant has received 11 weeks temporary total disability at the rate of sixty-four dollars ($64) per week, or a total of seven hundred and four dollars ($704).

4. That the claimant had a preexisting cervical spondylosis.

5. That the industrial injury of July 31, 1971, did not aggravate the preexisting condition.

6. That the resulting corrective surgery of February, 1973, was not caused by the industrial accident of July 31, 1971, nor the industrial accident of January 10, 1973.

WHEREFORE, it is ordered that the claimant take nothing further from these proceedings. It is further ordered that each party bear its own costs and that the defendants pay the cost of the shorthand reporter at the hearing.

Signed and filed this 30 day of April, 1975, at the office of the Iowa Industrial Commissioner at Des Moines.

HELMUT MUELLER
Deputy Industrial Commissioner

No Appeal

Sylvan E. Schneider, Claimant,

vs.

Brady Motor Freight, Employer,
and
Carrier Insurance Company, Insurance Carrier,
Defendants.

Review - Reopening Decision

Mr. Lyle A. Rodenburg, Attorney at Law, 228 Pearl Street, Council Bluffs, Iowa 51501, For the Claimant.

Mr. R.D. Peddicord, Attorney at Law, 702 Second Avenue, Des Moines, Iowa 50309, For the Defendants.

This is a proceeding in Review-Reopening brought by the claimant, Sylvan E. Schneider, against Brady Motor Freight, his employer, and Carrier Insurance Company, the insurance carrier, to recover additional benefits under the Iowa Workmen's Compensation Act by reason of an industrial injury that occurred on November 19, 1970. This matter came on for hearing before the undersigned Deputy Industrial Commissioner on April 24, 1974, at the Office of the Iowa Industrial Commissioner at Des Moines. At the conclusion of the hearing counsel were given leave to file evidentiary medical depositions and briefs. The last of these having been filed on July 25, 1974, the record was closed at that time.

An examination of the Iowa Industrial Commissioner's file reveals an appropriate Employers First Report of Injury, a Memorandum of Agreement calling for a temporary disability rate of $61 a week and a permanent partial disability rate at $56 per week, and a Form #5 disclosing temporary disability payments of 13 1/7 weeks and permanent partial disability payments of 95 weeks have been filed. There is sufficient evidence in the record to support the following statement of facts, to wit:

The claimant, age 64, had been a heavy equipment operator and diesel mechanic during the last forty years of his work activity. On November 19, 1970, while employed by Brady Motor Freight, Inc., he fell some 15 feet from a ladder onto a concrete floor. He sustained a fracture of the right elbow and further injuries to his dorsal and cervical spine. Claimant had four major hospitalizations, the last of which was in April of 1972. The claimant continues under the care of Dr. Dwight M. Frost of Omaha, Nebraska.

This issue here is the nature and extent of the claimant's industrial disability.

The evidentiary depositions of the attending physicians at the time of the initial surgery, Drs. Robert C. Jones, M.D., and Marvin Dubansky, M.D., are a part of this record. Dr. Dubansky testified that he performed the open reduction to reduce the fractured humerus and the comminuted radial head fragments as well as performing an anterior transfer of the ulnar nerve. Dr. Jones assisted in the third surgery and he carried out a neurolysis of the ulnar nerve at that time. Dr. Dubansky concluded that in his medical opinion the claimant has sustained a 50% permanent partial disability of the right upper extremity.

Dr. Dwight M. Frost, M.D., a specialist in physical medicine and rehabilitation, examined the claimant in January of 1973 and continues to be his treating physician. Dr. Frost, in addition to

agreeing with the limitation found by Dr. Dubansky, found a cervical dorsal sprain traceable to the industrial injury in question. This sprain is aggravated by a degenerative disc disease of the claimant's cervical spine at the levels C4 through C7. Dr. Frost also found that a great deal of reactive arthritis was present at those levels. A further diagnosis indicated that Dr. Frost found a very distinct mass of muscle in spasm at the claimant's midscapula area. In order to treat this continuing medical problem, Dr. Frost has prescribed medication which the claimant is taking on an as-needed basis. The doctor further testified that the cervical sprain is permanent and is causally related to the industrial trauma. Dr. Frost further expressed the medical opinion that the claimant has sustained a permanent partial disability of 38% of the body as a whole with which Dr. Robert C. Jones, M.D., concurs.

The claimant must establish by a preponderance of the evidence that the employment incident in question 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).

The record supports the finding that is made herein, to wit, that the claimant has sustained his burden of proof.

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 has sustained an industrial injury on November 19, 1970, and that said injury arose out of and in the course of his employment for his employer.

2. That as a result of this industrial injury the claimant has sustained an industrial disability of fifty percent (50%) of the body as a whole.

3. That the claimant has not been able to perform acts of gainful employment since the date of the accident.

WHEREFORE, it is ordered that the defendants pay the claimant two hundred fifty (250) weeks permanent partial disability at fifty-six dollars ($56) a week. It is further ordered that the defendants pay the claimant a healing period of one hundred fifty (150) weeks at sixty-one dollars ($61) per week, less appropriate credits for those numbers of weeks of permanent partial disability and temporary total disability previously paid. It is further ordered that the defendants are to continue the payment of recurring medical expenses for the treatment of the industrial injury in question.

Defendants are further ordered to pay the costs of these proceedings which include the cost of the transcription of the evidentiary medical depositions of Dr. Dwight M. Frost, M.D., Dr. Robert C. Jones, M.D., and Dr. Marvin Dubansky, M.D., as well as the charges of the shorthand reporter at the hearing.

Signed and filed this 18 day of November, 1974, at the Office of the Iowa Industrial Commissioner at Des Moines.

HELMUT MUELLER
Deputy Industrial Commissioner

Appealed to District Court; Affirmed.

Gene Scrivner, Claimant,

vs.

Rock Island Motor Transit Co., Employer, Self-Insured, Defendant.

Review - Reopening Decision

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

Mr. James D. Polson, Attorney at Law, 500 Bankers Trust Building, Des Moines, Iowa 50309, For the Defendant.

This is a proceeding in Review-Reopening brought by the claimant, Gene Scrivner, against his employer, Rock Island Motor Transit Co., a licensed self-insurer, to recover benefits under the Iowa Workmen's Compensation Act by virtue of an industrial injury that occurred on November 13, 1968. This matter came on for hearing before the undersigned Deputy Industrial Commissioner sitting as sole arbitrator on February 26, 1974, at the office of the Iowa Industrial Commissioner at Des Moines. Counsel were given leave to obtain additional medical evidence by way of discovery depositions and further time within which to file the transcript of proceedings. The last of these having been filed on February 5, 1975, the record was closed at that time.

An examination of the Commissioner's file discloses that an Employers First Report of Injury has been filed as well as a Memorandum of Agreement, which was approved by this department December 11, 1968, calling for a rate of $48 per week for temporary total disability and $47.50 per week for permanent partial disability. The file also discloses and the parties stipulate that the claimant has received 75 weeks temporary total disability at the rate of $48 per week, and that the claimant has also received 125 weeks permanent partial disability at $47.50 per week.

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

The claimant, age 52, is married and has no dependent children. On November 13, 1968, while

in the course of his employment for the defendant employer, the claimant injured his spine while lifting tires to be loaded into the truck that his duties required him to drive. Claimant had surgery performed by Dr. Donald W. Blair, M.D., on January 14, 1969, at the L4-L5 level. The claimant returned to duty on May 12, 1969. On March 20, 1970, the claimant's symptoms increased noticeably, and on June 24, 1970, the claimant's pain and limitation of motion caused him to cease employment. On June 12, 1971, Dr. Blair performed the second surgery. The claimant has been intermittently employed since the second surgery as a part-time schoolbus operator. As a result of the second surgery, the claimant's physical condition did not improve as it did after the first surgery. The claimant has been under medical care and medication on a continuous basis since then.

The issue in this case is the extent of the claimant's permanent partial disability of the body as a whole.

The medical deposition of Dr. Donald W. Blair contains the doctor's opinion that the claimant has sustained a 25 percent functional disability of the body as a whole.

The claimant's yearly earnings have been markedly reduced. Wage and Tax Statements Form W-2 were introduced into the record. We repeat them here.

	Gross Income
1968	$12,044.76
1969	7,615.20
1970	$10,321.40
1971	2,759.96
1972	494.22

"Disability" as defined by the Workmen's Compensation Act means industrial disability, although functional disability is an element to be considered. **Martin v. Skelly Oil Co**., 252 Iowa 128, 106 N.W. 2d 95. In determining the 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**, 252 Iowa 1112, 125 N.W. 2d 251. The evidence supports the claimant's contention and we now so find that he is unable to perform his normal duties, and as such is entitled to appropriate consideration as to the amount of industrial disability he has sustained. It is found that the claimant has sustained an industrial disability of 55 percent of the body as a whole

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 November 13 1968 and that this injury arose out of and in the course of his duties for his employer.

2. That the claimant has sustained an industrial disability in the amount of fifty-five percent (55%) of the body as a whole.

WHEREFORE, the defendant is ordered to pay the claimant two hundred and seventy-five (275) weeks permanent partial disability at the rate of forty-seven and 50/100 dollars ($47.50) per week. Defendant is further ordered to pay the claimant a healing period of one hundred and sixty-five (165) weeks at the rate of forty-eight dollars ($48) per week, less credit for those amounts previously paid, payments commencing with the date of injury, accrued payments to be made in a lump sum together with statutory interest.

Defendant is further ordered to pay the following medical expenses:

Dr. Donald W. Blair, examination 9/19/72	$10.00
University of Iowa Hospitals, x-rays, 12/11/72	31.25
Medical Services, University of Iowa Hospitals & Clinics, Dr. C. B. Larson, examination 12/5/72	50.00
Medical Services, University of Iowa Hospitals & Clinics, Dr. David Boyer, examination 7/11/73	10.00
University of Iowa Hospitals, Back brace, 7/16/73	100.00

Defendant is further ordered to pay the costs of these proceedings including the cost of transcription of the evidentiary depositions of Dr. Donald W. Blair as well as the attendance cost of the reporter at the hearing.

It is further ordered that should the defendant elect to appeal this decision, then the defendants shall reimburse the claimant for the cost of the transcript, which has been filed at the request of and paid by the claimant.

Signed and filed this 27 day of February, 1975, at the Office of the Iowa Industrial Commissioner at Des Moines.

HELMUT MUELLER
Deputy Industrial Commissioner

No Appeal.

Jack Tracy, Claimant,

vs.

Farmegg Product, Inc., Employer,
and
Insurance Company of North America, Insurance Carrier, Defendants.

Review-Reopening Decision

Mr. Robert L. Ulstad, Attorney at Law, P.O. Box 1377, Fort Dodge, Iowa 50501, For Claimant.

Mr. Frank T. Harrison, Attorney at Law, 510 Central Nat'l Bank Building, Des Moines, Iowa

50309, For Defendants.

This is a proceeding in Review-Reopening brought by the claimant, Jack Tracy, against his employer, Farmegg Product, Inc., and their insurance carrier, Insurance Company of North America, for the recovery of benefits on account of an injury on April 29, 1974. A hearing before the undersigned was held on May 21, 1975. The case was fully submitted on December 29, 1975.

A Memorandum of Agreement was filed by Defendants and approved by the Industrial Commissioner's Office on May 14, 1974. Pursuant to this memorandum, Claimant was paid temporary disability compensation at the rate of $91 per week.

The issue to be determined is the extent of compensable disability sustained by Claimant as a result of the injury on April 29, 1974.

There is support in the record for the following statement of facts:

Claimant was injured on April 29, 1974, while loading eggs with a hydraulic lift. On this date Claimant was examined at the Humboldt County Memorial Hospital and was transferred to Trinity Regional Hospital of Fort Dodge.

Claimant was examined by Roy M. Hutchinson, M.D. Dr. Hutchinson recorded the following history:

> This is a 41 year old white male who was working at the Egg Plant when a pallet loaded with 800 pounds of eggs fell on his left shoulder. This was a glancing blow. He was taken to the Humboldt Hospital where he was seen by Dr. Northup. X-rays done there were interpreted as normal. He complained of numbness and inability to move his left arm and hand. He was sent to Trinity West for admission.

His neurologic findings were:

> Positive findings are confined completely to the left shoulder and arm. He has some loss of sensitivity in his left arm up to the shoulder. He also has dminished (sic) motor responses in his arm and hand. He can flex and extend his wrist and he can flex and extend his fingers, however, that is quite slow in response. He has pain and tenderness in the left shoulder.

Dr. Hutchinson discharged Claimant from the hospital on May 3, 1974. He recommended physical therapy as treatment for Claimant's complaints.

Dr. Hutchinson referred Claimant for examination to University of Iowa Hospitals and Clinics at Iowa City. Claimant was examined by Robert L. Rodnitzky, M.D., of the Department of Neurology. The examination of Dr. Rodnitzky revealed:

> ...On motor testing the strength in the left upper extremity was difficult to evaluate because of apparent pain on effort in the left shoulder. The patient could only produce a muscular contraction of approximately 30-50% of normal in all muscle groups in the left upper extremity. The right upper extremity and both lower extremities were normal in every regard. Sensory examination revealed a subjective decrease to pinprick and cotton perception over the entire left hand, both the palmar and dorsal surfaces and over a small 3 cm. oval area about the medial epicondyle of the elbow. Stereognosis, proprioception and pallesthesia were normal. The stretch reflexes were generally trace to 1+ in the upper extremities and 1-2+ in the lower extremities. Plantar responses were flexor bilaterally. Cerebellar testing revealed no abnormalities.

Dr. Rodnitzky reported the electromyography performed on this date as revealing no evidence of denervation in the left supra-spinatus, deltoid, triceps, and first dorsal interosseous. His conclusions were:

> There is no distinct evidence of serious neurological deficit on Mr. Tracy's examination. I believe his apparent weakness in the left upper extremity is secondary to the pain it produces when attempting to produce full volitional contraction. There is certainly no evidence of denervation on EMG examination. I feel it is likely that much of his pain originates from the shoulder and is not on a cervical-radicular basis. Hopefully the shoulder pain will resolve with time and conservative treatment. Further orthopedic evaluation of this area might be indicated.

Following the examination by Dr. Rodnitzky, Claimant continued to receive conservative treatment in the form of physical therapy until September 20, 1974. On this date, the physical therapist reported:

> On final visit patient does show improvement in the fact that he is now able to obtain past 90° on active abduction sitting. He is able to obtain about 140°. Also improvement in external rotation although these two movements still continue to give marked discomfort.

Dr. Hutchinson followed Claimant from this date until his last examination on April 2, 1975.

Dr. Hutchinson's findings on April 2, 1975, were that Claimant could abduct his left arm to 90 degrees at the shoulder; that he could put his arm behind his head; and that he had a full range of motion at the elbow. He estimated that Claimant had a 50% loss of strength in his left hand and shoulder and a 25% permanent partial disability to his body.

Claimant was examined at the request of Defendants by Thomas B. Summers, M.D., a neurologist, on August 13, 1974, and May 30, 1975. Dr. Summers' examination of Claimant's left shoulder revealed:

> ***He did display weakness of a severe degree for the entire left upper extremity. In other words, his ability to grasp with the hand or to bend the forearm or arm-- all of those movements or motions were weak. I did notice that when his attention was

distracted or when he was casually observed, he could use the left upper extremity in almost normal fashion. I noticed this when he was dressing and undressing, and I felt that this was normal. Whenever he would move the left upper extremity or whenever I would move it, he would grimace and wince, seemingly because of pain. When I attempted to put the arm up over his head, it seemed like it required maximum effort to do so. I measured his arms, and I found the right arm to measure 30 and 1/2. I have it recorded as 30 point 10; 30 and a half; three, zero, point five centimeters for the right arm, and I found the left arm to be 29 and 1/2; 29 point 5 centimeters. That was taken at the mid-arm or the mid-biceps level. When I conducted a sensory examination, he indicated that all sensations which I listed or grouped as superficial and deep, and this would include pain and vibration and touch--all of these were impaired in the entire left upper extremity, including the pectoral girdle region. In other words, the hand, forearm, the arm, and the shoulder were involved in this record. I found the tendon reflexes to be hypoactive. All of the tendon reflexes I have rated them as plus, minus. I did not find any abnormal or what is called pathologic reflexes.

Dr. Summers referred Claimant to Burton M. Stone, M.D., for an electromyogram and a motor nerve conduction velocity study. Dr. Stone reported:

> An EMG was performed on the muscles of the left upper extremity and associated neck and shoulder girdle muscles.
>
> Numerous voluntary motor units were seen in all muscles tested.
>
> Throughout the examination, this man seemed unable to provide any significant amount of strength when asked to do a forceful contraction.
>
> Considering the fact that no evidence of denervation was found in any muscle tested, this weakness seemed to be far out of proportion to what would be expected.
>
> In the neck muscles there was evidence of much irritation with many polyphasic motor units, and there were a few scattered fibrillation denervation potentials. The trapezius muscle was normal; and the other shoulder girdle muscles, including the supraspinatus and the spinatus and pectorals, were normal.
>
> In addition to this, nerve conduction velocity studies were done on the left median and ulnar nerves. The evoked potentials were normal. The nerve conduction velocities, however, were low normal.

His impression was "weakness of apparently all the muscles in the left upper extremity far out of proportion to the electrical findings."

Dr. Summers described his diagnosis as follows:

> I did not feel that there was any evidence of any serious injury or any residuals of injury that I could detect to account for his symptoms and his apparent difficulties, and for that reason I felt that-- In other words, my physical examination, the x-ray studies, and the electrical studies failed to indicate any so-called organic or physical basis for his complaints. I felt this, together with my observations, would favor a diagnosis of a so-called functional disorder or neurotic disorder, which I called a psychophysiological reaction.

He further described the psychophysiological reaction to be of a musculo-skeletal type. Dr. Summers felt that Claimant was capable of gainful employment if so motivated.

The diagnosis of Dr. Summers after his examination on May 30, 1975, was the same as his examination on August 13, 1974. He testified on direct examination as follows about the cause of such a psychophysiological reaction:

> It is felt that neurosis can develop early in life. Oftentimes this develops as a reaction, you might say, to some incident or event. Later in life a common cause of this type of response is mental depression, but this, of course, leaves many cases or a wide gap where we are frankly at a loss to identify a cause or an etiologic factor.

On cross-examination Dr. Summers testified:

> Q. Could this incident that occurred to Mr. Tracy have been that injury, that attacking of the id, that precipitating factor if not the whole cause or factor for bringing on this that you diagnosed?
>
> A. It could.
>
> Q. And the fact is based upon the history, and assuming that is the correct history, that problem is the precipitating factor, isn't it?
>
> A. It probably is, yes.

The claimant has the burden of proving by a preponderance of the evidence that the injury of April 29, 1974, 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 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.

Claimant sustained his burden of proof by a preponderance of the evidence that the injury of April 29, 1974, resulted in compensable temporary disability or healing period and permanent partial disability to the body as a whole. The testimony of Claimant and Dr. Hutchinson causally con-

nected his disability with the injury of April 29, 1974. On cross-examination, Dr. Summers causally connected his diagnosis of psycho-physiological reaction-musculoskeletal type to the injury of April 29, 1974.

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 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 which must be determined. **Barton v. Nevada Poultry**, 253 Iowa 285, 110 N.W. 2d 660.

Claimant is married and 42 years old. Following graduation from high school in December of 1952, Claimant entered the U.S. Army in 1953 and served until March, 1956. While in the Army Claimant was trained as a medical technologist and performed duties associated with that training. From March 1956 until July 1957 Claimant attended junior college in Fort Dodge. Claimant worked for the Fort Dodge Police Department from 1957 until 1970. When Claimant resigned from the police department in 1970, he held the position of night captain and was earning from $8400-$9000 per year.

Since 1970, Claimant has worked as a tree trimmer, a lab technician, a laborer, and a truck driver. His take-home earnings from these jobs ranged between $120-$150. In 1973 he took a welding course at the junior college. On November 1, 1974, Claimant began work for Crouse Manufacturing as an assembler at the rate of $3.65 per hour. On the date of the hearing, Claimant was working for this employer.

Dr. Hutchinson estimated Claimant's functional disability to be 25% of the body as a whole. Although Dr. Hutchinson made certain physical findings, he failed to support his rating by delineating which physical findings contributed what percentage of disability to his rating of 25%. Dr. Summers described his diagnosis of a psycho-physiological reaction-musculoskeletal type to be a real condition which can be disabling.

Applying the evidence offered in this case in respect to Claimant's industrial disability to the considerations outlined in **Olson** and **Barton**, supra, Claimant has proved an industrial disability of 15%. As a result of the injury of April 29, 1974, Claimant has physical limitations. These physical limitations, whether the result of objective physical findings or of a psychophysiological origin, limit to some degree Claimant's ability to perform jobs involving physical labor. However, Claimant's work history revealed vocational training in areas requiring minimal physical labor. A comparison of Claimant's earning capacity after 1970 and prior to his injury of April 29, 1974, with his earning capacity at the time of the hearing demonstrated that Claimant's earning capacity was not substantially reduced. Consideration was given by the undersigned to inflation during this period of time.

The next issue to be determined is the amount of healing period compensation due Claimant. Section 85.34(1), Code of Iowa, provides:

> Healing Period. If an employee has suffered a personal injury causing permanent partial disability for which compensation is payable as provided in subsection 2 of this section, the employer shall pay to the employee compensation for a healing period, as provided in section 85.37, beginning on the date of the injury and until he has returned to work or competent medical evidence indicates that recuperation from said injury has been accomplished, whichever comes first.

Claimant testified that he returned to work on November 1, 1974. Dr. Summers indicated that Claimant was able to return to work on August 30, 1974, if he was so motivated. Apparently Dr. Hutchinson, the treating physician, disagreed with Dr. Summers' opinion since Claimant received physical therapy treatments through September 20, 1974. The continuing physical therapy treatments for Claimant after August 30, 1974, indicated that recuperation by Claimant from the injury of April 29, 1974, was not accomplished on August 30, 1974. The healing period is determined to be from April 30, 1974, to November 1, 1974.

The parties to this action stipulated to the admission of the following bills into evidence:

Trinity Regional Hospital	$ 12.00
Trinity Regional Hospital	176.00
Dr. Hutchinson	92.00
Methodist Hospital	55.00
Dr. Tripp	40.00

The testimony of Claimant, Dr. Hutchinson, and Dr. Summers established that these bills were necessary for the treatment of Claimant.

Defendants refused to stipulate to the following bills:

Trinity Regional Hospital	$ 25.15
University of Iowa Hospitals	89.00
Humboldt County Hospital	43.75

Since no evidence was offered to support the above charges as being fair and reasonable and Defendants refused to stipulate, the charges are not allowed.

Defendants failed to advance mileage expenses to Claimant from Fort Dodge to the examination in Des Moines by Dr. Summers. Claimant testified that the distance is between 180-200 miles round trip.

WHEREFORE, it is found that Claimant sustained an injury on April 29, 1974, which arose out of and in the course of his employment and resulted in a fifteen percent (15%) permanent partial disability to the body as a whole. It is further found that Claimant is entitled to temporary disability or healing period from April 30, 1974, to November 1, 1974. It is further found that the following bills were fair, reasonable, and necessary for the treatment of the injury of April

29, 1974:

Trinity Regional Hospital	$12.00
Trinity Regional Hospital	176.00
Dr. Hutchinson	92.00
Methodist Hospital	55.00
Dr. Tripp	40.00

It is further found that Defendants owe mileage expenses for one hundred ninety (190) miles at fifteen cents (15c) per mile.

THEREFORE, Defendants are ordered to pay Claimant seventy-five (75) weeks of permanent partial disability compensation at the rate of eighty-four dollars ($84) per week. Defendants are further ordered to pay twenty-six and three sevenths (26 3/7) weeks of temporary disability compensation at the rate of ninety-one dollars ($91) per week. Defendants are further ordered to pay the above mentioned medical bills. Defendants are further ordered to pay mileage expenses for medical treatment in the amount of twenty-eight and 50/100 dollars ($28.50).

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

Witness fees shall be paid by the party producing the witness.

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 6 day of February, 1976.

DENNIS L. HANSSEN
Deputy Industrial Commissioner

No Appeal

Eva Utley, Claimant,

vs.

Treloar's Crossroads Restaurant, Employer,
and
Western Casualty & Surety Co., Insurance Carrier,
Defendants.

Arbitration Decision

Mr. Herbert R. Bennett, Attorney at Law, 2nd Floor Beh Building, Fort Dodge, Iowa 50501, For the Claimant.

Mr. David A. Opheim, Attorney at Law, P.O. Box 957, Fort Dodge, Iowa 50501, For the Defendants.

This is a proceeding in Arbitration brought by the claimant, Eva Utley, against her employer, Treloar's Crossroads Restaurant, and its insurance carrier, Western Casualty & Surety Company, to recover benefits under the Iowa Workmen's Compensation Law on account of an injury sustained on May 14, 1974. The matter came on for hearing before the undersigned at the courthouse in Fort Dodge, Iowa on October 23, 1975. The record was left open for the submission of further testimony. The record was completed November 17, 1975.

The issue to be determined in this matter is whether or not Claimant sustained compensable disability and medical expenses in addition to those previously paid as a result of an injury occurring May 14, 1974, when Claimant slipped and fell on her left elbow.

Two doctors testified in the matter. Dr. Roy Sebek, M.D., orthopedic surgeon, testified on Claimant's behalf. Dr. John Wayne Hughes, M.D., orthopedic surgeon, testified on Defendants' behalf.

Dr. Sebek first saw Claimant in January, 1975. His testimony indicates that a permanent residual exists only in Claimant's elbow as a result of the fractured radius. Claimant's rotator cuff difficulty in the shoulder and other pain will eventually subside. His opinion on these issues is indicated by his testimony on page 7, lines 10 and 11, page 11, lines 1-19, page 18, lines 13-23, page 22, lines 21-25, page 23, lines 1-9 and page 25, lines 18-23 of his deposition. The language indicating a permanent residual to the elbow is found on page 24, lines 13-20 as follows:

> A. Well, she has a part of the surface which is not perfectly smooth, and this will roll on the other bone, and it won't get smoother as time goes on; there is a little steppage difference there, and she'll rub on this, and as the years go by, she will notice some changes with weather, but they will not be severe, and this is not a severe injury, but she is left with a little irregularity over the joint surface that is not perfect.

Dr. Sebek gives no percentage of permanency.

Dr. Hughes saw Claimant on one occasion, April 4, 1975. Her principal complaint to Dr. Hughes was of shoulder pain. He notes difficulty only with Claimant's left arm. The rest of the body is not involved. Some weakness in the arm appears. It will clear in time. He notes the fracture in the elbow had healed. Apparently his indication and explanation of Claimant's difficulty is only that of temporary difficulty as set forth on page 6, lines 19-25 and page 7, lines 1-6 of his deposition:

> Q. Doctor, after having given her the examination that you have just indicated, did you come to any conclusions as to why she had the complaints that she had, as far as-- I believe you indicated she had some pain and some difficulty with movements?
>
> A. Right. It's very difficult to say. I would only say that she felt probably like many patients do when they have fractures about the wrist or the elbow or whatnot, when they are immobilized for care of that area, they can have what's called adhesive capsulitis form in the area of the shoulder. This is a

binding down of the soft tissues around the shoulder. The motion becomes restricted. I felt this is probably the process that occurred in her.

No permanent residual of the injury is noted.

Based on the opinion of both physicians it appears that no permanent residuals of the injury extend beyond the scheduled member. Based on Dr. Sebek's opinion it is found that some minimal permanent impairment exists in Claimant's left elbow as a result of the factors noted in the quoted portion of his testimony. This is found to be a five percent (5%) permanent partial disability to the left upper extremity.

The question of the duration of the healing period due Claimant under the provisions of §85.34, first unnumbered paragraph and paragraph 1, Code of Iowa, are more complex. Prior to July 1, 1973, a healing period due was limited to sixty percent (60%) of the permanent partial disability entitlement no matter how long the incapacity from earning extended. Thus in the instant case, as Claimant's permanent partial disability entitlement is 115 weeks (5% of the 230 weeks, §85.34, Code of Iowa, paragraph 2, subparagraph m), the healing period would have been limited to 6.9 weeks (60% of 11.5 weeks). On longer permanent partial disability awards the healing period extended only for the duration of the incapacity from earning, even though continuing physical problems might be present. The test for temporary total disability under §85.33, Code of Iowa, under the prior law was the same as for healing period disability. See the case of **Jeffrey v. Northwest Baptist Home Society**, Thirty-first Biennial Report of the Industrial Commissioner, 52; **Snopek v. A. J. Cromer & Sons, Inc.**, Thirtieth Biennial Report of the Industrial Commissioner, 55. As of July 1, 1973 the following language appears in §85.34(1), Code of Iowa:

* * *

> Healing Period. If an employee has suffered a personal injury causing permanent partial disability for which compensation is payable as provided in subsection 2 of this section, the employer shall pay to the employee compensation for a healing period, as provided in section 85.37, beginning on the date of the injury and until he has returned to work or competent medical evidence indicates that recuperation from said injury has been accomplished, whichever comes first

* * *

The first test of "return to work" has not been met in the instant case. The alternative test of "competent medical evidence" indicating that "recuperation from said injury has been accomplished" requires definition before its applicability can be determined. Healing period can exist only with a permanent partial disability, §85.34, Code of Iowa, first unnumbered paragraph. One with a permanent impairment can never "recuperate" completely from the injury. The recuperation necessary for cessation of entitlement to healing period benefits must therefore be less than a complete return to the former condition. In most injuries the portions of the body injured in a permanent manner are the principal portions of the body which are incapacitating to the injured employee. In those cases, resolution of when the healing period ends and permanency begins is simplified. At the point of time when the permanent rating can be made, the part of the body affected is usually described by the physicians as reaching a plateau or stabilization point. Further, change is not expected to occur without some further development, such as an intervening cause or change, anticipated or unanticipated, brought about by the injury. Other parts of the body which are injured along with the part permanently impaired usually return to normal at a time before the permanently injured person has stabilized.

An alternative inquiry to that of medical stabilization in defining recuperation is into whether or not injured employee is capable of return to substantially similar employment as that in which the employee was injured. If either of the above tests are indicated medically, the claimant may be said to have reached a point of recuperation after which healing period benefits need not be paid.

The instant case presents a somewhat unusual situation. The claimant's fractured radius, the area of permanency, had "healed" or recuperated to the maximum point that can be reached some two months following the injury. The claimant's shoulder, a part of the body that on the present state of facts is not permanently impaired, has not completely healed or stopped improvement in the minds of both physicians. Both physicians indicate Claimant is capable of some light gainful employment and that activity of a mild nature will have positive effect on Claimant's shoulder. In order to give literal effect to the dictates of §85.34, Code of Iowa, the claimant is to have her healing period duration, when a permanent impairment is present, determined as of the point in time when the doctors feel Claimant's entire condition, not just the permanent portion, has reached recuperation or stabilization **or** when the doctors indicate Claimant is able to perform substantially similar employment as that in which she was injured. The doctors, while in disagreement as to when this will occur, agree that such time is beyond the point for which Claimant has previously been paid.

In making the above ruling this deputy commissioner is aware that temporary total compensation for the same shoulder injury without permanency of the uneven radial surface due to the fracture would likely be ended under the language and interpretation of §85.33, Code of Iowa. Facts and findings based on any evidence as to capability of return to any gainful employment are not made as they are not necessary. Such a distinction may seem unjust in some circumstances. However two separate

statutory sections are involved. Different tests apply. It may well be that at some future time, a permanent impairment to the part of the body only qualifying as a temporary injury at present may result. However, a permanent impairment to a part of the body does presently exist. The claimant is thus entitled to the healing period test of §85.34(1), Code of Iowa.

In applying the two part test for cessation of healing period to the instant case the testimony of the doctors must again be examined. Dr. Sebek's testimony on page 11, lines 11-25 and page 12, lines 1-9 is as follows:

> Q. Do you have an opinion, Doctor, based on a reasonable degree of medical certainty and probability as to how long a time it will be before she returns to normal and no longer has a loss of strength and pain in her left arm?
>
> A. I would estimate -- it's very difficult to do this, but I would estimate that it will be several months, probably before she gets over this. It's improving slowly; it's not a matter of years, but it is a matter of several months yet before this should ease.
>
> Q. And by several months, can you give us some idea what you mean?
>
> A. Well, if you said ten years, we wouldn't expect ten years, but if you said five years, you'd begin to get a little bit unsure of how exact a period of time this would be, and then we figure it would be sometime probably less than that, but you get a little less certain as you get lower down, because we don't know exactly how fast somebody her age will heal.
>
> Q. It'll be sometime, then between three and five years, or less period of time than that?
>
> A. Well, it's hard to say. I mean, I just say actually several months, and that's about as close as I could really come in this, because I can't look into the future that well and tell how fast she'll heal in this area.

While Dr. Sebek notes that several years could pass, he feels Claimant would "heal" in a period of "several months". This appears to be a somewhat lengthy "several months". According to Dr. Sebek Claimant has not reached a point of medical stabilization.

Dr. Hughes notes Claimant had pain in April of 1975 and would be able to return to full employment in the near future. He apparently was looking two or three weeks into the future.

In determining whether or not Claimant has reached the point of recuperation, as above discussed, from the injury of May 14, 1974 any conflict in the testimony is resolved in favor of Dr. Hughes. Accordingly Claimant's healing period is to run from the time of the injury to the time when Dr. Hughes has indicated Claimant could resume her prior employment. This is so even though Claimant may continue to have complaints in the future which are not of a permanent nature. The date appears to be about May 1, 1975, some three weeks following Dr. Hughes' examination. The period of time from the date of injury to May 1, 1975 is fifty and one-seventh weeks (50 1/7).

It appears that Dr. Sebek's treatment was originally authorized by Defendants. Treatment remained necessary. No alternative treatment was tendered. Dr. Hughes' exam appeared to be for evaluation only. The acupuncture treatments at the Chappell Clinic and Dr. Sara Sutton were apparently authorized and acquiesced in by the defendant insurance carrier's adjuster. All treatment was for Claimant's arm and shoulder following the injury except for a portion of Dr. Sebek's charges. Prior bills of Dr. Sebek have been paid. However, Dr. Sebek's testimony indicates that on each occasion except those of May 5, 1975, May 23, 1975, and June 12, 1975 when treatment was for an injury to Claimant's right hand, treatment was necessary for and rendered to Claimant's left arm injured in the instant injury. Accordingly the following bills are found to be authorized and necessary as a result of the May 14, 1974 injury:

Dr. Roy O. Sebek	$ 56.00
Dr. Sara Sutton	142.00
Chappell Clinic	160.00

THEREFORE, Defendants are ordered to pay Claimant eleven and five tenths (11.5) weeks of permanent partial disability to Claimant's right upper extremity. Defendants are further ordered to pay Claimant fifty and one-seventh (50 1/7) weeks of healing period disability. Credit is to be given for temporary total disability benefits previously paid.

Defendants are further ordered to pay the above indicated medical bills.

Defendants are further ordered to investigate the advisability of supervised physical therapy by a physical therapist and report within thirty (30) days to the Administrative Division of the Industrial Commissioner's office as to whether or not physical therapy is to be tendered and if so by whom.

Costs of the instant proceeding are taxed to the defendants.

Signed and filed this 23 day of April, 1976.

ALAN R. GARDNER
Deputy Industrial Commissioner

No Appeal

Stanley Wachsman, Claimant,

vs.

Mason City Tile & Marble Co., Employer,
and
Liberty Mutual Insurance Co., Insurance Carrier,
Defendants.

Review-Reopening Decision

Mr. Gilbert K. Bovard, Attorney at Law, 300 Mutual Federal Bldg., Mason City, IA 50401, For the Claimant.

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

This is a proceeding in Review-Reopening brought by the claimant, Stanley Wachsman, against his employer, Mason City Tile & Marble Co., and its insurance carrier, Liberty Mutual Insurance Co., to recover benefits under the Iowa Workmen's Compensation Law on account of an injury sustained on October 13, 1969. The matter came on for hearing before the undersigned at the courthouse in Mason City, Iowa, on Wednesday, May 14, 1975. The record was left open for the submission of medical testimony. The record was completed on June 20, 1975.

The issue to be determined in this matter is whether or not the claimant sustained compensable disability and medical expenses in addition to that previously paid as a result of an injury sustained October 13, 1969.

A Claimant has the burden of proof of showing a change of condition from a prior award or agreement under a review-reopening proceeding provided for in §86.34, Code of Iowa, **Henderson v. Iles**, 250 Iowa 787, 96 N.W. 2d 321. No prior award has been issued in the instant matter. The Memorandum of Agreement does not determine the nature of the disability. **Freeman v. Luppes Transp.**, 227 N.W. 2d 143. The payment of and acceptance of a check by the claimant indicates an agreement to pay compensation. **Whitters & Sons, Inc. v. Karr**, 180 N.W. 2d 444. Neither the Memorandum of Agreement nor the acceptance of a check indicates an agreement as to the extent of disability. In fact, the evidence shows the claimant was informed by the defendant insurance carrier that they would pay him a ten percent (10%) permanent partial disability. This was a unilateral determination by the carrier based on the functional impairment rating of the employer's physician, Dr. F. Eberle Thornton, M.D., orthopedic surgeon. (See Claimant's Exhibit #1). Such a unilateral determination of functional impairment followed by the tendering of a check, neither in weekly payments nor by a lump sum, to an injured employee, who in most cases is in dire need of funds will not be held to be a binding agreement on an injured claimant as to the degree of his industrial disability. This is especially true in the current emphasis by this office that at least some benefits be paid to an injured employee at the earliest possible time. No agreement is found to exist in the instant case sufficient to create the increased burden of showing a change of condition from the time the ten percent (10%) permanent partial disability was paid.

Defendants are quite right in citing to the **DeShaw v. Energy Mfg. Co.**, 192 N.W. 2d 777, case as a good illustration of potentially applicable law insofar as Syllabus I is concerned. However, careful attention should be paid to the identity of the proceedings noted by the court in **DeShaw**. The test in A and B under Syllabus IV set forth on page 21 of Defendants' Brief relates to a review-reopening proceeding or a **first injury** at work on which a Memorandum of Agreement was filed and the scope of inquiry within the context of that proceeding for a second injury at work on which no Memorandum of Agreement was filed. An arbitration proceeding for the second injury would allow a somewhat different inquiry than was allowed in the review-reopening proceeding pending before the court on appeal.

Whether or not the result Defendants see on the evidence in this case is correct depends upon the analysis of the evidence to be made below. Defendants appear to have admitted that Claimant in fact sustained some disability as a result of this injury. As the full extent of the industrial impairment has not been properly agreed upon or inquired into, the effect of this injury on earning capacity may now be examined. In contrast to the situation in the **DeShaw** case, a second injury need not be tied into a first injury.

Whether or not Defendants' payment of disability is considered an admission, Dr. Thornton's report of March 3, 1971, indicates the likelihood of permanency of ten percent (10%) or less from this injury. His May 8, 1973, report indicates continuing temporary disability and that no permanent rating could be made at that time. Dr. George I. Tice, M.D., indicates a disability that he feels could well have resulted from this injury. As no prior problems of significance were noted by the claimant, this is a sufficient establishment for this deputy commissioner to find causation between the injury and some permanent disability based upon Dr. Tice's testimony in addition to the other matters noted. Also to be noted is Dr. Tice's testimony:

> A. Well, it had been five years since the injury-- well, not quite. And he had not really changed that much. I would expect it to, but after a period of four or five years, you begin to doubt whether it is. You also begin to doubt whether anything will.
>
> * * *
>
> A. Well, that thing has been established by time and he's probably not going to get that much better.
>
> * * *

Q. And is that permanent?

A. I think so.

The above indication is sufficient to allow permanency to be found as presently existing as a result of this injury.

Apparently the congenital condition of a spondylolisthesis, the injury, and an arthritic condition all contribute to Claimant's disability according to Dr. Tice. While each factor is not as clearly separated as could be ideally desired, Dr. Tice obviously ties in some permanent problems to the instant injury. This is especially so in view of the lack of difficulty before the instant injury. Dr. Tice indicates Claimant to be one hundred percent (100%) disabled for heavy labor and fifty percent (50%) disabled for other purposes. On cross-examination, Dr. Tice indicates:

> Well, it's hard to be exact. And I will say that if you have a man that has a fairly quiet job and doesn't demand these extra things on him, I suppose you could cut it down to thirty percent. But certainly, I think most jobs he's going to be restricted.

It should be noted that Dr. Tice is giving what amounts to an industrial evaluation. While his opinion is of value, the ultimate determination for industrial disability is to be made by this deputy commissioner. The important factor is that a permanent disability to the body exists which is a result of this injury. Also important is its aggravation of other conditions which existed prior to the injury. The effect on this man's ability to earn wages and all factors bearing on this are to be determined by this deputy commissioner.

It should be noted that the examination by Dr. Tice was made prior to a raking episode indicated by the claimant around Easter of 1974. The claimant, through Dr. Tice and Dr. Thornton's opinion, has established a physical impairment as a result of the instant injury which preexisted the 1974 raking episode. Whether or not the raking episode was a contributing factor to Claimant's disability is a matter yet to be determined below.

Claimant testified his right leg became bad the day after the 1974 raking. While the condition remains, it is improved. Claimant indicates some change after the 1974 raking incident. Claimant also indicated difficulty following the sweeping of a carpet at home in the nature of increased back ache and leg pains. While the evidence is somewhat sketchy as to the result of the raking and sweeping and its origin, raking appears to have been a separate activity superimposed on prior difficulties. Dr. Walker notes the raking to have caused a completely separate sacroiliac strain. Dr. Walker's testimony stands uncontradicted as to the raking episode. The sweeping is found to be of no significance. The raking episode is found to be a separate and distinct incident. The raking strain appears to be of minimal concern physically and will likely clear in the future according to Dr. Walker. In view of Claimant's lack of ability to earn wages before the raking and the testimony of Dr. Walker, the raking and effect on the body is found to be of minimal concern industrially. Likewise, the preexisting conditions noted by Dr. Tice and others, are found to be of minimal concern industrially as Claimant had no significant difficulty prior to the injury of October 13, 1969.

Dr. Walker saw Claimant in October of 1972, and again in December of 1974. He notes Claimant has a mild spondylolisthesis and a mild degenerating disc at the L-5 level. These difficulties predate the October 13, 1969, incident. Superimposed on this problem is a sprain of the lumbosacral area. Claimant is essentially the same according to x-rays in 1974 as in 1972. Dr. Walker rates Claimant's impairment due to all difficulties at eight percent (8%) of the whole man. He notes that a fusion of the low back area affected by the spondylolisthesis would result in a fifteen percent (15%) impairment. He describes the difference in rating as a paradox. The difficulties would be lessened but the rating increased.

> Then it would be 15 per cent of the body as a whole, and this is paradoxical, because this is the standard of work that I would think would be proper for a man who had undergone spinal surgery, even though if it would have been corrected, basically as a defect; but this man does have trouble, and he does have fusion, and I have done this operation which, or fuse these two joints, and I would then consider his permanent disability would be 15 per cent of the body as a whole.

In viewing all the medical testimony, no question appears but that some permanent impairment exists as a result of the October 13, 1969, incident. With such impairment existing, the result of the October 13, 1969, incident on Claimant's earning capacity must be determined. As previously noted, the preexisting condition and raking incident are found to be insignificant industrially. The October 13, 1969, incident resulted in a definite change in Claimant's prior good earning capacity. Claimant's work history is of moderately heavy labor. He seems to have some supervisory skill and experience. He has various abilities from occupations he has attempted. However, since the date of the injury, Claimant has tried several things and has found that he has great difficulty in performing any tasks involving lifting. The difficulty is so great that he had to stop the various activities. Claimant is in his sixties. No matter what the degree of physical impairment, it is found that the existence of physical impairment when combined with all other factors, results in a forty percent (40%) permanent partial industrial disability.

Emphasis was placed on Claimant's reluctance to submit to surgery. No negative sanctions are

imposed as a result of the refusal, even if such negative sanctions are available. The doctors' testimony indicates as clearly as can be expected that different opinions exist in this matter as to necessity of back surgery. No doctor assures that a good result will follow although Dr. Walker is optimistic.

It should be noted that while Claimant was rated by Dr. Walker at eight percent (8%) impairment due to all factors prior to surgery and fifteen percent (15%) as opposed to the surgery figure, Dr. Walker feels Claimant would be able to work with less difficulty following surgery. This requires two comments. First, that the degree of actual physical impairment is sometimes a poor indicator of true industrial disability as illustrated. Secondly, no matter what the condition might be following surgical intervention, this deputy commissioner cannot speculate as to the future effect of something which has not occurred.

It appears that even with the times worked, as indicated by the claimant, the claimant has been totally incapacitated due to the effect of the October 13, 1969, injury upon his body as it existed prior to the injury for at least one hundred twenty (120) weeks. It is so found.

Medical expenses were placed into evidence subject to a resolution of questions as to their relevancy to the October 13, 1969, injury and questions of authorization by the defendants. The expenses are as follows:

Claimant's Exhibit #3
St. Joseph Mercy Hosp.-Mason City, IA
October 23, 1974, admission $262.00

Claimant's Exhibit #4
L. C. Orton, M.D.
Charges dating from
2/10/72-3/21/75 ..... 220.00

Claimant's Exhibit #5
Anderson Wheelchair & Therapeutic Supply
and
Rochester Orthopedic Appliances ... 96.60

Claimant's Exhibit #6
Medical Arts Pharmacy
Charges from 1/1/74-11/11/74 ..... 109.24

Claimant's Exhibit #7
Miscellaneous pharmacy bills
12/74 to date of hearing 45.23

Claimant's Exhibit #9
Dr. F. Eberle Thornton, Spencer Hosp.
1973 examination 73.00

Claimant's Exhibit #10
Mayo Clinic
October 3, 1972, admission 432.70

Claimant's Exhibit #11
Mayo Clinic
November 9, 1973, admission 263.90

Claimant's Exhibit #3 appears to be for treatment immediately following the raking incident in the spring of 1974. In view of the claimant's testimony and Dr. Walker's testimony, this expense is not allowed.

Claimant's Exhibit #4 is, likewise, not allowed. It is apparent that Claimant feels one hundred forty-eight dollars ($148) of the charges relate to the leg difficulties following the raking. It is impossible to tell, based upon available testimony, what the purpose of other charges prior to the April, 1974 date might be. Defendants are encouraged to pay prior portions of this bill if they are satisfied the treatment is for problems due to the instant injury, as opposed to treatments for colds, sore throats, etc. Due consideration is to be given to the findings in this decision in making this determination.

Claimant's Exhibit #5 for the appliances noted is allowed as related to the difficulties brought about by the instant injury. It should be noted that the Mayo Clinic bill is considered authorized as will be discussed below. The recommendations of Mayo's insofar as shown by Claimant's Exhibit #5 are considered authorized.

Claimant's Exhibit #6 is for the "conditions you [Claimant] have been testifying to". Likewise, the same is indicated as to Claimant's Exhibit #7. It is noted Claimant testified to both results of the instant injury as well as the difficulties after the raking incident, approximately two weeks prior to Easter, 1974. The deputy commissioner takes official notice of the fact that Easter in 1974 fell on April 14, 1974. The raking apparently occurred on or about April 1, 1974. All portions of Claimant's Exhibit #6 prior to April 1,1974, are allowed based upon Claimant's testimony. That sum is twenty-seven and 90/100 dollars ($27.90). One-half the sums after April 1, 1974, are allowed as necessitated by the October 13, 1969, injury. The grand total allowed from Claimant's Exhibit #6 is sixty-eight and 57/100 dollars ($68.57). Claimant's Exhibit #7, likewise, covers time affected by both conditions. One-half this amount of twenty-two and 62/100 dollars ($22.62) is allowed. It should be noted that Claimant's testimony amply corroborates his taking of the noted medications. In particular, Bufferin is indicated by the claimant and approved by the doctors.

Claimant's Exhibit #9 appears to be authorized as Claimant was tendered Dr. Thornton by the insurance carrier. No evidence of the defendants indicates that it was brought home to the claimant that he was to seek treatment elsewhere and not to return to Dr. Thornton. Likewise, Dr. McCoy's treatment appears to have been acquiecsed in by the defendants. Dr. McCoy referred Claimant to the Mayo Clinic. The claimant's testimony and that of other doctors indicate Claimant went to the Mayo Clinic solely for his back difficulties precipitated by the October 13, 1969, injury. Accordingly, the charges are allowed. A claim for mileage to the Mayo Clinic for two trips and to Waterloo, Iowa, for two trips is allowed. Apparently this issue has been resolved by consent of the parties.

As was previously noted at the hearing,

Claimant's Exhibit #12, a motel bill, is disallowed as no provision exists for its payment in §85.27, Code of Iowa.

THEREFORE, Defendants are ordered to pay Claimant two hundred (200) weeks of permanent partial disability compensation at the rate of forty-seven and 50/100 dollars ($47.50). Defendants are further ordered to pay Claimant one hundred twenty (120) weeks of healing period disability compensation at the rate of forty dollars ($40) per week. Credit is to be given for amounts previously paid.

Defendants are further ordered to pay or reimburse the claimant or, if appropriate, any group carrier of the employer under §85.38, Code of Iowa, the following sums:

Claimant's Exhibit #5	$ 96.60
Claimant's Exhibit #6	68.57
Claimant's Exhibit #7	22.62
Claimant's Exhibit #9	73.00
Claimant's Exhibit #10	432.70
Claimant's Exhibit #11	263.90

Costs of the proceeding are taxed to the defendants.

Signed and filed this 24 day of November, 1975.

ALAN R. GARDNER
Deputy Industrial Commissioner

No Appeal

Arlene M. Wieser, Claimant,

vs.

United States Gypsum Co., Employer,
and
American Motorists Co., Insurance Carrier Defendants.

Review-Reopening Decision

Mr. Robert L. Ulstad, Attorney at Law, P.O. Box 1377, Fort Dodge, Iowa 50501, For the Claimant.

Mr. Tito W. Trevino, Attorney at Law, Seventh Floor, Snell Building, Fort Dodge, Iowa 50501, For the Defendants.

This is a proceeding in Review-Reopening brought by the Claimant, Arlene M. Wieser, against her employer, United States Gypsum Company, and its insurance carrier, American Motorists Company, to recover benefits on account of an injury sustained on July 2, 1974. The matter came on for hearing before the undersigned on Thursday, October 23, 1975. The record was left open for the submission of further testimony. After the completion of testimony the final briefs were submitted on December 1, 1975.

The issue to be determined in this matter is whether or not the claimant sustained compensable disability and medical expenses in addition to that previously paid as a result of an injury sustained July 2, 1974, when Claimant was involved in removing a piece of wallboard which had become jammed when an assembly line had broken down.

It should be noted that credibility of both Claimant and Defendants' witnesses is affected by indications of unidentifiable difficulties, perhaps separate from this proceeding, perhaps not. The motives of both parties may be affected by these unidentifiable difficulties. The noted union grievance and attitudes and testimony of certain Defendants' witnesses give rise to the above comments. It is the responsibility of this deputy commissioner to attempt to sort out what is the real result of Claimant's injury uncolored by other circumstances.

A conflict in testimony is presented as to the severity of Claimant's injury on July 2, 1974. The conflict is resolved in favor of a finding that the injury to Claimant was not only an abrasion but involved the jerking of Claimant's arm and shoulder. In view of reliance on Dr. Thomas B. Summers' opinion as to lack of physical damage at later times, the presence of a psychophysiologic reaction to the injury and the finding of no permanent impairment, the fact that an injury occurred, no matter what its mechanism, is the significant factor.

It is found based on both physician's testimony that no permanency exists. Even the physician called by Claimant, Dr. Roy O. Sebek, indicates Claimant will continue to improve. Dr. Summers finds nothing but a psychophysiologic result of the injury as of the last examination. All indications are that the condition is treatable and will improve.

The doctors do not disagree that Claimant's "seizures" or blackouts are related to the instant injury. It is so found. However, the opinions as to the mechanism of the seizures are in conflict. Dr. Summers' diagnosis that the blackouts were a result of a psychophysiologic result is accepted. It should be noted that no epilepsy is found to exist in Claimant. Dr. Summers' opinion as to the psychophysiologic reaction to the trauma being the cause of Claimant's difficulties is accepted over Dr. Sebek's opinions. Dr. Sebek's opinion that Claimant "fell over backwards" following her seizures and subsequently injured her low back is not considered as his "thoughts" are not supported by any indication that Claimant actually fell in such a manner. No actual physical impairment is found to exist at present. More evidence is needed in this proceeding than Dr. Summers' alternative reference to malingering to allow a finding of malingering.

Claimant is continuing to have symptoms. However, no evidence shows that Claimant is totally incapacitated from all gainful employment. Dr. Donald J. Lulu, M.D. of the Kersten Clinic, indicated that Claimant could return to full employment following Dr. Summers' examination in the fall of 1974. Dr. Sebek, while his testimony

does not preclude employment, defers to Claimant's own desires. Claimant's continuing complaints, although of a psychophysiologic nature, after the seizures or blackouts stopped do not appear to be totally disabling. However the risk involved in working when Claimant had seizures appears great. Accordingly it is found that Claimant was totally incapacitated from all gainful employment for the duration of the time she was affected by the seizures. Evidence indicates the seizures continued until April, 1975. The last mention of a fainting spell or seizure was in the April 15, 1975 visit to Dr. Sebek. It is found that Claimant was temporarily and totally incapacitated from all gainful employment from July 2, 1974 up to April 15, 1975, a period of forty weeks and six days. This is compensable at the indicated rate of ninety-five and 25/100 dollars ($95.25).

The only bills for which claim is made are for Dr. Sebek's treatment and the late 1974 hospitalization at Dr. Sebek's insistance. These changes might be compensable except for one important factor. Defendant had made available the services of the Kersten Clinic in Fort Dodge and Dr. Thomas Summers, M.D., a neurologist, in Des Moines. Dr. Summers had directed Claimant to appear for further testing and treatments similar to that performed by Dr. Sebek. Claimant chose not to appear as directed by Dr. Summers. It is found that Defendants tendered adequate and competent care. Claimant chose to seek other treatment on her own and thus did so at her own expense.

It is found, based on Dr. Summers' diagnosis and indications, that treatment by a psychiatrist may be of benefit to Claimant. Accordingly Defendants are to tender the services of a qualified psychiatrist to Claimant. The tender is to include the names of three competent psychiatrists. Claimant may choose one. The tender is to remain open for acceptance for sixty (60) days. Upon acceptance the treatment is to continue at Defendants' expense until psychiatric testimony indicates further treatment is unnecessary or unrelated to the instant injury.

THEREFORE Defendants are ordered to pay Claimant forty and six-sevenths (40 6/7) weeks of temporary total disability compensation at the rate of ninety-five and 25/100 dollars ($95.25) per week. Credit is to be given for the temporary total disability benefits previously paid.

Defendants are ordered to tender psychiatric treatment as above described.

Costs of the proceeding are taxed to the defendants.

Signed and filed this 22 day of April, 1976.

ALAN R. GARDNER
Deputy Industrial Commissioner

Appealed to District Court; Decision Pending

Edward J. Walters, Claimant,

vs.

Black Hawk Construction Company, Employer, and

Hawkeye-Security Insurance Company, Insurance Carrier, Defendants.

Review-Reopening Decision

Mr. Louie Beisser, Attorney at Law, 2nd Floor Beh Building, Fort Dodge, Iowa 50501. For the Claimant.

Mr. Robert L. Ulstad. Attorney at Law, 403 Snell Building, Fort Dodge, Iowa 50501, For the Defendants.

This is a proceeding incorrectly styled in Arbitration brought by the claimant, Edward James Walters, against Black Hawk Construction Company, his employer, and Hawkekye-Security Insurance Company, the insurance carrier, to recover benefits under the Iowa Workmen's Compensation Act by virtue of an alleged injury that occurred on August 22, 1973. This matter came on for hearing before the undersigned Deputy Industrial Commissioner sitting as sole arbitrator on October 22, 1974, at the courthouse in and for Webster County at Fort Dodge, Iowa. At the conclusion of the evidence, the record was left open by agreement of the parties for the purpose of obtaining and filing appropriate dental reports and a brief and argument. The last of these having been filed on February 11, 1975, the record was closed at that time.

An examination of the Commissioner's file fails to reveal an Employers First Report of Injury as having been filed. In the Answer filed by the defendants it may be noted that the contract of employment was admitted and further that the claimant did receive an injury to his jaw on that date. The defendants in the Answer further offered to pay 7 days of workmen's compensation in addition to $286.00 for dental work. At this point a caveat is in order. Sections of the Iowa Code that require examination are as follows:

> "86.11 **Reports of injuries.** Every employer shall hereafter keep a record of all injuries, fatal or otherwise, sustained by his employees in the course of their employment and resulting in incapacity for a longer period than one day. If the injury results only in a temporary disability, causing incapacity for a longer period than seven days, then within forty-eight hours thereafter, not counting Sundays and legal holidays, the employer having had notice or knowledge of the occurrence of such injury and resulting disability, a report shall be made in writing, by the employer to the industrial commissioner for that purpose. If such injury to the employee results in permanent total disability, permanent partial disability or death, then

the employer, upon notice or knowledge of the occurrence of the employment injury, shall file a report with the industrial commissioner, within forty-eight hours after having notice or knowledge of the permanent injury to the employee or his death.

"86.12 **Failure to report.** Any employer who willfully fails to make the reports required by this chapter shall be liable to a penalty of fifty dollars for each offense to be recovered by the commissioner. The commissioner shall be represented by the county attorney of the county in which such proceedings is brought."

An examination of the Industrial Commissioner's file reveals a major administrative problem occured by the defendants' failure to file an appropriate First Report of Injury as required by the above. While the record fails to disclose that the failure on the part of the Hawkeye-Security Insurance Company to file the required First Report of Injury was willful, this opportunity must be taken to admonish the defendant, an insurance carrier recognized as an expert in the administration of workmen's compensation insurance and a major underwriter of this type of coverage in this state, to review its procedures and take those appropriate steps necessary to prevent a recurrence of a misunderstanding of this type in the future.

In view of the evidence presented, it is clear that this matter was incorrectly styled as an "Application for Arbitration." The record does not dispute any of the following items:

1. That the claimant was an employee on August 22,1973.
2. That the claimant was injured on August 22, 1973, while in the course of his employment.
3. That his gross wages were $120 per week.
4. That the industrial injury in question arose out of the claimant's employment.

The Answer filed by the defendants in tendering the payment of 7 days temporary total disability in addition to $286.00 dental expense is hereby held to constitute a Memorandum of Agreement as contemplated by Section 86.13.

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

The claimant, age 27, is married and resides near Fort Dodge. He was employed by the defendant employer as a bricklayer tender for some three months prior to the date of the industrial accident in question. He was receiving as wages $3 per hour. On August 22, 1973, while pushing a loaded wheelbarrow up a plank preparatory to unloading its contents, the claimant slipped and fell, striking his mouth and jaw on the back of the wheelbarrow. He sought medical assistance from Dr. J. J. Landhuis, M.D. Dr. Landhuis took X-rays of the facial bones, closed the cut in the claimant's lip with appropriate sutures, and made the notation that the upper left incisor was "knocked out." In the absence of instructions to the contrary, the claimant sought the services of Dr. Edward R. Wafful, D.D.S., on August 24, 1973. In lieu of testimony, the report of the dentist, Dr. Wafful, was made a part of the record by stipulation of the parties. On October 22, 1973, the defendants, exercising the option contained in Section 85.39, arranged for the examination of the claimant by Dr. R. W. Kruger, D.D.S. Dr. Kruger testified at the hearing.

There is a substantial variance between the estimates of the cost of the repair and replacement of the claimant's teeth. Dr. Wafful was of the opinion that the reasonable cost of repair of the injuries sustained by the claimant would be $1,423. Dr. Kruger indicates that in his judgment the repair required of the claimant's teeth by reason of the industrial injury in question should run $286.

Therein lies the issue in this case.

It is agreed in the Defendants' Brief and Argument that Section 85.27, while making no reference to dental care or dentures, that by virtue of an attorney general's opinion of 1916 and a letter published by the Iowa Industrial Commissioner on March 12, 1960, setting forth this department's policy, dentures come within the interpretation of medical appliances as referred to.

The claimant was sent to Dr. Landhuis by his employer. The First Report of Injury, belatedly introduced into the record as Defendants' Exhibit "C," clearly indicates that the Hawkeye-Security Insurance Company knew that the superintendent of their insured and the defendant employer in this matter, Black Hawk Construction Company, did send the claimant to the Kersten Clinic for treatment. It was the act of this physician, chosen as the appropriate attending physician by the employer, that indicated to the claimant that he might choose a dentist. The claimant acted in a normal, prudent, reasonable manner when he sought out the assistance of his family dentist, Dr. Wafful. Dr. Wafful, some two days after the injury, reported as follows:

"I saw Mr. Edward Walters right after his accident in my office on 8-24-73. He had just come from Kersten Clinic where he had emergency treatment and his lacerated lip sutured. His upper central incisor had been knocked clean out of the gum and upper jaw bone. The right central was badly chipped and loose. The upper right cuspid, lateral, left lateral and left cuspid were loose and sore. The lower six front teeth were also loose and sore. He had chipped the back teeth when the teeth had slammed together, and a couple teeth were decayed and chipped also. His gums were sore, swollen and bleeding. He had a fracture of the maxillary bone, and I wanted to make a removable temporary

partial denture (or splint) right away to stabilize the bone, teeth, and gums, and do a thorough prophylaxis so that he could start regular oral hygiene. He could not care for and clean his mouth and teeth very well as sore as it was. For a nice looking, big husky young fellow, he looked pretty badly hurt by the accident."

A careful reading of the testimony of Dr. Robert W. Kruger, D.D.S., discloses that he saw claimant professionally for the first time November 7, 1973. On this basis, the dentist's testimony could not be persuasive on the question of the condition of the claimant's teeth prior to the industrial injury. On the other hand, the family dentist relates that the claimant was a member of the armed services, having been discharged in 1967. As a matter of judicial notice, it is found that the claimant received proper and adequate dental care for the term of his service in the armed forces from 1962 to 1967.

The family dentist further reports that the claimant had had regular dental service, and specifically advises in his report of December 26, 1974, that the claimant had sound natural teeth before the accident.

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. 2nd 607; **Bodish v. Fischer, Inc.**, 257 Iowa 516, 133 N.W. 2nd 867. The claimant has sustained the burden of proof, and having sustained this burden, the remaining question is one of the reasonableness of the requested dental care. Clearly the testimony of the family dentist, Dr. Wafful, D.D.S., is to receive the greater weight in an attempt to resolve the fact issue presented. Based upon his personal knowledge, his ongoing dental examinations of the claimant are sufficient to rebut and to allow this deputy to disregard the testimony of Dr. Kruger.

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, while an employee of the defendant employer, sustained an industrial injury on August 22, 1973.

2. That said industrial injury arose out of and in the course of the claimant's employment.

3. That as a result of said industrial injury, the claimant has now lost two incisors, requiring replacement.

4. That the claimant further sustained other damage to adjoining teeth requiring replacement by a permanent fixed bridge.

5. That the estimate of one thousand four hundred twenty-three dollars ($1,423) rendered by Dr. Edward R. Wafful, D.D.S., is fair and reasonable.

WHEREFORE, it is ordered the defendants pay the claimant one week temporary total disability at the rate of sixty-eight dollars ($68) per week.

It is further ordered that the defendants pay the fair and reasonable costs of repair of the claimant's teeth, not to exceed one thousand four hundred twenty-three dollars ($1,423).

It is further ordered that the defendants pay the costs of these proceedings as well as the cost of the shorthand reporter present at the hearing.

Signed and filed this 4 day of March, 1975, at the Office of the Iowa Industrial Commissioner.

HELMUT MUELLER
Deputy Industrial Commissioner

Appealed to District Court; Dismissed

Ronald Arthur Witt, Claimant,

vs.

Henke Manufacturing Corporation, Employer,
and
Bituminous Casualty Company, Insurance Carrier,
Defendants.

Review-Reopening Decision

Mr. Jay P. Roberts, Attorney at Law, P.O. Box 119, Waterloo, Iowa 50704, For the Claimant.

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

This is a proceeding in Review-Reopening brought by the claimant, Ronald Arthur Witt, against his employer, Henke Manufacturing Corporation, and its insurance carrier, Bituminous Casualty Company, to recover benefits under the Iowa Workmen's Compensation Law on account of an injury sustained on May 23, 1973 and an injury allegedly sustained October 22, 1973. The matter came on for hearing before the undersigned at the courthouse in Waterloo, Iowa, on Thursday, June 5, 1975. The record was left open for the submission of further testimony. After repeated requests for information, the record was closed by order of this office on December 18, 1975. The record was reopened on January 12, 1976 after application. The record was ultimately completed on February 25, 1976.

The issue to be determined in this matter is whether or not the claimant sustained compensable disability in addition to that previously paid as a result of an injury occurring on May 23, 1973 and whether or not Claimant sustained an injury arising out of and in the course of his employment with the defendant employer on October 22, 1973. No medical bills were placed in evidence. Defendants have paid Claimant 20 2/7 weeks of temporary total disability for the time beginning May 24, 1973 and ending October 14, 1973.

Claimant testified to an injury occurring on May 23, 1973 while lifting a heavy steel bar-like structure. He felt a snapping sensatioin in his low back. Claimant's back hurt and his legs felt numb shortly after the May 23, 1973 date. The numbness in Claimant's legs appeared to develop when a "needle" was stuck "in his back" when hospitalized shortly after the accident in Waterloo, Iowa. Claimant was thereafter taken to the University Hospitals in Iowa City where he apparently spent several weeks. Claimant ultimately returned to work in October of 1973 upon being released by a physician. No dispute appears to exist as to the compensability of Claimant's disability between the May 23, 1973 date of injury and Claimant's return to work on October 14, 1973.

When Claimant returned to work he indicated his legs had a "little bit" of numbness. During the month of October of 1973 Claimant testified he "rehurt" himself when he lifted a four feet long piece of iron. As he bent down he felt the same "snap"as he felt in May, 1973. He told his foreman of this occurrence and was sent to a doctor.

Claimant was not hospitalized immediately. His back hurt "from the back of my neck all the way down to my toes." Claimant indicates he limps at present and has limped since the injury. Claimant feels his condition is worsening. He has numbness in "...my left arm and middle, the lower part of my back, and down my left leg." Claimant indicates he can do nothing at present and has difficulty walking. He has headaches nearly every day.

On cross-examination Claimant testified as follows concerning the injury of October, 1973 as found on page 28, lines 14 - 19 of the transcript of testimony:

Q. Did it snap right in the same place?

A. No.

Q. Different place?

A. I don't know if it did or not.

Q. Couldn't you tell?

A. It was hurting all the time.

This vagueness in answering combined with the omission of mention of a specific injury in the history given to doctors at the Mayo Clinic subsequent to the hearing, gives rise to sufficient question so as to lead to a finding that no injury occurred in October, 1973. All that was experienced was the difficulty inherent in Claimant's condition which became apparent upon performing the activity. Claimant's lack of history is indicated by Dr. Robert H. Cofield, M.D., of the orthopedic section at the Mayo Clinic as found on page 6, lines 8 - 11:

Q. And did he mention to you any incident in October of 1973?

A. I remember his saying that he tried to go back to work at that time and that caused him more pain. I don't remember any specific incident.

The sole question remaining is whether or not Claimant suffered compensable disability as a result of the May, 1973 injury after October of 1973. Claimant testified he worked only one week in 1974. As he was unable to perform the work his employer released him as Claimant "couldn't handle" his job. The defendant apparently had no light work available for Claimant.

It can be noted summarily that while Claimant complains of problems in his arms and upper portions of his body, Dr. Cofield notes only difficulties due to this injury in Claimant's back. Claimant indicates his condition has grown worse since he was last employed. This worsening is significant in determining Claimant's entitlement to disability as will be discussed later.

The only medical evidence properly in the record is for the time period between May of 1973 and October, 1973 and the stay at the Mayo Clinic in August, 1975. There is no medical evidence as to Claimant's ability to work following October, 1973 to August of 1975. In view of Dr. Cofield's findings which tend to contradict the testimony of the claimant as to the severity of difficulty, and in view of Claimant's testimony that Claimant's condition had grown worse from October, 1973 to the time of the hearing, Claimant's actual condition appears not to have been greatly disabling between October, 1973 and the last point upon which evidence was presented. Dr. Cofield has indicated Claimant should not return to heavy work. However, Claimant must be totally incapacitated from all gainful employment to qualify for temporary total disability. Claimant has not shown by a preponderance of the evidence that he was totally incapacitated from work by only his own statements when such contradictory indications from the medical profession are present. That Claimant had difficulties due to this injury as well as other sources cannot be disputed. The evidence does not preponderate in Claimant's favor that the difficulties brought about by the May, 1973 injury totally disabled the claimant from all gainful employment.

Dr. Cofield noted some difficulties in Claimant's lumbar spine. However, his testimony has constant reference to terms such as minimal and slight. Dr. Cofield uses the term "difficulty" in performing tasks, even with reference to heavy activity. He does not state Claimant is "unable" to perform many activities.

Before a discussion of permanency, reference must be made to the admissibility of certain medical reports. Medical reports attached to Claimant's Answers to Interrogatories are in evidence. Reference is made in Dr. Cofield's deposition to the neurology department at the Mayo Clinic. In fact he quotes from one portion of a report from the neurology department. No objection was made. At the close of the deposition of Dr. Cofield and beginning on page 17, lines 17 - 25, and page 18, lines 1 - 18, the following conversation with reference to medical reports transpired between counsel:

A. Well, just on the one examination like I said before, he experienced mild to moderate discomfort in moving his spine.

Mr. Roberts: All right. I have no further questions. Did you want to offer those two letters?

Mr. McClintock: Well, I think we might as well put -- they are admissible under the Rules the way it is anyway, all the reports.

Mr. Roberts: I will stipulate to putting these two from Doctor Cofield in.

Mr. McClintock: Well, we have got these other reports too.

Mr. Roberts: If you want to go into the neurology report, we can do that without the Doctor.

Mr. McClintock: Let me just ask you this, Doctor. In your examination did you review the records that were made and notations made by Dr. Phillip Brown and by Doctor Goldstein?

WITNESS: Yes

Mr. McClintock: Ok. So that you were aware of what they had done before, their work-up --

WITNESS: Yes.

Mr. McClintock: -- their findings, so that is all a part of your background with respect to this patient?

WITNESS: Yes, sir.

Mr. McClintock: And that was all done right here at the Mayo Clinic.

WITNESS: Yes.

Mr. McClintock: Ok. That's all I have.

The "Rules" referenced in line 22, page 17 are not described. These could be the "Rules" of evidence or a newly adopted Rule of the Industrial Commissioner not applicable to the instant proceeding, see Rules of the Industrial Commissioner found in the Iowa Administrative Code at 500-4.17. It is apparent that at least reports of Dr. Cofield were such that if introduced they could go into evidence. Dr. Cofield's deposition was taken with the reports available. Every opportunity for cross-examination concerning the reports was present. For these reasons the referenced reports of Dr. Cofield are admissible. It should be noted that only one report was in fact submitted to this office, a report dated December 19, 1975. Two additional reports were submitted to this office for consideration. A report dated September 11, 1975 of Dr. N. P. Goldstein, M.D. and a report dated September 9, 1975 of Dr. Philip W. Brown, M.D. were submitted. Both doctors are in the neurology department of the Mayo Clinic. In view of the lack of objection to the reference to the findings of the neurology department in Dr. Cofield's depositions the reports are considered. The reports are part of the systems analysis of the Mayo Clinic referenced by Dr. Cofield. Although defense counsel did not completely identify or consent to the admission of the reports at the time of the deposition of Dr. Cofield a detailed objection was made at a later date. In any event the two neurology reports are considered as part of the evidence in this matter.

The final date for completion of the **reopened** record was February 13, 1976. In this one instance, this deputy commissioner will overlook a minor violation of an order closing the record and allow the later evidence consisting of Dr. Cofield's deposition (filed with the Industrial Commissioner February 23, 1976) and the above noted medical reports of the Mayo Clinic (filed with the Industrial Commissioner February 25, 1976) to be considered.

Nothing in significant conflict with Dr. Cofield's opinion and findings based thereon appears in any reports. Perhaps the indication that complaints were present to a greater degree than related to Dr. Cofield exists. This possible conflict is resolved in favor of Dr. Cofield's version. Dr. Brown does indicate a desire to provide Claimant with more diagnosis and therapy. Dr. Goldstein indicates that any left arm difficulties are unrelated to any injury presently before the Industrial Commissioner.

Determination of whether or not permanency exists requires interpretation. Dr. Goldstein and Dr. Brown do not indicate whether or not a permanent condition exists. Dr. Edward Sitz, M.D. does not approach the aspect of permanency. Dr. D. W. Nibbelink, M.D., of the Iowa City University Hospital Department of Neurology indicates in an April, 1974 report, that if Claimant's difficulty persists up to a year, little restitution of function will occur. The function is Claimant's walking ability. The report while dated in April, 1974 appears to be from the prior Iowa City visit in 1973. In view of the opinion of later physicians and a much improved condition of the claimant, the opinion of Dr. Nibbelink as to permanency dwindles in weight. Any conflict between his opinion and that of Dr. Cofield is resolved in favor of Dr. Cofield.

Dr. Cofield, in a report of December 19, 1975, refers to a five percent permanent rating. However, Dr. Cofield's deposition taken January 29, 1976 indicates he feels Calimant will have a slow but gradual resolution of the problem. If a problem will resolve itself, no permanency would exist.

The instant case appears to present a situation where the injured employee is having difficulty due to a compensable injury which prevents or interferes with the performance of heavy labor but is not totally incapacitating from all gainful employment. The difficulty is not of a permanent nature. Accordingly no weekly benefits in addition to those previously paid are due. However, indication from the Mayo Clinic is that further physical rehabilitation services may be helpful.

THEREFORE, the relief sought by Claimant in addition to the weekly benefits previously paid is denied, except that Defendants are to tender an adequate physical rehabilitation program to the claimant. The tender is to remain open for sixty (60) days following this decision. If the tender is

accepted within the alloted time Defendants shall furnish the physical rehabilitation program and other appropriate services contemplated by §85.27, Code of Iowa, for as long as necessary due to the instant injury. The rehabilitation counselor of the Industrial Commissioner's Office is available for consultation in developing an adequate program.

SO ORDERED.

Costs of the proceeding are taxed to the defendants.

Signed and filed this 9 day of June, 1976.

ALAN R. GARDNER
Deputy Industrial Commissioner
Appealed to District Court; Decision Pending

Carl M. Witt, Claimant,

vs.

Merchants Delivery, Inc., Employer,
and
Illinois National Insurance Co. & State Of Iowa,
Insurance Carrier, Defendants.

Review-Reopening Decision

Mr. Thomas J. Wilkinson, Jr., Attorney at Law, 830 Higley Building, Cedar Rapids, Iowa 52401, For the Claimant.

Mr. David F. McGuire, Attorney at Law, 214 First Avenue Building, Cedar Rapids, Iowa 52401, For Defendant, Illinois National Insurance Co.

Miss Dorothy L. Kelley, Assistant Attorney General, State Capitol, Des Moines, Iowa 50319, For Defendant, State of Iowa.

This is a proceeding in Review-Reopening brought by the claimant, Carl M. Witt, against his employer, Merchants Delivery, Inc.; their insurance carrier, Illinois National Insurance Company; and The State of Iowa for the recovery of benefits for injuries sustained by him on December 26, 1972. The case came on for hearing before the undersigned Deputy Industrial Commissioner on September 18, 1975. The case was fully submitted on October 10, 1975.

DIVISION I

The issue to be determined in this division is the extent of compensable disability due Claimant from Defendant Employer and Defendant Insurance Carrier as a result of the injury of December 26, 1972.

A Memorandum of Agreement was filed by Defendant Employer and Defendant Insurance Carrier and approved by this office on February 5, 1973. Pursuant to this Memorandum, Claimant was paid 20 weeks of temporary disability compensation at the rate of $68 per week.

On December 26, 1972, Claimant sustained burns to his left leg when his pant leg was inflamed as a result of a backfire from one of Defendant Employer's trucks. Following the injury, Claimant was hospitalized at St. Luke's Hospital until February 2, 1973. He was treated by Campbell Watts, M.D.

On December 11, 1974, Claimant was evaluated by Donald D. Wier, M.D., medical director of the Rehabilitation Center at St. Luke's. Dr. Wier estimated the disability to Claimant's left leg to be 5%. In his deposition on September 26, 1975, Dr. Wier reiterated his disability rating of 5%.

No evidence was presented that Claimant's injury of December 26, 1972, was not limited to his left leg. Since the left leg is a scheduled member, the ability to earn wages is not a factor in determining the disability to a scheduled member. **Barton v. Nevada Poultry,** 253 Iowa 285, 110 N.W. 2nd 660.

The rating of Dr. Wier was determinative that Claimant sustained a 5% permanent partial disability to his left leg as a result of the injury of December 26, 1973.

WHEREFORE, it is found that Claimant on December 26, 1973, sustained an injury which arose out of and in the course of his employment and resulted in a 5% permanent partial disability to his left leg. It is further found that Claimant was incapacitated from working for at least 6 weeks and is entitled to maximum healing period compensation.

THEREFORE, Defendant Employer and Defendant Insurance Carrier are ordered to pay Claimant ten (10) weeks of permanent partial disability compensation at the rate of sixty-three dollars ($63) per week and six (6) weeks of healing period at the rate of sixty-eight dollars ($68) per week.

Credit is to be given to Defendant Employer and Defendant Insurance Carrier for compensation already paid by them. Since Defendant Employer and Defendant Insurance Carrier have already paid in excess of the amount determined by this order, no further payments are due from them.

DIVISION II

The issue to be determined in this division is the extent of compensable disability due Claimant under the provisions of the Second Injury Compensation Act.

In addition to the 5% disability to the left leg, Claimant's left hand was amputated as a result of a corn picking accident in 1957. Claimant's combined disabilities qualify him under the Second Injury Compensation Act for a determination of his industrial disability. 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. 2nd 251.

Claimant is married and the father of three children. He was born on October 18, 1924. After quitting school at the end of the eight grade, Claimant worked on farms until he enlisted in the United States Marine Corps at the age of seventeen. His primary duty while in the Marine Corps the next four years was driving a truck.

After his discharge from the Marine Corps and until his injury on December 26, 1972, Claimant worked as a farmer, a heavy equipment operator, a cab driver and a truck driver. Claimant testified that a change in I.C.C. and D.O.T. regulations pertaining to drivers with an amputated limb reduced the opportunities available to him in pursuit of his vocation of a truck driver.

Following the accident of December 26, 1972, Claimant started his own trucking business. A summary of his tax returns for the years 1972, 1973, and 1974 is as follows:

	1972	1973	1974
Wages:			
Federal Hybrid Seed Corn	$ 306.25	-0-	-0-
Merchants Delivery	1,000.00	-0-	-0-
B.J. Contract	704.68	-0-	-0-
Linn-Jones FS Services	-0-	$1,938.79	-0-
Net self-employment income (loss):			
Kenwood Cafe	(1,887.00)	-0-	-0-
Carl's Truck Line	-0-	212.00	(3,663.00)
Net rental income (loss)	799.00	2,137.00	(1,577.00)
Gain on sale of real estate	-0-	2,371.00	-0-

Dr. Wier examined Claimant on December 11, 1974. His examination of Claimant's left leg was as follows:

> He walked with a very minimal limp. He did have well healed split thickness skin grafts applied to the distal, anterior, medial aspect of the left leg with a donor site on the right thigh, medial, lateral areas of the thigh. That was well healed.
>
> The area where the skin grafts had been applied, that skin was thin, scarred minimally, dry, with some superficial scaling, but no active ulceration or other lesions. There was some reduction of size of the muscle mass of the leg, the muscles of the left leg. The left calf was slightly smaller than the right. Measured ten inches above the internal malleolus, it was one-half inch smaller, but in the thigh area the circumference twenty-four inches above the medial malleolus was about an inch and a quarter smaller around in circumference than the right one. However, the power of the muscles seem fairly good with a single exception that the left quadriceps was slightly weaker compared to the right as we were able to test it.
>
> He had a well healed scar at the wrist level of the left hand but surgical absence of the hand. That is, the hand was totally amputated.
>
> Then the general examination otherwise was really essentially unremarkable. There was some slight reduction in sensation in the involved skin area, not a total absence from sensation, but when tested by touching with vibration, pinprick, there was some slight reduction of the ability to perceive the sensory stimuli as compared to other areas.
>
> The neurological and general examination otherwise were pretty much normal.
>
> Oh, he did have a scar that apparently related to repair of a hiatus hernia but we felt this was incidental to this examination.

Dr. Wier estimated Claimant's disabilities to be 5% of the left leg and 90% of the left arm. In combining the disabilities, Dr. Wier projected Claimant's disability to the body as a whole to be 60%, 55% attributable to he left arm and 5% attributable to the left leg.

Dr. Wier testified about Claimant's impairment as follows:

> A. Well, we felt that the principal source of impairment would be related to his hand amputation and that this would be about the same as it had been over the years, and he seemed to be able to, you know, manage well, relatively well, despite the hand amputation. So we felt that would probably continue to be the case, but there would certainly be limits of the sorts and kinds of things that he might be able to do.
>
> Q. Could you give examples of the limits? He was, I believe, a truck driver.
>
> A. Well, I suppose the principal problem is that he wouldn't have quite the same kind of control of a steering wheel while shifting with his right hand as one would prefer to see, and I guess one would have to question, you know, whether that would be altogether safe and appropriate to, you know, just use a stump to control the steering wheel, especially in the context of if something unexpectedly came up. Obviously he would have trouble carrying anything that would involve grabbing with both hands to manage it or hang onto it or lift it. It would be totally dependent on just one hand as far as pinch-grasp-release type of functions. And this would be an impairment for a variety of sorts of activities, so there would be many kinds of jobs in the same manufacturing plant that he just simply wouldn't be able to do which have to be done with two hands.

He further testified about the impairment in Claimant's left leg as follows:

> A. Well, I think here we have a little bit more complicated proposition. What we were mostly relating to was impairment of mobility due to the, you know, skin involvement that is the direct result of the thermal burn, and that shouldn't really be very disabling at all. In fact he had really

quite good motion. The problem is really one more of strength, and there really was as far as we could determine no basis for his being weak except that he had not built up the strength in the muscles sufficient to overcome the effects of the prolonged period of inactivity at the time his burns were healing. That I wouldn't necessarily regard as permanent because, of course, from our prospective (sic) that is something that should be correctable more or less completely. It would, however, involve a system of active exercises and so forth that a person would have to carry out. So if he couldn't do it, then I would presume that he had not accomplished those exercises sufficiently to, you know, finish the job so to speak. From what we could tell, however, there would be no reason that he couldn't accomplish this, given some chance to build up his strength and endurance.

Q. Now, with respect to the ulcerations or eruptions as a result of bumping the leg, is this something that continues?

A. Yes, tends to be. The skin is not completely like healthy full thickness skin. It's thin, it tends to be drier in part because the glands that help secrete material to lubricate the skin just aren't there in normal quantities, so the skin tends to be rather dry, to scale, to itch such that a person might scratch it, and if it does get bumped, since it's only half as thick or a fraction as thick as skin normally is, it doesn't have quite the resistance to injury. So bumping or scraping is likely to cause an ulcer that would not be the case on normal skin.

Dr. Wier believed a guard could be designed to protect the leg from trauma.

Applying the above evidence to the considerations outlined in **Olson**, supra. Claimant proved an industrial disability of 47%. The testimony of Dr. Wier is determinative that the primary source of Claimant's industrial disability is the amputation of his left hand. The amputation resulted in the application of the I.C.C. and D.O.T. regulations which limited Claimant in his vocation of a truck driver. The injury to the left leg contributed very little to his total impairment. Dr. Wier believed that Claimant could increase the strength and endurance in his left leg with exercises. He also noted that a protector could be designed to protect the scarred area from bumping or scraping.

The 47% industrial disability award must be reduced by deducting the compensable value of the previously lost members, i.e., 47% of 500 weeks less 90% of 230 weeks and 5% of 200 weeks. After reducing the award, Claimant is entitled to 18 weeks of compensation at the rate of $63 per week.

WHEREFORE, it is found that Claimant on December 26, 1973, sustained an injury which entitled him to benefits from the Second Injury Fund in the amount of eighteen (18) weeks at sixty-three dollars ($63) per week.

THEREFORE, Defendant, State of Iowa, is ordered to pay Claimant eighteen (18) weeks of permanent partial disability compensation at the rate of sixty-three dollars ($63) per week.

Signed and filed this 14 day of November, 1975.

DENNIS L. HANSSEN
Deputy Industrial Commissioner

No Appeal

Florence Barnett, Claimant,

vs.

Community School District, Employer,
and
Iowa National Mutual Insurance Co., Insurance Carrier, Defendants.

Review-Reopening Decision

Mr. Robert L. Ulstad, Attorney at Law, P.O. Box 1377, Fort Dodge, Iowa 50501, For the Claimant.

Mr. Frank T. Harrison, Attorney at Law, 510 Central National Bank Building, Des Moines, Iowa 50309, For the Defendants.

This is a proceeding in Review-Reopening brought by the claimant, Florence Barnett, against her employer, Fort Dodge Community School District, and its insurance carrier, Iowa National Mutual Insurance Company, to recover benefits on account of an injury or occupational disease sustained in the fall of 1973. The matter came on for hearing before the undersigned in Fort Dodge, Iowa, on Thursday, February 5, 1976. The record was left open for the submission of medical testimony. The record was completed on February 23, 1976.

The issue to be determined in this matter is whether or not the claimant sustained compensable disability and medical expenses in addition to that previously paid as a result of exposure to soap at the defendant employer's place of business.

A memorandum of agreement for an injury of December 10, 1973 is on file. The defendants have paid claimant a total of six and six-sevenths (6 6/7) weeks in sick leave and workmen's compensation benefits for the exposure which, according to Claimant's testimony, occurred in the weeks preceding December 10, 1973, when she was washing dishes at the defendant's facility. The principal issues to be resolved are whether or not further difficulties sustained by Claimant are a result of the exposure of the weeks preceding December 3, 1973, for which a Memorandum of Agreement is on file; and whether of not the dif-

ficulties sustained by Claimant were a result of subsequent exposure at work or otherwise.

Claimant testified that beginning in October of 1973 or thereabouts, her hands began to break out. Finally on December 17, 1973, she went to Dr. Herb Kersten, M.D. at the Kersten Clinic in Fort Dodge, Iowa. Dr. Kersten's diagnosis was that of eczematoid dermatitis having its origin in exposure to a soap product at work. Claimant testified that the "...only thing that it 'could' have been..."was the change in soap products at work. The change was apparently to a pink soap product. Defendants' evidence contradicted this as the pink soap product was not put into use until after November 22, 1973. However, a change early in the fall of 1973 in soap manufacturers occurred. The same manufacturer of the pink soap was the soap manufacturer to which Defendants changed in the fall of 1973. In view of the testimony of Dr. T. Michelfelder, M.D., dermatologist, concerning the difference between a "primary irritant" and "allergic reaction" as discussed in his opinion and as will be the subject of findings later in this opinion, the change in soaps is not of great significance. Perhaps other evidence concerning the exposures and medical probability could be discussed at this point concerning the exposure preceding December 10, 1973. There is question in this deputy commissioner's mind concerning the causation of the exposure which preceded the December 10, 1973 disability. In view of Defendants having on file a Memorandum of Agreement for this exposure, such discussion is not necessary.

Dr. Kersten released Claimant to return to work at mid-January, 1974. Claimant returned on what is found to be January 15, 1974, and suffered an immediate outbreak. On January 17, 1974, Claimant saw Dr. Michelfelder at the Kersten Clinic. Claimant indicated she was off work for two more weeks. Claimant's time cards indicate Claimant was "ill" during the week commencing December 10, 1973. Claimant was "gone" during the week ending January 13, 1974. During the week ending January 19, 1974, Claimant apparently worked one day, a Tuesday. This appears to have been January 15, 1974. Claimant apparently worked a full week for the week ending Friday, February 1, 1974. Claimant apparently returned to work on January 28, 1974, following her flare-up on return to work on what was apparently January 15, 1974. The time from December 10, 1973, inclusive of January 14, 1974, is five and one-sevenths (5 1/7) weeks. The time inclusive of January 16, 1974, up to January 28, 1974, is one and five-sevenths (1 5/7) weeks. Claimant's history of no prior problems, the doctors' testimony, and condition of the claimant indicate that a work related experience in the fall of 1973 caused the weeks of lost time. The total time compensable for this exposure is thus six and six-sevenths (6 6/7) weeks. The problems in disability noted to this point are found to be related and a continuation of the original exposure in the fall of 1973 for which the Memorandum of Agreement is on file. It should be noted the Memorandum of Agreement was for a given exposure. The above weeks of temporary total disability are found to be the proximate result of the exposure for which the Memorandum of Agreement was filed.

Claimant was then placed in a position at the defendant's facility where no exposure to soaps occurred. The period of time shown on the time cards in evidence indicates Claimant was working regularly after January 28, 1974. She had some continuing difficulties which were apparently not disabling. In December of 1974, Claimant returned to Dr. Michelfelder. The history given Dr. Michelfelder was that Claimant was involved with washing dishes with no soap involved yet had difficulty. Dr. Michelfelder felt Claimant's hands were infected. It should be noted at this point that the claimant's testimony was that until early 1975 she continued to do cleaning work for other people. Her exposure to irritants and those other activities is not certain in view of the testimony that Claimant used a nonsoap product. However, Claimant apparently had this reaction and was not exposed to a soap product at defendant's place of employment. In approaching Claimant's difficulties in December of 1974, Dr. Michelfelder's dishpan hands concept is used to indicate that Claimant should "be kind to broken skin." However, it should be noted that although the dishpan hands concept could arguably be a continuation of Claimant's original problem, other causes appear present. Note also the condition at this time was not totally incapacitating.

Dr. Michelfelder indicated that he saw Claimant in May, 1975, for examination purposes. Claimant still had some dermatitis present. Dr. Michelfelder said he felt the dermatitis was work related. He felt Claimant should avoid "...cleaning solution, soaps, etc."

A casual look at the development and progression of Claimant's difficulties as indicated by Claimant's testimony and portions of Dr. Michelfelder's testimony, seems to indicate Claimant had an exposure at work which created a propensity for reacting to soaps, cleaners and perhaps even water. No prior problems are noted. However, Claimant's other activities of cleaning for other people, apparently throughout 1974, and important portions of Dr. Michelfelder's opinion, rebut any prima facie case which may have been made. Had further testing been performed, the reality of Claimant's condition may have been different than herein found. However the testing, such as a patch test for allergies, was not performed. As complex as dermatitis can be, careful study of the medical experts' opinion must be made to determine what the reality established by the evidence before this deputy commissioner in fact becomes.

Significant is Dr. Michelfelder's testimony on page 11, lines 18 - 25 and page 12, lines 1 - 10:

> Q. Doctor, then we have a condition here where, I believe, you talked about the reduced ability of the skin to resist injury when exposed to, in this case, strong deter-

gents. We have a detergent that is irritative to the skin, sensitize it. Would that be a fair statement?

A. Not necessarily. There are two types of contact dermatitis. One is what we call primary irritant dermatitis that most people would react to. For example, if you patch tested somebody with just plain gasoline, everything would react. If you diluted that maybe one part gasoline, maybe five parts of olive oil, something like that, only those people who were allergic to gasoline would react to it.

So, we are talking about primary irritant contact dermatitis or allergic contact dermatitis.

It is my opinion that this was not an allergic affair but probably a primary irritant affair, although I did not test her.

It is found based upon Dr. Michelfelder's opinion that all that is established is an exposure to a primary irritant. This does not "sensitize" the skin or, apparently, create any permanent propensity for action other than would exist in most people or as indicated by Dr. Michelfelder earlier on page 11, accompany aging. If the employment furnishes the primary irritant, and if the evidence or other factors establish that this is so, then the result of exposure to the primary irritant is compensable, even though any human being would react to the irritant. This appears similar to the exposure to cold which creates frostbite. An employee so exposed to cold in the circumstances where the work exposure is greater than the non-work exposure has a compensable injury or injurious exposure. As previously found, based in part on evidence and in part on defendants filing of a Memorandum of Agreement, several weeks of disability as a result of compensable exposure are found in late 1973 and early 1974.

In view of Dr. Michelfelder's opinion that no sensitization has occurred and thus no permanency established the circumstances of later exposure must be examined. The Memorandum of Agreement does not release Claimant from her burden of proof on this later exposure. **Freeman v. Luppes Transport Co.**, 227 N.W. 2d 143. From January, 1974 to December, 1974, an eleven month period, Claimant's difficulties were apparently minimal. She sought no medical treatment. She continued with her employment at Defendant and worked at approximately the same time cleaning for other establishments. While her testimony emphasized contact with water and possible other materials, such as hand lotion at the defendant facility, Claimant's testimony also indicated she had contact with similar substances in her cleaning work for others. Note here that upon Claimant's return to work in January, 1974 she was placed in another position in the dishwashing line away from the exposure for which the Memorandum of Agreement was filed. Also significant is that while Dr. Michelfelder certainly "feels" Claimant's problems have their origin at work with the defendant, he is not fully informed of Claimant's other activities and in fact concedes he is unsure as to what Claimant was exposed. Perhaps the best summary of his awareness of the lack of foundation for his opinion is indicated on page 29, lines 5 - 25:

Q. Doctor, one question. Since we are relying kind of on the temporal aspect, the fact that when she is in it she is breaking out, if that were the case and yet if she is coming back and breaking out when she is not in it but in water?

A. Yes.

Q. I think the last time she was washing dishes but only with water. Could there be some irritant that is causing that dermatitis that she is still exposed to?

A. It is possible.

Q. What kind of irritants can there be that cause this, perfume, clothing?

A. Practically anything. There are women who will walk into, say, the yarn shop out here and just get, itch. It is this sort of thing. It can be anything one can be allergic to.

I had one patient who gets the hives when he takes a shower, water. I send him down to Iowa City. He has what we call aquagenic urticaria. Poor guy takes a bath and breaks out. So, it can be anything in the world.

Based on the above comments from Dr. Michelfelder's testimony the findings are that Claimant has failed to establish the requisite degree of probability that any permanency exists and that Claimant's exposure after January, 1974 was disabling or caused by exposure to soaps at work or any exposure at work. To make such a finding would require speculation as to the nature of the irritant to which Claimant was exposed and the source of the irritant to which Claimant was exposed. Neither of these was indicated to be work related so as to allow any finding of compensability. In any event the exposure was not disabling.

The bill marked as Claimant's Exhibit 1 from the Professional Pharmacy is for medication rendered at a time when Claimant's difficulties are found not to be established as work related. It is accordingly not allowed. No other medical bills were introduced into evidence.

Also in dispute is the weekly rate of compensation due Claimant. The evidence shows Claimant became disabled after prior exposure as of the work week beginning December 10, 1973. The time cards for the prior week, during which the most recent exposure and that apparently precipitating disability occurred, show Claimant working three days. Claimant worked seven hours on Monday, five hours on Tuesday, and six hours forty-five minutes on Friday. Examination of other time cards and testimony indicate Claimant ordinarily worked five days per week at six hours

per day. Nothing shows that the Wednesday and Thursday of the week prior to December 10, 1973 would be any different as the school appears to have been in operation. The customary hours for the pay period of which Claimant was working are found to be seven hours Monday, five hours Tuesday, and six hours forty-five minutes Friday as those were in fact worked in the pay period. Examination of other weeks to determine what is customary in a pay period in which Claimant worked is not necessary except for the days in the pay period when Claimant did not work. Time worked is a prima facie showing of what is customary **in that pay period.** Examination of other evidence is necessary to determine the customary time for Wednesday and Thursday of that pay period. Based on above noted evidence the customary time worked is six hours for Wednesday and six hours for Thursday. Section 85.36 the first unnumbered paragraph and paragraph one of the Code of Iowa provides:

> **Basis of compensation.** The basis of compensation shall be the weekly earnings of the injured employee at the time of the injury. Weekly earnings means gross salary, wages, or earnings of an employee to which such employee would have been entitled had he worked the customary hours for the full pay period in which he was injured, as regularly required by his employer for the work or employment for which he was employed, computed or determined as follows and then rounded to the nearest dollar:
>
> 1. In the case of an employee who is paid on a weekly pay period basis, the weekly gross earnings.

The total of the working hours worked by Claimant is thus thirty and three quarters hours. Claimant's hourly rate is one dollar and eighty cents ($1.80). Claimant's gross weekly wage apparently paid weekly for the pay period during which exposure resulted in disability is fifty-five dollars and thirty-five cents ($55.35). Claimant is married with four children who qualify as exemptions. Claimant's weekly compensation rate is thus forty-one dollars and forty-two cents ($41.42).

No evidence is presented that Claimant's earnings are less than that for a full-time worker in the same line of industry or that the earnings in any manner qualify for any exception found in Section 85.36, Code of Iowa. It should be noted that no provisions of Section 85.36, Code of Iowa, in effect in December, 1973, except that pertaining to seasonal employment, considered earnings Claimant made from other employment.

THEREFORE, Defendants are ordered to pay Claimant six and six-sevenths weeks (6 6/7) at the weekly rate of forty-one dollars and forty-two cents ($41.42). Credit is to be given for the amounts previously paid at the lesser rate.

Cost of the proceeding are taxed to the defendants.

Signed and filed this 21 day of May, 1976.

ALAN R. GARDNER
Deputy Industrial Commissioner

Appealed to District Court; Decision Pending

Leo M. Bixby, Claimant,

vs.

Edwards Bakeries, Inc., Employer,
and
Liberty Mutual Insurance Co., Insurance Carrier
Defendants.

Review-Reopening Decision

Mr. Thomas R. Schulz, Attorney at Law, 301 Northwest Tower, Davenport, Iowa 52806, For the Claimant.

Mr. Thomas F. Daley, Jr., Attorney at Law, 600 Union Arcade Building, Davenport, Iowa 52801, For the Defendants.

This is a proceeding in Review-Reopening brought by the claimant, Leo M. Bixby, against his employer, Edwards Bakeries, Inc., and its insurance carrier, Liberty Mutual Insurance Company, on account of an injury on March 8, 1972. A hearing before the undersigned was held on October 29, 1975. The case was fully submitted on March 12, 1976.

A Memorandum of Agreement was filed by Defendants on February 9, 1973. Pursuant to this memorandum, Claimant was paid 7 5/7 weeks of temporary disability compensation at the rate of $64 per week.

The issue to be determined is whether Claimant is entitled to additional compensation as a result of the injury of March 8, 1972.

On March 8, 1972, Claimant injured his back when he slipped on ice in the parking lot of a food store while making deliveries for his employer. At the request of Claimant's family physician, a Dr. Swearingen, Claimant was examined on April 28, 1972, by John E. Sinning, M.D., an orthopedic surgeon.

Dr. Sinning noted in his history an injury to Claimant on March 8, 1972. Dr. Sinning's examination revealed the following:

> Mr. Bixby was examined undressed, wearing undershorts. I noted that he was a big-well-muscled man who moved about without any evidence of distress. He stood erect without a list, that is, without leaning abnormally to either side, and he was able to bend forward, rounding out his back normally. I measured the amount his back stretched out as he bent forward at four and a half inches, which is a normal range of forward bending. The lateral bending of his back was normal. He was able to walk normally of his tiptoes and on his heels, and he was able to hop nor-

mally on either foot. Straight leg raising was tested and was negative to ninety degrees, showing no sign of sciatica. The calves of his legs measured equally at fourteen and three-quarter inches, showing no relative disuse of either leg. The reflexes at the knees and ankles were brisk and normal. There was no tenderness as I squeezed the calf in his legs. The muscle groups of both legs were tested and found to be normal. With pressure over the low back there were no specific areas of discomfort, although the left sacroiliac seemed the most uncomfortable. There was no muscle spasm, there was no muscle irritability as I palpated over the upper and lower back. That concluded my examination.

X-rays ordered by Dr. Swearingen and taken at St. Luke's Hospital were reviewed by Dr. Sinning. Dr. Sinning testified that the x-rays appeared normal.

Dr. Sinning's impressions concerning Claimant's back problem were as follows:

> ...So far as the back was concerned, I found nothing to indicate any important dysfunction. Based on the findings of the back moving perfectly well without spasm, without evidence of irritability of the muscles, with no evidence of nerve deficit and with no finding of atrophy or weakness in any of the muscle groups, I felt that a course of exercises which might strengthen low back and abdominal support muscles was a reasonable course to pursue. This suggestion was made in hopes of strengthening muscles to compensate for any weakness which might have followed from his time off work and his injury. But it should be recognized that these suggestions were made based on Mr. Bixby's subjective complaints and without objective findings on which to base these recommendations.

He also expressed the opinion that Claimant's inability to work was not directly related to his back.

During April of 1972, Claimant returned to work for Defendant Employer and worked for Defendant Employer until his resignation on approximately August 5, 1972. In August of 1972, Claimant was hired by Jancey Engineering Company as a machinist. He worked for Jancey Engineering until he began work for J. I. Case Company in February, 1973.

On April 5 and 12, 1973, Claimant was examined by Dr. Sinning. He was referred to Dr. Sinning by a representative of Defendant Carrier. The following history was taken by Dr. Sinning:

> Mr. Bixby told me that he had begun work at J. I. Case as a machinist about six weeks before my examination. His job was running lathes and mills, picking up ten to twelve pounds at a time for his machine. Sometimes he would bend over, reaching into a tub to pick up the pieces. He told me that he would rather be driving but was not able to do this because of pain in the back, especially at the junction of the thoracic and lumbar spine, with this pain radiating both upward between his shoulders and downward. He told me that driving a truck to Iowa City had caused that kind of pain for two or three days, and he felt he would not be able to handle that kind of work on a regular basis. Driving his car to his parents' home forty-five miles away caused soreness in the back that would persist for days. The pain would be so intense that he could hardly breath (sic). He told me he was aware of a change in his disposition so that he was easily upset, in addition to having headache. He described the headache as mainly on the right side from the back of his head to the forehead. He complained of pain in his left big toe. He said that lying in bed with his arm at his side or lying on his side, that his arm would become numb, and he would not be able to move it. This happened three times. Then he would move the left arm, which was getting numb, with the right arm until the feeling would come back and he could move it normally. He complained of the major pain at the junction of the thoracic and lumbar spine. * * *
>
> He told me the pain had been about the same for the previous month. He also complained of neck pain. He said the pain was so bad he could scream. With chiropractic treatment, he was pretty good for a day or so, and then the pain would gradually come on again and gradually worsen. He said if he was nervous, the pain was particularly bad. He was taking one Darvon a day.

X-rays ordered by Dr. Sinning of Claimant's cervical, thoracic, and lumbosacral spine were interpreted by him to be normal. Dr. Sinning was unable to make any objective findings to support Claimant's complaints. He testified:

> I would say that, specifically, I was looking for some findings on which to base a reason to limit Mr. Bixby in his work, and that I found no objective findings of impairment on which to base any recommendation to limit his work in any way.

On September 17, 1975, Claimant was hospitalized at Mercy Hospital by a Dr. Anderson. Dr. Anderson asked Dr. Sinning to see Claimant in consultation because of his back complaints. Dr. Sinning recorded the following history:

> Q. First of all, what history did he give you?
>
> A. He told me that he had continued work at J. I. Case, working as a machine operator. He told me that he was ordinarily doing his work but with some difficulty if it required heavy lifting, that is, more than forty pounds. He said that during the first part of the lifting

procedure, he had pain, and it was difficult to do the lifting; but, once the weight was up to the level of his waist, he could then lift it all right. He said he ordinarily was using a crane when there was any heavy lifting to be done. He told me that he had begun having more trouble with his back -- excuse me, that is an incorrect statement. The onset of his back trouble for which he was hospitalized had been during a time of layoff from work, and the problem for which he was hospitalized was not related to work. He had had the onset of severe and virtually paralyzing back pain following a cough. He tried to get up. He coughed again, fell to his knees and had to be helped up again. The pain was not helped by medication, and so he had been hospitalized on September 17 by Dr. Anderson.

Dr. Sinning's impression following his examination was an acute strain of the back with a strong element of anxiety. He testified:

> That means that Mr. Bixby's presentation of his difficulty was extraordinarily dramatic; that the physical examination, though it demonstrated virtually no objective evidence of dysfunction of the back, was accompanied by gesturing, over tensing of the muscles, a dramatic presentation of his difficulties.

Dr. Sinning recommended physical therapy, the use of a Hubbard tank, and a psychiatric evaluation if his symptoms persisted.

Claimant was last examined by Dr. Sinning on September 24, 1975. His examination was as follows:

> ...He reported that his back felt good, and that his only complaint was some pain in the buttock and thigh when he would sit with his legs up and extended in front of him, that is, position of sitting with his legs up on a footstool or another chair. My examination was near repeat of the examination conducted previously, and I noted that he was able to walk this time briskly without a limp or any indication of protection of his back. He was able to tiptoe and hop on either foot. He was able to bend over, rounding out his back nicely for smooth lateral flexion. He had gotten over the protection or splinting of his back that was present at the time of the initial examination. That refers to his inability to bend over in the standing position that we mentioned previously. Straight leg raising was done easily to ninety degrees. He complained then of pain in his back, apparently because of hamstring tightness with the hamstrings tightening the pelvis and stretching out the back at that point.
>
> * * *
>
> That is a normal finding of a muscle which can be stretched to its fullest extent and then causes some distress because it's being over stretched. It was possible to flatten out Mr. Bixby's back by bringing his hips and knees up toward his chest without pain. He complained again of pain across the low back at the level of the fifth lumbar and first sacral vertebra with no difference in pain whether or not his back was tight or relaxed. Based on that finding, I discounted the possibility of instability which had been considered previously. Once again, he was able to do a sit-up from the supine position while in bed.

Dr. Sinning discussed with Claimant his recommendations of exercises and a psychiatric consultation. He also recommended fo Claimant that "...he return to his regular work without restrictions."

On April 18, 1975, Claimant was examined by F. Dale Wilson, M.D. A history of injury to Claimant in March of 1972 was noted by Dr. Wilson. Dr. Wilson described his findings as follows:

> Most significant finding about his head was a tenderness located right over his greater occipital nerve on the right side with similar but less severe tenderness on the left side. The motions of his neck were adequate but aggravated the tenderness and discomfort at the base of his right skull. There was a change in sensation of his right foot. There was decreased sensation over the great toe and the calf. He had a decreased sensation over the saddle area of his buttocks. These are the positive findings.
>
> * * *
>
> The tenderness over that particular area is diagnostic of an irritation of the greater occipital nerve, a neuritis of the great occipital nerve, and is the basis for his headaches.

His diagnosis was:

> An old back injury with myofascia discomfort of the neck, greater occipital neuralgia, stiffness in motion of the back, tenderness to the right of the lumbosacral area, a neuropathy of the L5—S1 spinal segment.

He recommended that Claimant:

> ...should have a review from a careful orthopedist and neurologist to confirm my findings, and that he be considered for an x-ray study, namely, the myelogram of his spine, because there was some reason to think he might have a disc. He did have involvement of his segments.

Dr. Wilson estimated Claimant's disability to be 25%.

The claimant has the burden of proving by a preponderance of the evidence that the injury of March 8, 1972, was the cause of the disability on which he bases his claim. **Lindahl v. L. O. Boggs,** 236 Iowa 296, 18 N.W. 2d 607. 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.

Considering the evidence offered in light of the

foregoing principles, Claimant failed to sustain his burden of proof that the injury of March 8, 1972, caused any additional disability for which he is entitled to compensation. Dr. Sinning's testimony did not causally connect any disability to Claimant as a result of the injury of March 8, 1972. Greater weight was given by the undersigned to the testimony of Dr. Sinning than to the testimony of Dr. Wilson. Dr. Sinning examined Claimant on April 28, 1972; April 5 and 12, 1973; and September 19 and 24, 1975. Dr. Wilson's only examination of Claimant was on April 18, 1975. As a result of Dr. Sinning's examination of Claimant shortly after the incident of March 8, 1972, and his periodical examinations thereafter, he was in a better position to evaluate Claimant's complaints. Additionally, Dr. Wilson recommended that his diagnosis be confirmed by a careful orthopedist and neurologist. Dr. Sinning, who is a qualified orthopedic specialist, examined Claimant after Dr. Wilson and failed to confirm Dr. Wilson's diagnosis.

WHEREFORE, it is found that Claimant failed to sustain his burden of proof by a preponderance of the evidence that the injury of March 8, 1972, resulted in any additional disability for which he is entitled to compensaton.

THEREFORE, Claimant's Application for Review-Reopening is dismissed.

Costs of the court reporters for the hearing and the depositions of Dr. Wilson and Dr. Sinning are taxed to Defendants. Witness fees are to be paid by the party producing the witness.

Signed and filed this 11 day of May, 1976.

DENNIS L. HANSSEN
Deputy Industrial Commissioner

No Appeal

Charles Bryson, Claimant,

vs.

Montgomery Ward and Company, Employer, Self-Insured, Defendant.

Review-Reopening Decision

Mr. Paul Deck, Attorney at Law, 222 Davidson Building, Sioux City, Iowa 51101, For the Claimant.

Mr. Richard Rhinehart, Attorney at Law, 615 Security Bank Building, Sioux City, Iowa 51101, For the Defendant.

This is a proceeding in Review-Reopening brought by the claimant, Charles Bryson, against his self-insured employer, Montgomery Ward and Company, Inc., for the recovery of benefits on account of an injury on March 21, 1973. A hearing before the undersigned was held on October 7, 1975. The case was fully submitted on February 13, 1976.

Deputy Industrial Commissioner Alan R. Gardner held in a Review-Reopening Decision filed September 16, 1974, that Claimant as a result of the injury of March 21, 1973, sustained permanent partial disability to the body as a whole in the amount of 8%. He further found that Claimant was entitled to 24 weeks of healing period compensation at the rate of $68 per week.

The issue to be determined is whether Claimant is entitled to any additional compensation since the Review-Reopening Decision filed on September 16, 1974.

There is support in the record for the following statement of facts:

Since the Review-Reopening decision of September 16, 1974, Claimant has continued to be treated by Horst Blume, M.D. The testimony of Dr. Blume was offered by Claimant.

On April 10, 1974, Dr. Blume performed a denaturation of both sides of the intervertebral joint of the lumbar spine at the level of L4. A second denaturation process was performed on November 26, 1974. At this time, Dr. Blume made nine destructive lesions around the intervertebral joints of L4/5 and L5/S1.

Dr. Blume subsequently examined Claimant on January 20, 1975; March 17, 1975; and August 15, 1975. Dr. Blume's examination on August 15, 1975, revealed the following:

> * * * When I examined him I was able to raise the right leg in a straight position up to eighty degrees and it did not cause any leg pain, but some back pain. When I did it on the left side only up to seventy, seventy-five degrees, it caused back and left leg pain in the back portion of the leg or posterioral aspect as we call it, all the way down to the calf and even down to the big toe. There was also local tenderness in the lower lumbar spine area in the center at L4 slash 5 and paravertebrally, which means beside the spine, at the level of L5S1 left. Again, some sensory deficit in the lateral and dorsal aspects of the left foot could be encountered and some in the left lower leg and a small amount in the left thigh. Since we had seen improvement with the denovation (sic) of the intervertebral joints, I told him that we should try it again since in one of my notes that I made previously, the intervertebral joints, if it has to be repeated, one should try to get the needle into the more posterioral one-third of the intervertebral joint at the level of L5, where I was never able to place the thermo-electro, because of other structures being superimposed in this area. So, it is somewhat difficult to get the needle where one wants to put the destructive lesion. I again, want to emphasize that I do not want to operate on this patient since I have not been convinced that the myelogram and discographic findings justify surgery on this patient. We do have what we call discs that are not

normal, but I would like to continue the kind of conservative treatment that I have done so far and have proven in the past that I have helped him, even though not long lasting, but some of the intensity of the pain I was able to reduce.

Concerning any increase in Claimant's physical disability, Dr. Blume testified:

Now, since I thought that I would be able to cure this man with some of the procedures that I have done and I have failed to do so--I do think that I still--it is still my opinion within reasonable medical certainty that we have a partial-permanent disability to the body as a whole and as far as the percentage is concerned, I would say that it is approximately the same or we may speculate it may be between eight and five percent.

He expanded his testimony on cross-examination:

MR. RHINEHART: I have been trying to think of the question I wanted to formulate so I could, hopefully, restate in a substantially accurate way the testimony which your (sic) previously gave, and in this connection, I believe Mr. Deck asked you whether there had been an increase in the Claimant's physical disability and your answer was that there was a partial-permanent disability somewhere--I think you indicated from five to eight percent. Of course, the question I'm prompted to ask in this regard is how it is that after such extended medical care, the Claimant has a greater physical disability than he did before?

A. Because the back condition and the leg condition is now there practically all the time and I don't foresee if I can help him in a great extent, except to make him more comfortable.

At the time of the last hearing, Claimant was attending college at Briar Cliff. In March, 1975, Claimant dropped from college due to the number of absences resulting from pain in his back and legs. Claimant needs 20 hours to graduate.

After dropping from college, Claimant attempted to find employment but had been unsuccessful in finding employment that he can tolerate. Claimant has started a business in his home by repairing tape players, small TVs, and car radios. He averages about $35 per week after expenses.

On the date of the hearing, Claimant was taking a correspondence course from DeVries Institute in an attempt to get a first class Federal Communications radio-television license. If Claimant obtains the license, he would be able to repair citizen band radios and transmitters.

Claimant has the burden of establishing by a preponderance of the evidence that he suffered an impairment or lessening of earning capacity as a proximate result of his injury of March 21, 1973, subsequent to the date of the Review-Reopening Decision filed on September 16, 1974, which entitles him to additional compensation. **Deaver v. Armstrong,** 170 N.W. 2d 455, 457, and authorities cited in that opinion.

Considering the evidence offered in light of the foregoing principle, Claimant sustained his burden of proof of an impairment or lessening of his earning capacity since the Review-Reopening Decision filed on September 16, 1974, which entitles him to additional permanent partial disability and healing period compensation. The additional permanent partial disability proved by Claimant is 10% of the body as a whole with maximum healing period applicable thereto. The evidence since the prior hearing which supports this award is Dr. Blume's testimony that Claimant's physical disability is greater now since "...the back condition and the leg condition is now there practically all the time and I don't foresee if I can help him in a great extent, except to make him more comfortable," and Claimant's inability to complete college and to find gainful employment suitable with the physical limitations described by Claimant and Dr. Blume.

The following medical bills were offered by Claimant:

St. Vincent Hospital	$ 539.30
Dr. Blume	2,144.00

He also testified that he incurred battery expenses of $25 and electrode gel expenses of $12 in connection with the stimulator prescribed by Dr. Blume and expenses of $35 for heating pads. No objection was made by Defendant to these bills.

WHEREFORE, it is found that Claimant sustained an impairment or lessening of his earning capacity since the Review-Reopening Decision filed on September 16, 1974, and is entitled to additional permanent partial disability compensation to the body as a whole in the amount of ten percent (10%). This is in addition to the eight percent (8%) permanent partial disability previously awarded. It is further found that Claimant is entitled to maximum healing period compensation for the additional ten percent (10%) permanent partial disability. It is further found that Defendant should pay the following bills:

St. Vincent Hospital	$ 539.30
Dr. Blume	2,144.00
Stimulator expenses	37.00
Heating pads	35.00

THEREFORE, Defendant is ordered to pay Claimant fifty (50) weeks of permanent partial disability compensation in the amount of sixty-three dollars ($63) per week. Defendant is further ordered to pay Claimant thirty (30) weeks of healing period compensation at the rate of sixty-eight dollars ($68) per week. Defendant is further ordered to pay the above mentioned medical bills.

Costs of the court reporters for this hearing and for the deposition of Dr. Blume are taxed to Defendant. Witness fees are to be paid by the party producing the witness.

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

Signed and filed this 27 day of February, 1976.

DENNIS L. HANSSEN
Deputy Industrial Commissioner

Appealed to District Court; Decision Pending

Shirley J. Cook, Claimant,

vs.

Wolverine Worldwide of Muscatine, Employer, and
Employers Insurance of Wausau, Insurance Carrier, Defendants.

Review-Reopening Decision

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

Mr. Elliott R. McDonald, Jr., Attorney at Law, 301 Northwest Tower, Davenport, Iowa 52806, For the Defendants.

This is a proceeding in Review-Reopening brought by the claimant, Shirley J. Cook, against her employer, Wolverine Worldwide of Muscatine, and their insurance carrier, Employers Insurance of Wausau, for the recovery of benefits for injuries sustained by her on October 29, 1973. The case came on for hearing before the undersigned Deputy Industrial Commissioner at the courthouse of Scott County in Davenport, Iowa, on December 11, 1974. The record was closed on March 27, 1975.

The issue to be determined is the extent of compensable disability sustained by Claimant as a result of the injury of October 29, 1973.

A Memorandum of Agreement was filed by Defendants and approved by this office on December 11, 1973. Pursuant to this Memorandum of Agreement, Claimant was paid twenty-eight (28) weeks of temporary disability compensation at the rate of ninety-one dollars ($91) per week.

On October 29, 1973, Claimant was injured when a heavy table piled with pig hides tipped over and struck her. From October 29, 1973, to November 29, 1973, Claimant was treated by a R. E. Olson, M.D. Dr. Olson's diagnosis was: "traumatic myosites (sic) of thigh. Large hematoma & ecchymosis left thigh." On November 29, 1973, Claimant was referred by Dr. Olson to William Catalona, M.D., F.A.C.S., an orthopedic surgeon.

Dr. Catalona's findings were as follows:

> "...I found a very definite acutely tender enduration over the anterior aspect of her quadriceps muscle about the middle of her thigh. The area was very sensitive to touch and she described numbness, tingling and paresthesias on firm palpation or percussion. Acutely flexing her knee or stretching her quadriceps caused pain in the area of tenderness. She also had about one inch atrophy."

An x-ray of the area for possible myositis ossificans was interpreted by Dr. Catalona to be negative.

Following the examination by Dr. Catalona, Claimant continued to be treated by Dr. Olson. On February 25, 1974, she was referred to Carroll Larson, M.D., an orthopedic surgeon at University of Iowa Hospitals in Iowa City, Iowa. Neither Dr. Larson's report nor his testimony concerning his examination was offered by either party.

On August 9, 1974, Claimant was referred for evaluation by Defendant Insurance Carrier to William R. Whitmore, M.D., an orthopedic surgeon. In his history Dr. Whitmore noted the injury of October 29, 1973. Dr. Whitmore's examination revealed the following:

> "Inspection of the leg reveals some irregularity in the soft tissue in the upper extent of the vastus medialis area of the thigh. There is a shallow groove type of defect. Palpation in this area causes a reaction of pain on the patient's part.
>
> Motion in the hip, knee and ankle appear normal although any manipulation or moving of the leg seems to be painful to the patient. There is about a half inch atrophy of the thigh and calf on the left side compared to the right. There appears to be no muscle paralysis but there is muscle weakness demonstrated by the patient's inability to completely extend the knee against resistance.
>
> The deep tendon reflexes at the knee and ankle are 2+ bilaterally. Pin prick sensation is generally good throughout. However on the lateral border of the foot she states that this sharpness is not as great.
>
> X-rays of the left thigh reveals no bony evidence of injury. I see no soft tissue calcification."

Dr. Whitmore expressed the following opinion:

> "In my opinion she sustained a severe soft tissue injury of the left distal thigh area. In my opinion an injury of this type should heal with only minimal residuals. This does not fit the picture I see in examining Mrs. Cook. That leads me to draw only two possibilities. One is overstatement of the symptoms by Mrs. Cook. The other is the type of pain that she describes now being in the hip, thigh, calf, ankle associated with numbness at (illegible) lateral border of the left foot suggests possibility of nerve root irritation. This was not discussed with the patient since I saw her only for evaluation and report. If nerve root irritation could be ruled out then I would feel that Mrs. Cook is overstating her symptoms."

Claimant received the following letter dated August 29, 1974, from R.C. VanVleet, Claim Supervisor for Defendant Insurance Carrier:

> "Dear Mrs. Cook:

As you know, we had you examined by Dr. William R. Whitmore in Davenport, Iowa. Dr. Whitmore's examination failed to give us a specific diagnosis as to your continuing difficulties. The doctor indicated he could not understand why your disability continues, except maybe you have what is referred to as a nerve root irritation. Since the nerve roots are in the spinal canal, we are of the opinion that any injury you received while working for Worldwide Wolverine has since healed, and if you are suffering a disablity currently, it is not as a result of your employment with them.

We must, therefore, discontinue payment of any further benefits.

Yours truly,
/s/ RCVan Vleet
Claim Supervisor

RCVan Vleet vd
c c. Worldwide Wolverine"

She subsequently received a letter from R. S Wozniak, plant superintendant of Defendant Employer. He acknowledged receipt of a copy of Van Vleet's letter and requested Claimant to report to work in the next three days or she would be terminated.

Claimant testified that she reported for work and attempted to do the job assigned to her. The job required her to stand. She indicated that she talked with Wozniak about her inability to perform the job. On September 30, 1974, Claimant was terminated by Defendant Employer.

Claimant on September 28, 1974, was examined by William B. Roudybush, M.D., for complaints of "severe discomfort and weakness of the left lower extremity from mid thigh down." Dr. Roudybush noted a marked depression about midway down of the anterior aspects of the lower left extremity. The dimensions of the depression were estimated by Dr. Roudybush to be 5" long, 1" wide, and 3/4" deep. He also noted atrophy in the left leg and decreased range of motion in the left knee. She was subsequently seen on October 1, October 13, and October 22, 1974.

Dr. Roudybush's diagnosis was "sequela to a traumatic injury to the left thigh."

Dr. Roudybush referred her to a Nelson P. Stevland, M.D. of the Department of Neurology at University of Iowa Hospitals. Dr. Stevland examined Claimant on November 12, 1974. Dr. Stevland's examination was as follows:

"On physical examination she appeared as a well nourished, well developed white female. Pupils were equal, round and reacted to light and accomodation. Extraocular movements were full. Funduscopic examination was normal. The palate elevated in the midline, the tongue was midline with good AMR's. The neck was supple with full range of motion. The patient was alert and fluent. On testing of the gait, the patient tended to favor her left leg. The patient refused to walk on her toes or do tandem walking secondary to pain. Cranial nerves II-XII were intact. Cerebellar examination was intact. On testing of muscle strength there was questionable effort on the patient's part in testing of the lower left extremity. Muscle strength was graded as follows: grip 100/100, biceps 100/100, deltoids 100/100, triceps 100/100, psoas 100/80, quadriceps 100/70, hamstrings 100/50, dorsiflexion 100/50, and plantar flexion 100/60. Muscle stretch reflexes were graded as BJ 1/1. BRJ 1/1, TJ 2/2, KJ 2/2 and AJ 2/2. There were no Babinski signs. Sensation was intact to cold and light touch. There was a relative decrease in vibration sense in the left leg compared to the right. There was no dermatomal pattern identified. On examination of the patient's back there was no pain to percussion, range of motion of the spine was normal. There was lichenification of the skin ridges in a 6 × 6 cm patch located on the anterior thigh on the left. The patient relates that this area has itching at times. There was a palpable indentation in the bulk of the quadriceps muscle in the lower left anterior thigh. This was at the site of the alleged injury. The patient underwent EMG's and nerve conduction velocities, these were both normal. There was no objective evidence on neruological exam of a neuro deficit. The precise origin of the patient's pain following the trauma was not determined. The pain may be musculo-skeletal in origin. We advised symptomatic treatment for the patient's pain."

Dr. Stevland provided Dr. Roudybush a report of his examination of Claimant. On cross-examination Dr. Roudybush was asked about Dr. Stevland's report. Dr. Roudybush testified as follows:

"Q. Didn't Dr. Stevland feel that there was no neurological problem?

A. Now, this is weasel language, let's put it that way, because he says there was no objective evidence on neurological examination of neurologic deficit. Objective evidence means there was no evidence on his part that he could tell there was a neurological deficit.

Q. Was there some objective evidence on your part that would indicate that there was a neurological deficit?

A. Yes. She did not have normal sensation in all areas of the lower extremity below the knees. There was loss of sensation to touch and to pin prick and hot and cold. Now, this could be also altered by the person's observing you doing things too, and I suppose where there could be some eventual gain, that person might be less and more sensitive, but I do not believe that she altered her statements to me. I think she told

me precisely what she felt; and if so, there was some evidence of mild nerve deficiency in the anterior and medial aspect, and this was the skin area."

Dr. Roudybush explained the objective symptoms that he saw as follows:

"Q. Well, what is wrong with her? What is causing these objective symptoms that you saw?

A. Now, I should call her in and show you, because you wouldn't understand unless you saw precisely what I am talking about. If that is all right, I will, because she is out in the waiting room. Unless you see precisely what we are referring to, you would be very handicapped. Thousands of words couldn't possibly tell you what one observation of the area could reveal to you.

Q. Well, let's try in less than a thousand. What are we talking about here.

A. We are talking about an injury which was sustained and of such severe degree that it literally avulsed the anterior musculature here of these quadriceps. It just literally avulsed them as a blunt object would do.

Q. I am not familiar with the verb you are using there.

A. Avulse, A-v. An avulsion of it.

Q. What does that mean?

A. All right. If you see a laceration that is nice and trim in its cut, you know that that was made by a knife. But if you see a laceration which has been hit so hard that there was no cut but it was so hard that the tissue was actually pushed about, pushed apart, I mean, by force, you will find bruised edge all along both the muscle and the skin of that area. We call this an avulsion. Now, an avulsion of tissue does not have to break the tissue on the outside, just like you don't have to have a laceration to have a torn tendon. But this was so hard that it comes down and literally avulsed musculature tissue all across the anterior aspect of the leg and left a deep depression."

He also testified that Claimant was unable to perform a standing job which required the lifting and placing of pig hides under a machine. Dr. Roudybush believed Claimant would be able to perform work where she sits down. Dr. Roudybush further expressed the opinion that an injury of this type should show progressive improvement for at least three months after the injury and small or imperceptible improvement for approximately one year. He estimated her permanent partial disability to be thirty percent (30%) of the left leg.

Dr. Catalona reexamined Claimant on November 7, 1974. He noted that his findings were essentially the same as on November 29, 1973. A repeat x-ray of the area revealed no evidence of bone or soft tissue damage. His opinion as a result of his examination was as follows:

"I must admit that I am not sure what is going on here, one suspects the possibility of a trapped cutaneous nerve. I cannot conceive the scarred muscle would cause the reaction which she describes."

He recommended evaluation by a team of specialists in the Department of Neurology and Orthopedics at University of Iowa Hospitals.

Claimant's complaints about her left leg on the date of the hearing were periodic pain in her toes, pain in her knee and constant pain in her upper thigh. She also indicated some problem with her hip.

The claimant has the burden of proving by a preponderance of the evidence that the injury of October 29, 1973, was the cause of her disability on which she bases her 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.,** 253 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 357, 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.

Claimant sustained her burden of proof that the injury of October 29, 1973, resulted in both permanent partial disability and temporary disability. Dr. Roudybush estimated the disability to Claimant's leg to be thirty percent (30%). He further estimated that Claimant, as a result of the injury, should have had continued improvement for approximately one year.

The medical reports of Drs. Catalona, Whitmore and Stevland did not rebut the prima facie case of permanent partial disability established by Claimant. Neither Dr. Catalona nor Dr. Whitmore nor Dr. Stevland expressed an opinion as to permanent partial disability. Both Dr. Catalona and Dr. Whitmore mentioned a possible nerve problem. Dr. Stevland stated that the origin of Claimant's pain following the trauma was not determined but it may be musculo-skeletal in origin. The above testimony lends credence to Dr. Catalona's recommendation of a joint evaluation by a team of specialists in the Department of Neurology and Orthopedics at the University of Iowa Hospitals.

Claimant also sustained her burden of proof as to payment of the medical bills of Dr. Catalona for his examination of November 7, 1974, and for the treatment by Dr. Roudybush of ninety dollars ($90).

WHEREFORE, it is found that Claimant, on October 23, 1970, sustained an injury which arose out of and in the course of her employment and resulted in a thirty percent (30%) permanent partial disability to her left leg. It is further found that Claimant is entitled to a healing period of fifty-two (52) weeks. It is further found that Defendants should pay the medical bills of Dr. Roudybush in the amount of ninety dollars ($90) and of Dr. Catalona for his examination of November 7, 1974.

THEREFORE, Defendants are ordered to pay Claimant sixty (60) weeks of permanent partial disability at the rate of eighty-four dollars ($84) per week. Defendants are further ordered to pay Claimant fifty-two (52) weeks of healing period compensation at the rate of ninety-one dollars ($91) per week. Defendants are further ordered to pay the bills of Dr. Roudybush in the amount of ninety dollars ($90) and of Dr. Catalona for his examination of November 7, 1974.

Costs of the court reporters for the deposition of Dr. Roudybush and of 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 8 day of April, 1975.

DENNIS L. HANSSEN
Deputy Industrial Commissioner

No Appeal

Charles Cravatta, Claimant,

vs.

Ragan Plumbing & Heating, Employer,
and
Iowa Mutual Insurance Company, Insurance Carrier, Defendants.

Review-Reopening Decision

Mr. David H. Sivright, Jr., Attorney at Law, 408 South Second Street, Clinton, Iowa 52732, For the Claimant.

Mr. Matt K. Wolfe, Attorney at Law, 724 North Second Street, Clinton, Iowa 52732, For the Defendants.

This is a proceeding in Review-Reopening brought by the claimant, Charles Cravatta, against his employer, Ragan Plumbing & Heating, and their insurance carrier, Iowa Mutual Insurance Company, for the recovery of benefits for injuries sustained by him on September 20, 1971. The record was closed on December 20, 1974.

The issue to be determined is the extent of compensable disability sustained by Claimant as a result of the injury of September 20, 1971.

A Memorandum of Agreement was filed by Defendants and approved by this office on May 8, 1973. Pursuant to this Memorandum, Claimant was paid eighty-one (81) weeks of temporary disability at the rate of sixty-four dollars ($64).

On September 20, 1971, Claimant was injured when a fire brick fell from a furnace door and struck him on top of his right shoulder.

Treatment initially consisted of injections of cortisone by Joseph O'Donnell, M.D. Dr. O'Donnell later referred Claimant to an orthopedic surgeon in Chicago, Illinois, who recommended surgery. Surgery consisting of a resection of the lateral portion of the clavicle was performed by Tom Flores, M.D., of Bluff Medical Center, Clinton, Iowa, on August 15, 1972.

Additional surgery was performed by Dr. Flores on March 19, 1973. On this date, Dr. Flores resected the tip of the coracoid and attached it to the clavicle with a screw. The purpose of the surgery was to substitute the muscles attached to the coracoid for the damaged ligaments in this area.

On March 19, 1974, a third operation was performed by Richard L. Kreiter, M.D., an orthopedic surgeon. The screw placed in Claimant's shoulder during the previous surgery was removed. Additionally, Dr. Kreiter resected approximately two and one-half (2½) inches of the lateral end of the clavicle. Dr. Kreiter subsequently saw Claimant for reexamination on March 28; April 1; April 16; April 26; May 17; August 7; and November 12, 1974.

On November 12, 1974, Dr. Kreiter noted the following active ranges of motion:

1) Abduction	90°
2) External rotation	35°
3) Flexion	90°
4) Extension	35-40°

No measurement was made of Claimant's flexion grip.

Dr. Kreiter's opinion as to permanent partial disability was as follows:

> "Well, I think if one would take the rating of disability, as I usually do, from the manual for orthopedic surgeons in evaluating permanent physical impairment, that looking, and this is simply functional reading actually, it is on the function of the shoulder in measurement of motion, it has nothing to do with the cosmetic problem, with the scarring, it has nothing to do with the complaint of pain, but it is a functional type of evaluation, that according to this manual the resection of the distal end of the clavicle is rated at approximately five percent permanent physical impairment and loss of physical function to the whole arm. What they are talking about is resection of the amount that Dr. Flores did in his original surgery. We are talking in terms of maybe a half to three quarters of an inch of the clavicle. Now because of his continued problem, because

of the ectopic new bone he had an additional amount of the clavicle resected. So I think that this would add a bit more to the disability rating in that regard, and I am not sure whether this would be somewhere between five and ten percent. Now also I think you have to rate motion independently. This would be--this would be just the resection of the bone. Then I think we would have to go back and determine the amount of loss of motion in the shoulder. And in so doing I think that Mr. Cravatta would probably in that regard have certainly only--just a minute here--that he would have a mild limitation of motion with no abduction beyond ninety degrees, rotation only forty degrees with full flexion and extension, and this again, this would be another five percent. So you would add those up, and it would be somewhere, I would imagine, between ten and fifteen percent of physical impairment and loss of physical function to the whole arm."

As to the type of work Claimant was able to perform, Dr. Kreiter testified:

"A Well, at the present time, and from what you know Charles has indicated, that he is unable, you know, to do any heavy work overhead, and as I indicated before, I think there may be gradual improvement, but I think that there is a good possibility that he may have difficulty doing, you know, work that requires a lot of overhead activity. But I would think that as far as doing, you know, rather heavy work, you know, down below the level of the shoulders, with time--

"Q Around the waist or lower?

"A Below the level of the shoulders, within the ranges of motion we are talking about, below ninety degress of abduction and flexion."

Parker C. Hardin, M.D., a general surgeon, examined Claimant on November 9, 1972, and September 6, 1974. The following abnormalities were noted by Dr. Hardin following his examination of Claimant on September 6, 1974.

"1. A 5¼ inch scar curving over the anterior surface of the right shoulder and the right upper chest with a width of 5/8 inch in a number of places.

2. A 3¼ inch Keloidal scar descending downward from the above to the axilla with a width in one place of one inch.

3. Marked anesthesia between the two scars of approximately 3 inches transversely by 4 inches longitudinally.

4. A loss of approximately 3/7 of the normal strength of the flexion grip of the right thumb, fingers, and hand."

Comparison measurements were taken of Claimant's left shoulder and right shoulder. The measurements recorded by Dr. Hardin were as follows:

	Right Arm	Left Arm
Abduction	105°	180°
Total abduction	70°	80°
Total Posterior	35°	60°
Rotation	loss of 15°	

All other movements of all portions of both upper extremities were performed normally.

X-rays were taken on both November 9, 1972, and September 6, 1974. Dr. Hardin testified that the x-rays taken in 1974, revealed the following:

"Yes, sir, taken two months ago, and it shows that, as I said, the outside three inches is now totally removed of the right clavicle, but it is what's left at the end of the remaining part of the right clavicle is now surrounded by abnormal bony substance, which means periosteal formation of new bone, so that it is now at least twice as thick, meaning at least an inch thick, with three or four little additional pieces of extra abnormal bone clustered around the end of this abnormal thickened area involves what's left out of the outer still remaining one and a half inches of the right clavicle."

Dr. Hardin estimated Claimant's permanent partial disability to be at least fifty percent (50%) of the right shoulder and thirty-five percent (35%) of the right hand. Concerning Claimant's ability to perform strenous activity or exertion, Dr. Hardin stated:

"It would apply, and I will state it, that in my opinion this man can never again perform the duties of any work which would require any significant muscular effort, such as lifting or pulling or repeated exertion involving the right shoulder or the very much weakened right fingers, thumb, and hand or the general use of the right upper extremity, which would of course rule out all types of labor work or any type of work involving a heavy exertion of that part of the body."

On cross-examination Dr. Hardin testified as follows about the acromioclavicular joint:

"The most important thing in my mind is that he has lost the acromioclavicular joint, which is a very important stabilizing joint controlling and stabilizing and strengthening and making normal so many of the movements of the shoulder. There are two principal joints in the shoulder. One is the joint between the head of the humerus, which is of course the principal bone of the arm which fits into the open glenoid cup of the clavicle, of the scapula. That's one of the joints, and the other main joint is this joint from the clavicle up to the other part, which is called the acromion. This all helps hold the upper arm in place. Such a thing as this also weakens the shoulder so that it is more likely to be pulled or dislocated out of the socket by a considerably lesser trauma than what happens to a normal person who had the acromioclavicular joint."

The claimant has the burden of proving by a preponderance of the evidence that the injury of September 20, 1971, 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.,** 253 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.

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 right shoulder on September 20, 1971. Although the rating by Dr. Kreiter was ten to fifteen percent (10-15%) physical impairment and loss of physical function to the arm, he assessed a percentage of the rating for the resection of the clavicle and the loss of motion in his shoulder. The items mentioned above for which Dr. Kreiter assessed a percentage of disability clearly demonstrated that the disability was not limited to the right arm but involved the right shoulder and clavicle. Dr. Hardin's testimony also indicated that Claimant's disability was not confined to the right arm. He estimated Claimant's disability to be fifty percent (50%) of the right shoulder. Dr. Hardin also described the loss of the acromioclavicular joint "to be the most important thing in my mind."

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 is thirty-three (33) years old, married, and a high school graduate. Claimant's work history includes working on a railroad for one year, serving in the U.S. Navy for six years, driving a truck for two years, and performing the duties of a boilermaker. He received his card as a boilermaker in 1970.

Claimant testified that he has problems performing the personal activities of shaving with his right arm, washing under his left arm, and combing his hair. He did not believe he could perform the work required of a boilermaker. Other than performing light jobs around his trailer court, Claimant has not worked since the accident.

Dr. Kreiter expressed the opinion that Claimant would be unable to do any heavy work overhead but could perform heavy work below the ranges of motion determined by him. Dr. Hardin testified that Claimant could never perform work duties which required any significant muscular effort. He further testified that Claimant could not drive a truck. Both doctors expressed functional disabilities as previously mentioned.

Applying the evidence offered in this case in respect to Claimant's industrial disability to considerations outlined in the case of **Olson,** supra, Claimant proved a twenty percent (20%) permanent partial disability to the body as a whole. As a result of the incident of September 20, 1971, Claimant's industrial asset of performing physical labor was reduced. Both Dr. Hardin and Dr. Kreiter testified concerning Claimant's physical limitations. The uncontroverted testimony of Claimant that he was physically unable to perform the duties required of a boilermaker and the testimony of Dr. Hardin that Claimant was unable to drive a truck demonstrated an inability of Claimant because of the injury to engage in employment for which he was fitted.

WHEREFORE, it is found that Claimant on September 20, 1971, 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 twenty percent (20%) at the rate of fifty-nine dollars ($59) per week. It is further found that Claimant was incapacitated from working for at least sixty (60) weeks and is entitled to maximum healing period compensation at the rate of sixty-four dollars ($64) per week.

THEREFORE, Defendants are ordered to pay Claimant one hundred (100) weeks of permanent partial disability compensation at the rate of fifty-nine dollars ($59) per week. Defendants are further ordered to pay Claimant sixty (60) weeks of healing period compensation at the rate of sixty-four dollars ($64) per week.

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

Costs of the court reporter in transcribing the depositions of Dr. Hardin and Dr. Kreiter and of this hearing 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 27 day of January, 1975.

DENNIS L. HANSSEN
Deputy Industrial Commissioner

No Appeal

Victor B. Crawford, Claimant,

vs.

John Deere Waterloo Tractor Works, Employer, Self-Insured, Defendant.

REVIEW-REOPENING DECISION

Mr. Robert D. Fulton, Attorney at Law, P.O. Box 2427, Waterloo, Iowa 50705, For the Claimant.

Mr. Wirt P. Hoxie, Attorney at Law, P.O. Box 879, Waterloo, Iowa 50704, For the Defendant.

This is a proceeding in Review-Reopening brought by the claimant, Victor B. Crawford, against his self-insured employer, John Deere Waterloo Tractor Works, to recover benefits under the Iowa Workmen's Compensation Act on account of an injury on May 18, 1972. The case came on for hearing before the undersigned Deputy Industrial Commissioner at the courthouse of Black Hawk County in Waterloo, Iowa, on July 25, 1974. The case was fully submitted on August 29, 1974.

A memorandum of Agreement was filed and approved on May 30, 1972. Temporary disability payments at the rate of sixty-four dollars ($64) per week were paid to the claimant for a period of fifty-nine and six-sevenths (59 6/7) weeks.

The issue to be determined is the extent of permanent partial disability sustained by Claimant as a result of the injury of May 18, 1972.

On May 18, 1972, Claimant was struck by a telpher car while he was repairing a cupola. Claimant was taken to the emergency room of Schoitz Memorial Hospital where he was treated by Richard D. Acker, M.D., and John R. Walker, M.D., an orthopedic surgeon.

Claimant testified that he presently is unable to climb ladders because his leg will give out. He described complaints of pain in his leg, hip and back. Claimant also testified that he cannot stand on his left leg alone without some type of support.

Dr. Walker diagnosed Claimant's problem as a result of the accident to be a compound comminuted fracture of the junction of the middle and lower one-third of the femur. An intermedullary nail was placed in this area. On July 21, 1972, the intermedullary nail began to penetrate the intercondylar notch of the knee or femur due to the comminution and the shortening of the femur. Subsequently, the nail was pulled back a distance of approximately one and one-half inches. On August 13, 1972, the nail was removed due to further movement of it. A patelloplasty was performed on April 16, 1973, by Dr. Walker. Following the patelloplasty Claimant was treated by Dr. Walker until February 2, 1974.

Dr. Walker on February 2, 1974, made the following physical findings:

a) Good flexion and extension;
b) Loss of 10 degrees of internal rotation;
c) Left leg 1/4" shorter, and
d) Some limp.

He did not think Claimant's left leg being shorter by one fourth inch would have any bearing on his problems in the future. Dr. Walker estimated Claimant's permanent partial disability to be twenty-two percent (22%) of the lower left extremity.

Dr. Acker also made an evaluation of Claimant's permanent partial disability. The following physical findings were noted by Dr. Acker:

a) Both legs equal in length;
b) Loss of extension of 25°;
c) Loss of flexion of 40°;
d) Slight quadriceps weakness; and
e) No pronounced limp or unnatural gait.

He estimated Claimant's permanent partial disability to be thirty-six percent (36%) of the left lower extremity. Dr. Acker referred Claimant to Bernard Diamond, M.D., and Dale G. Phelps, M.D. Both Dr. Diamond and Dr. Phelps are orthopedic surgeons.

Dr. Diamond examined Claimant on November 11, 1973. His physical examination was essentially as follows:

> He is a Caucasian male, 5'9", 182 lbs., fairly well developed. He has a long medial utility incision, left knee, well healed, well healed long low lateral scar lateral side of the thigh. There is also a 3 inch scar well behind left trochanter on left. He walks with a limp on left that looks like a short leg gait and left knee is in valgus and lower limb is definitely externally rotated. He is also tilted somewhat to left on standing and walking. In examining left hip he has external rotation contracture of about 25° and no internal rotation from that point. On testing external rotation on left, he has excessive external rotation, that is, going to perhaps 80° or 85° as against 50° on right. Adduction and abduction of hip are good, flexion good. He has a ½ inch shorter left lower extremity. Left knee shows good flexion and extension, some soft tissue prominent over a small nubbin of patella which remains anterior to knee. This tissue is not tender. He has quite good extension at 180°, fairly strong quadriceps, though not quite as strong on other side. Ligaments and cruciates stable, knee flexion is good. Right thigh is ¾ inch larger on comparison measurement in upper third of thigh.

X-rays were taken by Dr. Diamond. Dr. Diamond interpreted the x-rays as follows:

> Comparison x-rays of both lower limbs from the hips down were taken because of the peculiarities of his gait. AP and lateral of both hips, AP and lateral of both femurs, AP and lateral of both knees were taken. The hip joints were normal, except for some mild

thickening about the left greater trochanter area where the pin was no doubt inserted. The left femur shows a healed fracture at the junction of the middle and lower thirds, with rotation of the fragments. The left knee shows segment of patella remaining anterior to the joint riding somewhat high.

Dr. Diamond's diagnosis was : "The left femur shows a healed fracture at the junction of the middle and lower thirds, with rotation of the fragments. The left knee shows segment of patella remaining anterior to the joint riding somewhat high."

Dr. Diamond estimated Claimant's permanent partial disability as a result of the May 18, 1972, accident to be thirty percent (30%) of the body as a whole. He testified concerning his rating as follows:

A. Well, about disability. I felt that most of the disability in the case is due to the fractured femur with the rotation of the fragments. Less disability is due to the knee. I understand the legal situation of disabilities in lower limb versus entire body, but in this case I was in somewhat of a quandary because this man's limp and the general effect of this on his walk I felt was a whole body mechanism rather than simply a totally unrealistic mechanical problem, and I just couldn't consider him as a piece of machinery. And so I felt that it would be proper for me to give this as a disability of the entire body, and I gave him a 20% of the entire body for the fractured femur and 10% of the entire body for his knee, with a total disability of the entire body of 30%.

Q. And you, if I understand you right, assessed it to the entire body because of the effects of his deformity caused by this injury to his gait?

A. Yes.

Q. And his stance?

A. His gait and his stance and the obvious limp and the obvious turning of the back that he has to do and tilting of the spine that he has to do in walking, yeah.

Q. So you are taking the effects of this injury on the entire body as you have now explained them giving your opinion then based on the entire body?

A. Yes. If I were to give the injury to the limb itself I would have to up the ratios for him, but this is based on his entire body.

Claimant was examined by Dr. Phelps on March 6, 1974. In his physical examination of Claimant Dr. Phelps noted the following:

1) Walked with a limp;
2) External rotation of left limb by about 15°;
3) Left leg was shorter by approximately 3CM;
4) Lacked 10° of coming to full extension;
5) Flexion was equal in both legs;
6) Marked weakness in the left leg as compared to the right; and
7) Atrophy or weakness in the muscles in the left as compared to the right.

Dr. Phelps also reviewed the x-rays provided for him by Defendant. Dr. Phelps noted that the alignment was very good but there was evidence of a shortening on the x-rays as the fracture healed. He also noted that the patella had been almost completely removed.

Based on his examination of Claimant and his review of the x-rays, Dr. Phelps estimated Claimant's permanent partial disability as a result of the accident of May 18, 1972, to be seventy-five percent (75%) of the left lower extremity. Dr. Phelps broke his rating down as follows:

1) Shortening of 3CM on the left	15%
2) Patellectomy	30%
3) Limitation of extension of knee	10%
4) Rotational deformity	20%
TOTAL	75%

A projection of future problems was included in Dr. Phelps rating.

Dr. Phelps testified as follows concerning the effect of the May 18, 1972, injury on Claimant's body as a whole.

A. Well, the 75% of the lower extremity takes into consideration the effect on the body as a whole. The shortening of a leg in essence affects the body, not the leg itself.

Q. How does it affect the body though?

A. By giving an abnormal gait, by making the pelvis being carried at an angle throughout the ambulation, and putting an excessive strain on the back. But as I say, this is taken into consideration in giving any disability to shortening of a leg. Essentially having a short leg in itself is not disabling if both legs are short. Everybody's legs are different lengths, so unless it was affecting the rest of your body, just having a short leg wouldn't be a disability.

Q. But again you say it would have an effect on the back and on the pelvis and such things as this?

A. Primarily on the back.

Q. And on the stance and gait?

A. Yes.

Melvin Downing, Claimant's foreman, testified on behalf of Defendant. Downing has known Claimant for eight years. He testified that because of the condition of Claimant's leg he cannot safely climb ladders. He described Claimant's walk since the accident to be a lot slower and with a limp. Downing also testified that Claimant was a good worker.

The claimant has the burden of proving by a preponderance of the evidence that the injury of May 18, 1972, 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 testimony of Dr. Diamond, Dr. Phelps, Claimant, Downing, and my observations at the hearing indicated that Claimant's permanent partial disability was not confined to his left lower extremity as determined by Dr. Walker and Dr. Acker. Dr. Diamond testified that he assessed the disability to the entire body due to, "His gait and his stance and the obvious limp and the obvious turning of the back that he has to do and tilting of the spine that he has to do in walking." Dr. Phelps stated that the shortening of the leg affects the body as a whole "by giving an abnormal gait, by making the pelvis being carried at an angle throughout the ambulation, and putting an excessive strain on the back." The above findings of Dr. Phelps and of Dr. Diamond were buttressed by the testimony of Claimant and Downing as to Claimant's problems resulting from the injury of May 18, 1972. Additionally, Claimant's abnormal gait was observed at the hearing by the undersigned.

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.

Functional disabilities assessed by Dr. Walker, Dr. Acker, Dr. Diamond and Dr. Phelps were twenty-two percent (22%) of the left lower extremity, thirty-six percent (36%) of the left lower extremity, thirty percent (30%) to the body as a whole, and seventy-five percent (75%) of the left lower extremity, respectively. With this amount of functional disability, Claimant no longer has the same employment mobility as a man with no disability and of the same age and qualifications.

Although Claimant returned to the same department following his injury, his duties within the department were changed. Both Claimant and his foreman testified that Claimant no longer climbs ladders as he was required to do prior to the injury.

No evidence was offered by Claimant as to his age, education, qualifications, or experience.

Applying the evidence offered in this case in respect to Claimant's industrial disability to the consideration outlined in **Olson**, supra. Claimant has proved a twenty-five percent (25%) permanent partial disability to the body as a whole.

WHEREFORE, it is found that Claimant on May 18, 1972, 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 twenty-five percent (25%) at the rate of fifty-nine dollars ($59) per week.

THEREFORE, Defendant is ordered to pay Claimant one hundred twenty-five (125) weeks of permanent partial disability compensation at the rate of fifty-nine dollars ($59) per week.

Costs of the depositions of Dr. Walker, Dr. Acker; Dr. Phelps, Dr. Diamond and 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 23 day of October, 1974.

DENNIS L. HANSSEN
Deputy Industrial Commissioner

No Appeal

Lois Dachenbach, Claimant,

vs.

O'Bryan Brothers, Inc., Employer,
and
Insurance Company Of North America, Insurance Carrier, Defendants.

Review-Reopening Decision

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

Mr. Marvin E. Duckworth, 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, Lois Dachenbach, against her employer, O'Bryan Brothers, Inc., and Insurance Company of North America, the insurance carrier, to recover additional benefits under the Iowa Workmen's Compensation Act by reason of an industrial injury that occurred on January 9, 1973. This matter came on for hearing before the undersigned Deputy Industrial Commissioner of May 17, 1974, at the courthouse in and for Decatur County at Leon, 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 23, 1974, the record was closed at that time.

An examination of the Industrial Commissioners voluminous file reveals that an appropriate First Report of Injury was filed on January 18, 1973. The file further reveals that a Memorandum of Agreement, Form 4, was filed and approved on

January 24, 1973, calling for a temporary disability payment in the amount of $61.54 A form 5 is also present in the Commissioner's file, disclosing 24 2/7 weeks temporary disability as having been paid, with a total of $1,494.53, with July 5, 1973, as the last date of compensation payment.

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

Claimant, age 54, married, residing in Humeston, Iowa, began her duties for her employer in August of 1967. On January 8, 1973, while attempting to walk to her automobile, which was parked on a lot provided by the employer for employee parking, the claimant slipped and fell on the ice, injuring her right knee. The following day she sought the medical assistance of Dr. James Egly, D.O., of Chariton, Iowa. The claimant does not have a motor vehicle operator's license and cannot drive a car. At the direction of Dr. Egly, x-rays of the knee were taken. No abnormality was found. The claimant's discomfort, however, did not improve and Dr. Egly referred the claimant to Dr. Donald W. Blair, M.D., a board certified member of the American Board of Orthopedic Surgery. Dr. Blair's initial impression was primarily of a strain of the medial collateral ligament of the right knee. This initial examination took place on February 21, 1973. Dr. Blair saw the claimant again on June 26, 1973. The doctor found some mild pitting edema; there was no effusion within the joint; the motion was free. Some subpatellar crepitus was present at that time. Dr. Blair was of the opinion and advised the claimant that consideration be given for the resumption of work by her on a limited basis if available. He fully expected her symptoms to gradually diminish. The claimant continued under Dr. Egly's care, and in early July in a conference with her employer it was felt that the claimant would not be able to do justice to her job. Public transportation facilities do not exist between Humeston and Leon. The claimant was dependent upon sharing rides. No part-time employee with whom the claimant could ride to accept part-time employment lived in the neighborhood of Humeston. The claimant felt that Dr. Blair had been overly severe in his examination of her in June and accordingly obtained the services of Dr. Ronald K. Bunten, M.D., a board-certified orthopedic specialist. Dr. Bunten saw the claimant for the first time on October 29, 1973. On that day the doctor's examination revealed that the claimant was able to squat to about the 60° knee flexion position on the right. The right knee further showed a mild thickness and effusion present within the joint. The doctor felt there was a possibility that the claimant had sustained a torn medial meniscus and a contrast arthrogram was performed on February 6, 1974. The arthrogram demonstrated no tear of the lateral or medial meniscae. A serological examination indicated that the claimant has rheumatoid arthritis.

The claimant had fallen on her front porch on January 18, 1974, and she testified that it was the instability in her right knee that caused her to fall.

The issue in this case is whether or not a preexisting rheumatoid arthritis may be aggravated by trauma.

Unfortunately the number of medical practitioners who practice this subspeciality of internal medicine is limited. There is a rheumatoidology department at the University of Iowa. In light of the testimony of Dr. Bunten, who feels that trauma may aggravate a preexisting rheumatoid arthritic condition, it is indicated that in order for the defendants to discharge the obligation of the reasonable medical care anticipated by Section 85.27, the defendants make arrangements for an examination of the claimant by the Department of Rheumatoidology at the University of Iowa. Defendants are further instructed that if the report of the examining rheumatoidologist cannot be made a part of this record by agreement, they shall take the evidentiary medical deposition of the examining physician upon due notice to opposing counsel, so as to preserve Claimant's right to cross-examine the medical witness.

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 she bases her 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). The record supports the finding that the claimant has sustained her burden of proof. Dr. Bunten, who discovered the rheumatoid arthritis, confirms the claimant's direct testimony that she is unable to perform acts of gainful employment as required by her employer.

Dr. Blair seems to indicate in his evidentiary deposition that his suggestion for the claimant's return to work was based upon the expectation that her symptoms would gradually diminish. These symptoms had not diminished at the time of the hearing. It was apparent to this deputy that the claimant's left knee was substantially swollen. The evidence contained in this record does not allow this department to make a determination as to the extent of the claimant's permanent physical impairment. Further, the evidence is insufficient to allow us to answer the primary question posed by the matter, which is whether or not trauma can and did aggravate the preexisting rheumatoid arthritis now found to be present in the claimant.

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 January 9, 1973, and that this injury arose out of and in the course of her employment.

2. That as a result of this industrial injury the claimant was paid sixty-one and 54/100 dollars ($61.54) per week for twenty-four and two sevenths (24 2/7) weeks or a total of one thousand four hundred ninety-four and 53/100 dollars ($1,494.53).

3. As a result of the industrial injury, the claimant has been unable to perform in gainful employment between January 9, 1973, and the date of Dr. Bunten's testimony as of May 28, 1974.

4. That the claimant is entitled to a medical examination by the doctor in charge of the Rheumatoidology Department at the University of Iowa.

WHEREFORE, it is ordered that the defendants pay the claimant seventy-eight (78) weeks temporary total disability at the rate of sixty-one and 54/100 dollars ($61.54) per week less credit for amounts previously paid. In that all of these payments have accrued, this payment is to be made in a lump sum.

It is further ordered that the defendants pay any and all unpaid charges of Dr. Donald W. Blair and Dr. Ronald K. Bunten still due and owing as the result of their treatment of this injury.

The following medical expense items shall be paid by the defendants:

American Prosthetics	$20.09
Radiology, P.C.	40.00
Dr. James R. Egly, D.O.	271.50
Pathology Laboratories	14.00
Reimbursement of itemized prescription drugs	15.78

It is further ordered that the defendants shall schedule and provide for an examination of the claimant by the head of the Rheumatoidology Department at the University of Iowa Hospitals and that this examination take place on or before January 1, 1975. It is further ordered that the defendants shall provide transportation to the claimant to the University of Iowa Hospitals from her residence at the rate of fifteen cents (15c) for each mile traveled. It is further ordered that, at the conclusion of the examination and if the parties cannot agree that the report rendered by the examining physician be admitted into evidence in this matter, the evidentiary deposition of the examining physician be taken at the expense of the defendants. It is further ordered that this deposition be taken and filed with this department on or before February 15, 1975.

It is further ordered that the defendants pay the costs of these proceedings as well as the cost of transcription of the evidentiary deposition of Dr. Bunten. It is further ordered that the defendants pay the cost of the court reporter in attendance at the hearing.

Signed and filed this 28 day of October, 1974, at the office of the Iowa Industrial Commissioner at Des Moines.

HELMUT MUELLER
Deputy Industrial Commissioner

Appealed to District Court; Affirmed

Elmer B. Davenport, Claimant,

vs.

Hallett Construction Co., Employer,
and
Liberty Mutual Insurance Co., Insurance Carrier,
Defendants.

Review-Reopening Decision

Mr. Stanley R. Simpson, Attorney at Law, Lippert Building, Boone, Iowa 50036, For the Claimant.

Mr. Ross H. Sidney, Attorney at Law, 1980 Financial Center, Des Moines, Iowa 50309, For the Defendants.

This is a proceeding in Review-Reopening brought by the claimant, Elmer B. Davenport, against his employer, Hallett Construction Company, and their insurance carrier, Liberty Mutual Insurance Company, on account of an injury on December 7, 1966. The case came on for hearing before the undersigned Deputy Industrial Commissioner on August 5, 1975, at the offices of the Industrial Commissioner in Des Moines, Iowa. The case was fully submitted on the day of the hearing.

A Memorandum of Agreement was filed by Defendants and approved by this office on November 30, 1967. Pursuant to this memorandum, Claimant was paid temporary disability and healing period compensation of 4.2 weeks at $40 per week and 16 weeks at $48 per week. Additionally, Claimant was paid 14 weeks of permanent partial disability compensation at the rate of $47.50. The date of the last payment of compensation was November 29, 1969. Claimant filed his Application for Review-Reopening on December 13, 1974.

The issue to be determined is the applicability of §86.34, 1966. §86.34, Code 1966, provides:

> "**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."

The Application for Review-Reopening filed on December 13, 1974, was more than three years from the date of the last payment of compensation on November 29, 1969.

In order to avoid the bar of the statute, counsel for Claimant argued that Defendants should not be permitted to assert the statute of limitations in §86.34, Code 1966, due to the doctrine of equitable estoppel.

On June 18, 1974, Claimant testified that he was contacted by a representative of Defendant Carrier and was informed by him that he had a check in the amount of $2400 made payable to him and his attorney. Claimant described the color of the check to be yellow and gold. The representative refused to give the check to Claimant unless his attorney was present. Claimant was instructed to contact his attorney and upon the return of the representative later that day he would give the check to Claimant and his attorney. Claimant described the car the representative was driving as a brown Buick with a black vinyl top. He further testified that the check was to cover his hospitalization at Iowa Methodist Hospital. Claimant, his attorney, and the representative did not get together on this day.

Approximately three days after talking with this representative, Claimant and his attorney visited Defendant Carrier's office in Des Moines, Iowa, and discussed the check with Vern Stensrud. Stensrud informed them that there must be a mistake since he didn't send a representative of Defendant Carrier to Claimant's residence to deliver a check for $2400 or $2500.

Stensrud testified that he informed Claimant that the check was not written by Defendant Carrier. In support of this statement, Stensrud testified: (1) that the adjuster assigned to the Boone area terminated his employment with Defendant Carrier on June 10, 1974; (2) that Defendant Carrier did not own a Buick; (3) that no payment of $2400 or $2500 was noted on the front part of the file as is customarily done with all checks that are written; (4) that there were no checks written on the file in 1974 or any stop payments of checks; (5) that the last check written on the file was to Iowa Methodist Hospital in 1969; (6) that Liberty Mutual as a matter of practice does not make a check payable to a claimant and his attorney; and (7) that field adjusters for Defendant Carrier in Iowa do not have authority to write checks for workmen's compensation claims and do not normally deliver checks.

The Supreme Court in **Paveglio v. Firestone Tire and Rubber Company**, 167 N.W. 2d 636, listed the elements of estoppel as follows:

"A. False representation or concealment of material facts,

B. Lack of knowledge of the true facts on the part of the person to whom the misrepresentation or concealment is made,

C. Intent of the party making the representation that the party to whom it is made shall rely thereon,

D. Reliance on such fraudulent statement or concealment by the party to whom made resulting in his prejudice."

Assuming for argument that a representative of Defendant Carrier did make the statements alleged by Claimant, Claimant failed to show he was prejudiced by such representations. Claimant testified that the check in the amount of $2400 was for the payment of a bill at Iowa Methodist. No evidence was offered by Claimant of a bill at Iowa Methodist in that amount. If a bill does exist in that amount, he would be entitled at the present time to have the bill paid if it was causally connected to his injury of December 7, 1966. This is permissible since there is not a statute of limitations applicable to medical expenses under §85.27, Code 1966, in a review-reopening proceeding. It is further noted that on June 18, 1974, Claimant was precluded from recovering any compensation since more than three years had elapsed from the date of the last payment of compensation on November 29, 1969.

Additionally, the testimony of Stensrud was persuasive that the man Claimant saw on June 18, 1974, was not a representative from Defendant Carrier.

WHEREFORE,it is found that more than three years have elapsed from the date of the last payment of compensation on November 29, 1969, and the filing of Claimant's Application for Review-Reopening. It is further found that Claimant failed to sustain his burden of proof that Defendants should be estopped from asserting the limitation in §86.34, Code 1966. It is further found that the limitation in §86.34, Code 1966, does not apply to services under §85.27, Code 1966.

THEREFORE, Claimant's Application for Review-Reopening as it pertains to compensation is dismissed as not being timely filed within three years from the date of the last payment of compensation.

Costs of the hearing are taxed to Defendants.

Signed and filed this 14 day of August, 1975.

DENNIS L. HANSSEN
Deputy Industrial Commissioner

No Appeal.

Thomas E. Davis, Claimant,

vs.

Firestone Tire & Rubber Co., Employer,
and
Liberty Mutual Insurance Co., Insurance Carrier,
Defendants.

Review-Reopening Decision

Mr. Arthur C. Hedberg, Jr., Attorney at Law, 840 Fifth Street, Des Moines, Iowa 50309, For the Claimant.

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

This is a proceeding in Review-Reopening brought by the claimant, Thomas E. Davis, against his employer, Firestone Tire & Rubber Co., and their insurance carrier, Liberty Mutual Insurance Co., for the recovery of benefits for injuries sustained by him on October 25, 1972. The case came on for hearing before the undersigned Deputy Industrial Commissioner on February 24, 1975, at the Industrial Commissioner's Office in Des Moines, Iowa. The case was fully submitted on June 4, 1975.

A Memorandum of Agreement was filed by Defendants and approved by this office on November 29, 1972. Pursuant to this Memorandum, Claimant was paid 12 weeks of temporary disability or healing period compensation at the rate of $68 and 20 weeks of permanent partial disability compensation at the rate of $63 per week.

The issue to be determined is the extent of permanent partial disability sustained by Claimant as a result of the injury of October 25, 1972.

On October 25, 1972, claimant's left leg was caught between a "push cart" and a wooden pallet. His leg was treated by Rutledge C. Schropp, M.D., and Marshall Flapan, M.D., an orthopedic surgeon. Claimant was also examined by Donald W. Blair, M.D., an orthopedic surgeon, and Ronald K. Bunten, M.D., an orthopedic surgeon. The reports of each of the orthopedic surgeons were offered as evidence in this case. Additionally, a report of F. E. Thornton, M.D., an orthopedic surgeon, was submitted. Dr. Thornton's report was based not on an examination of Claimant but on a review of the reports of Drs. Bunten and Flapan. No dispute existed among the doctors as to the causal connection between the injury of October 25, 1972, and the disability each of them found to exist in Claimant's leg.

The permanent partial disability ratings of the physicians were as follows:

Dr. Flapan	5% left lower extremity
Dr. Blair	10% of the left foot or 5% of the left lower extremity
Dr. Thornton	10% of the left lower extremity
Dr. Bunten	20% of the left lower extremity or 10% permanent impairment of his total body function

Since no evidence was presented that Claimant's injury was not limited to the left lower extremity, Dr. Bunten's rating of 10% permanent impairment of his total body function was not appropriate.

Section 85.34 (2) (o) provides that permanent partial disability to a leg shall be paid on the basis of 200 weeks.

The ability to earn wages is not a factor in determining the disability to a scheduled member. **Barton v. Nevada Poultry,** 253 Iowa 285, 110 N.W. 2d 660.

Applying the disability ratings to the maximum of 200 weeks for a leg, the following number of weeks of permanent partial disability are determined:

Dr. Flapan	5% of 200 weeks = 10 weeks
Dr. Blair	5% of 200 weeks = 10 weeks
Dr.Thornton	10% of 200 weeks = 20 weeks
Dr. Bunten	20% of 200 weeks = 40 weeks

As all of the physicians are eminently qualified and no evidence was offered to the contrary, equal weight was given to each of their opinions by this arbitrator. An average of the disability ratings of the physicians is determined to be 10% of the left lower extremity. A rating of 10% of the left lower extremity entitles Claimant to 20 weeks of permanent partial disability. This was precisely the amount of permanent partial disability paid to Claimant.

WHEREFORE, it is found that Claimant on October 25, 1972, sustained an injury which arose out of and in the course of his employment and resulted in a ten percent (10%) permanent partial diability to his left leg which is compensable at the rate of sixty-three dollars ($63) per week. It is further found that Claimant was incapacitated from working for at least twelve (12) weeks and is entitled to maximum healing period compensation at the rate of sixty-three dollars ($63) per week.

THEREFORE, Defendants are ordered to pay Claimant twenty (20) weeks of permanent partial disability at the rate of sixty-eight dollars ($68) per week. Defendants are further ordered to pay Claimant twelve (12) weeks of healing period compensation at the rate of sixty-three dollars ($63) per week.

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

Costs of the hearing are taxed to Defendants.

Signed and filed this 11 day of June, 1975.

DENNIS L. HANSSEN
Deputy Industrial Commissioner

Thomas E. Davis, Claimant,

vs.

Firestone Tire & Rubber Co., Employer,
and

Liberty Mutual Insurance Co., Insurance Carrier, Defendants.

Amended Review-Reopening Decision

Mr. Arthur C. Hedberg, Jr., Attorney at Law, 840 Fifth Street, Des Moines, Iowa 50309, For the Claimant.

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

Now on this 16 day of June, 1975, a clerical error having been committed, the undersigned amends his Decision filed on June 11, 1975, in the above captioned matter as follows:

1. That the phrase "healing period compensation at the rate of sixty-three dollars ($63) per week" appearing in the paragraphs on page 3 beginning with "Wherefore" and "Therefore" should read "healing period compensation at the rate of sixty eight dollars ($68) per week."

2. That the phrase "permanent partial disability at the rate of sixty-eight ($68) per week" appearing in the paragraph on page 3 beginning with "Therefore" should read "permanent partial disability at the rate of sixty-three dollars ($63) per week."

The remainder of the Decision shall stand as in the original Decision filed June 11, 1975.

Signed and filed this 16 day of June, 1975.

DENNIS L. HANSSEN
Deputy Industrial Commissioner

No Appeal

Bryan Doty, Claimant,

vs.

Moorman Manufacturing Company, Employer, and

Liberty Mutual Insurance Company, Insurance Carrier, Defendants.

Review-Reopening Decision

Mr. Robert L. Ulstad, Attorney at Law, P.O. Box 1377, Fort Dodge, Iowa 50501, For the Claimant.

Mr. Don N. Kersten, Attorney at Law, Seventh Floor Snell Building, Fort Dodge, Iowa 50501, For the Defendants.

This is a proceeding in Review-Reopening incorrectly styled by the claimant, Bryan Doty, as an Arbitration against Moorman Manufacturing Company, his employer, and the Liberty Mutual Insurance Company, the insurance carrier, to recover additional benefits under the Iowa Workmen's Compensation Act by virtue of industrial injuries that occurred on February 16, 1973, and January 24, 1974. This matter came on for hearing before the undersigned Deputy Industrial Commissioner sitting as sole arbitrator at the courthouse in and for Webster County at Fort Dodge, Iowa, on October 23, 1974. At the conclusion of the hearing, counsel were given leave to file appropriate evidentiary medical depositions, vocational rehabilitation records, and briefs and arguments. The last of these were filed on May 21, 1975, and the record was closed at that time.

An examination of the Commissioner's file reveals that no First Report of Injury has ever been filed by the defendant employer. However, the file reflects that the Liberty Mutual Insurance Company has paid $272 in compensation benefits to the claimant covering the period from April 13, 1973, to May 10, 1973, and has further paid appropriate necessary reasonable medical expenses in the amount of $1,063. The record further discloses that while no Memorandum of Agreement was filed, payments so made and the acceptance thereby of the claimant satisfy the required agreement in regard to compensation as contemplated by the statute so as to make this matter one of review pursuant to Section 86.34, Code of Iowa, rather than an original proceeding as contemplated by Section 86.14, et seq.

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

Claimant, age 25, married with two minor children, and a graduate of Lake City High School, began his employment as a feed salesman for the defendant employer in October of 1972. His work history prior to his current employment began as a part-time clerk in a local hardware store until graduation from high school. He enlisted in the Air Force and received a medical discharge in 1968 after being a member of the armed forces for a short period of time. The claimant testified that the medical reason given for his discharge was that he had degenerating disc disease. Claimant had a lumbar laminectomy done by Robert A. Hayne, M.D., at the Veterans Administration Hospital in Des Moines. At that time a protruded disc in the lumbar spine was removed for relief of pain in the left lower extremity. Claimant then accepted employment for a finance company as a collector in the Waterloo area. He resigned this position after feeling that a transfer to Davenport would not be in his best interest. He then accepted a position with the Lake City Police Department and shortly thereafter became associated with the Arco Chemical Company for whom he drove a delivery truck for some six months. In January of 1972 Dr. Hayne performed a laminectomy at the fourth lumbar interspace. The surgery revealed a protrusion of the intervertebral disc at the fourth lumbar interspace on the left side.

In October of 1972 the claimant began his duties for the defendant Moorman Manufacturing Company. The defendant employer was aware of

the claimant's history as it related to his difficulty in the lumbar area of his spine. While his primary function was the sale of feed, he testified without contradiction that one of his functions was to have on hand an appropriate supply of feed so as to be able to make a immediate delivery of a representative portion of a sale to a farmer when it was made. On February 16, 1973, with snow and ice on the ground, the claimant was loading his pickup with hog feed which came in 50 pound bags. He had made a sale to a farmer and was to deliver some of this feed. While in the act of loading the feed, the claimant twisted, slipped and fell and experienced an immediate onset of pain which became progressively worse. He sought medical assistance from Dr. Dale L. Christensen, his family physician. He had been under the care of Dr. Christensen since 1971. The claimant was examined on February 17, 1973, and Dr. Christensen felt it advisable to hospitalize the claimant at that time. He was discharged from the Stewart Memorial Hospital in Lake City on February 27, 1973. The doctor discharged him with the advice that he should be able to attempt to drive his vehicle in performance of his job as a salesman. However, he was admonished that lifting was out of the question. The claimant resumed employment on March 12, 1973, and was back to see the doctor on March 26, 1973, complaining of substantial back pain. Dr. Christensen sent the claimant to Dr. T. B. Summers, a neurologist, in Des Moines. Dr. Summers' diagnosis was that the claimant had a chronic redicular syndrome lower lumbar left. Dr. Summers felt if advisable to consult with Dr. Robert C. Jones, M.D., a neurosurgeon who is also in Des Moines.

Accordingly, the claimant was seen by Dr. Jones on April 14, 1973. The history obtained by the doctor confirmed that the claimant had had two prior laminectomies. Dr. Jones performed a myelogram which showed a defect at L5-S1, which was a new condition. Dr. Jones reached this medical conclusion when he compared the results of the previously performed myelogram films. Surgery which resulted in the removal of a bulging disc at L5 also allowed Dr. Jones to free the adjacent irritated nerve roots. The claimant improved and was referred back to his own physician, Dr. Christensen.

In September of 1973, the claimant sought out Dr. Jones again, complaining of intermittent episodes of severe pain and discomfort in both legs. The claimant was attempting part-time employment during this time, but was having problems due to the fact that he was unable to conduct his affairs for a sufficient number of consecutive hours. Due to the resumption of complaints, Dr. Jones recommended a radio frequency facet rhizotomy. Dr. Jones felt that the apophyseal joints were secondarily involved. The nerves that go to these joints are a source of pain, and the procedure he proposed would create a heat lesion in the affected area, thereby reducing the pain. In October of 1973, upon another period of hospitalization, Dr. Jones made a further diagnosis of arachnoiditis. Notwithstanding that the myelogram performed in October of 1973 showed defects at L4-L5 and L5-S1, further surgery was not recommended due to the distinct possibility that additional scarring would create further and more complex difficulties. Dr. Bakody did perform an RFFR at L3-L4, L4-L5, and L5-S1 on both sides. The results were good. The claimant felt symptom-free. On January 14, 1974, the claimant was required to attend a dinner meeting in conjunction with his employment. He had gone home prior to the meeting to clean up and change clothes. He had been out in his territory that day discussing the evening meeting with some of his customers. While en route to his car, he fell down the front stairs of his residence. His difficulty increased remarkably immediately thereater. After seeing Dr. Jones in February of 1974 and another period of hospitalization, Dr. Bakody performed a second RFFR in March of 1974, the results of which were guarded. Dr. Jones' last examination showed that the claimant's deep tendon reflexes were decreased. There was some decrease in the sensation of the L5 dermatone, which is the nerve from the back which goes over the top of the foot on the left. Both ankle reflexes were about one-plus and equal. The straight leg-raising was positive on the right. Bending was limited to 40 degrees. The claimant has not been able to perform acts of gainful employment since January 24, 1974.

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 this employment. If his condition is considered more than slightly aggravated, the resultant condition is considered a personal injury within the Iowa law. **Jacques v. Farmers Lumber & Supply Co.**, 242 Iowa 548, 47 N.W. 2d 236; **Ziegler v. U. S. Gypsum Co.**, 252 Iowa 613, 106 N.W. 2d 519; **Yeager v. Firestone Tire & Rubber Co.**, 253 Iowa 369, 112 N.W. 2d 299. The claimant is not entitled to recover for the results of preexisting injury or disease, but only for an aggravation thereof which resulted in the disability found to exist. **Olson v. Goodyear Service Stores,** 255 Iowa 1112, 125 N.W. 2d 251. If a workman already has some disability and his diability is increased by a compensable injury, he is entitled to compensation to the extent of the increased disability. **DeShaw v. Energy Manufacturing Company,** 192 N.W. 2d 777.

The claimant is required to establish by a preponderance of the evidence that the employment incident in question brought about the health impairment on which he bases his claim. **Lindahl v. L.O.Boggs,** 236 Iowa 296, 18 N.W. 2d 607; **Bodish v. Fischer,** 257 Iowa 516, 133 N.W. 2d 867.

The claimant has met his burden of proof that he sustained industrial injuries on February 16, 1973, and January 24, 1974. It stands uncon-

tradicted in the record that the claimant had a prior condition of his spine which required two separate episodes of surgical intervention, and that these episodes occurred prior to the commencement of the claimant's employment. We are urged by the defendants in their brief to provide them with a credit of 30%, using that arbitrary figure to reduce the total current industrial disability. Due to the two prior surgical procedures, we are inclined to partially agree, and to find that the claimant had a 20% permanent partial disability of the body as a whole as of the date of his employment by the defendant employer herein.

The doctrine announced in **Langford v. Kellar Excavating & Grading, Inc.,** 191 N.W. 2d 667 is applicable here. This deputy is not persuaded that the second episode of January 24, 1974, is a cause of his current disability and failure to perform assigned duties. We hold that the claimant's disability is directly traceable to the first industrial accident of February 16, 1973, without which it would not now exist, and that the January 24, 1974, episode was not of any great significance.

Based upon the testimony of Dr. Jones, the attending physician, the claimant had not fully recovered from the industrial injury of February 16, 1973. In support of that finding we offer the following testimony taken from the transcript of Dr. Jones' evidentiary deposition, page 13, line 6, to page 14, line 14, which reads as follows:

> "A. I saw him next on January 29, 1974.
>
> Q. Would you tell us about that examination, Doctor?
>
> A. He said he was miserable. He had fallen on January 24 on a flight of cement steps at home. He had gone home to change his clothes to go to a dinner meeting and somersaulted head-first and landed on his back and was worse. I asked him how he was getting along before he fell, and he said he was having leg pains, the right greater than the left, and these had been on the increase. He was trying to work 5 to 6 hours a day before the fall and had not been able to work since. He said his arms were hurting since Christmas. Sitting was bothering him.
>
> On examination, it was difficult to obtain deep tendon reflexes, although I felt his left ankle reflex was slightly reduced compared to the right. He was able to bend 40 degrees with pain in the left leg. Straight leg range was positive 30 degrees bilaterally, and the examination of the arms was normal. I admitted him at this time for traction and physical therapy. He went in the hospital on February 2nd, and he had a long course of physical therapy, including traction directly to the neck and the back, and this is February of 1974. Because of the failure of this conservative treatment, Dr. Bakody again performed a radiofrequency facet rhizotomy, hoping to catch more pain-sensitive areas in the joints that I have previously described near the backbone or the spinous processes, and the patient was sent home two days later, and on March 13, which was approximately 2 weeks after that, he said he was, "Not to bad", in Dr. Bakody's handwriting. He was having some pain in the low back and driving a car was bothering him. He was walking around with some flexion. There was some bilateral limitation of straight leg raising. He had indicated that RFFR that I just alluded to had given him about 50 per cent relief of pain."

Dr. Jones expressed the medical opinion that the claimant has a 50% functional disability to the body as a whole. We are persuaded that based upon Dr. Jones' qualifications and his role as the attending physician, his opinion should be given the greater weight. We give little weight to the testimony of Dr. Ralph Woodard, M.D., who testified for and on behalf of the defendants. Dr. Woodard's qualifications and general demeanor on cross-examination do not allow this deputy to exercise a sufficient degree of reliability so as to take his medical opinion into account.

The issue to be determined at this point is the nature and extent of the claimant's industrial disability.

From the tenor of the defendants' Brief, we believe it is necessary in this case to define the term "industial disability." In that connection we will quote from **Diederich v. Tri-City Railway Co.,** 219 Iowa 587, 593, 258 N.W. 899. The court said: "It is therefore plain that the legislature intended the term 'disability' to mean 'industrial disability' or the loss of earning capacity and not a mere 'functional disability' to be computed in the terms of percentages of the total physical and mental ability of a normal man." This doctrine was further followed in **Martin v. Skelly Oil Co.,** 252 Iowa 128, 106 N.W. 2d 95, and again in **Olson v. Goodyear Service Stores**, 255 Iowa 1112, 125 N.W. 2d 251. This department is charged with the statutory duty of determining a claimant's industrial disability. In an attempt to further clarify the issue, we feel it prudent to further quote from **Olson v. Goodyear**, supra, at page 1121, as follows:

> "Disability****as defined by the Compensation Act means industrial disability, although functional disability is an element to be considered [citing Martin v. Skelly Oil, supra]. 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."

In applying the guidelines and the doctrine as announced in previous decisions, we must

comment that the injury in this case, one of continuing pain, occurred to a man in the dawn of his work life at age 25. An appropriate attempt is being made on the part of the claimant and Rehabilitation Education and Services Branch of the Department of Public Instruction of the State of Iowa. However, at the time of the writing of this decision that program has not borne fruit. We further believe that comment with respect to future review-reopening procedure is required. In that connection it is necessary to review and understand Section 86.34, Code of Iowa, which reads 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. Once an award for payments or agreement for settlement under this chapter has been made where the amount has not been commuted, the commissioner may at any time upon proper application make a determination and appropriate order concerning the entitlement of an employee to benefits provided for in section eighty-five point twenty-seven (85.27) of the Code. 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." (Emphasis added)

It is apparent that the legislature anticipated the type of problem presented by this case. In the event that the claimant's retraining efforts succeed and he finds his way back into the ranks of the gainfully employed, the defendant employer may make an appropriate application asking this department to review and reduce the award.

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

1. That the claimant sustained an injury that arose out of and in the course of his employment for his employer on February 16, 1973.

2. That the defendant insurance carrier has paid the claimant two hundred seventy-two dollars ($272) in compensation benefits covering a period from April 13, 1973, to May 10, 1973.

3. That such payment and the acceptance satisfy the required agreement in regard to compensation as contemplated by the statute so as to make this matter one of review, pursuant to Section 86.34, Code of Iowa, rather than an original proceeding as contemplated by Section 86.14, et seq.

4. That the episode of January 24, 1974, did not result in a material aggravation or a change in the claimant's physical condition, and that the claimant has been unable to perform acts of gainful employment since that date.

5. That the claimant is entitled to the maximum rate allowable under the statue or sixty-eight dollars ($68) per week for temporary total disability and sixty-three dollars ($63) per week for permanent partial disability.

6. That the claimant lost twenty-one (21) weeks of gainful employment during the calendar year 1973.

7. That the defendants paid the claimant four (4) weeks temporary total disability, leaving a balance due of seventeen (17) weeks for the calendar year 1973.

8. That the claimant has suffered an industrial disability amounting to seventy percent (70%) of the body as a whole, but that at the commencement of his contract of employment with the defendant employer herein the claimant was suffering from a twenty percent (20%) permanent partial disability of the body as a whole.

WHEREFORE, it is ordered that the defendants shall pay the claimant a healing period of one hundred and fifty (150) weeks duration at the rate of sixty-eight dollars ($68) per week less credit for those four (4) weeks previously paid.

Defendants shall pay the claimant a permanent partial disability of two hundred and fifty (250) weeks at the rate of sixty-three dollars ($63) per week, this giving the defendants an allowance for the extent of the claimant's preexisting physical infirmity. Defendants shall pay the following medical expenses:

Mercy Hospital	$3,079.48
Dr. Robert C. Jones	1,345.00
Mileage for 10 round trips of 214 miles each between Lake City and Des Moines at the rate of 10 cents per mile.	

It is further ordered that payments called for in this decision shall commence with the date of injury and that all accured payments are to be made in a lump sum.

Defendants are further ordered to pay the cost of the court reporter at the hearing and the transcription of the depostions of Dr. Dale L. Christensen, M.D., Dr. Robert C. Jones, M.D., and Lloyd Morstad.

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

Signed and filed this 8 day of July, 1975, at the office of the Iowa Industrial Commissioner at Des Moines.

HELMUT MUELLER
Deputy Industrial Commissioner

Petition for Review Dismissed

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 States 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 conductive 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 the 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 annulled 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

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

Carl D. Engstrom, Claimant,

vs.

Iowa Truck Center Inc., Employer,
and
Royal-Globe Insurance Companies, Insurance Carrier, Defendants.

Review-Reopening Decision

Mr. Harry W. Dahl, Attorney at Law, 5600 Grand Avenue, Des Moines, Iowa 50312, 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 in Review-Reopening brought by the claimant, Carl D. Engstrom, against his employer, Iowa Truck Center, Inc., and its insurance carrier, Royal-Globe Insurance Companies, to recover benefits on account of an injury sustained on February 28, 1972. The matter came on for hearing before the undersigned at the Offices of the Iowa Industrial Commissioner in Des Moines, Iowa, on Friday, December 14, 1973. The matter was left open for submission of medical testimony. The matter was initially considered completed in May of 1974. As this office was informed the parties were discussing settlement, the record was left open until October of 1974.

The issue to be determined in this matter is whether or not the claimant sustained compensable disability and medical expenses as a result of the injury of February 28, 1972, occurring when Claimant lifted "heads" from a truck engine on which he was working. A more specific question is presented concerning whether or not the employer satisfied his obligation under §85.27, Code of Iowa, thus rendering other treatment sought by the claimant as unauthorized.

It should be noted initially that a number of documents compiled by the claimant and a portion of the claimant's testimony bear on his attitude toward the insurance carrier and certain doctors. It is not thought by this Deputy Commissioner that in determining the applicability of the Workmen's Compensation Act at this point of time that that attitude of the claimant has any legal relevancy. The documents and testimony appear to have little other value. Attempts were made at earlier times in conjunction with this office to help alleviate the negative attitude.

It is sufficient to note that the histories given the doctors concerning the problems originally sustained by the claimant are not significantly in conflict. The testimony of the claimant on this issue is likewise consistent with other statements. Of particular interest on the point of time immediately following the injury is the report of Dr. Gary P. Richards, D.C. Disc degeneration is noted. However, paravertebral muscle spasm is found. Based upon Claimant's statements, history and notations by the doctor following the injury, both objective and subjective symptoms were sustained by the claimant when the "heads" were lifted on February 28, 1972.

Claimant's testimony and the history given to the doctors of the progression of the complaints following the injury is, likewise, not in significant conflict. The notation of some back difficulty of undetermined significance prior to February 28, 1972, is also present.

In addition to the testifying doctors, evidence of the opinion of Dr. Jerome G. Bashara, M.D., an orthopedic surgeon, and Dr. Gary P. Richards, D.C., is available. Dr. Richards first saw the claimant on March 5, 1972, for the instant injury. He noted a slight narrowing of the L5/S1 disc interspace with minimal degenerative changes. Claimant was being treated in August of 1972, by the chiropractor. The chiropractor indicated in August of 1972, that the claimant will be unable to return to his prior employment or any job involving lifting, twisting or bending. He noted Claimant was improving. However, improvement was slow. Apparently, most of the acute problems would be related to the lifting incident of February 28, 1972.

Dr. Bashara saw Claimant in September of 1972. His diagnosis was degenerative disc disease at L5/S1 and mild retrolisthesis. His only comment

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-Reopening 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 a 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.

as to the origin of the difficulties is that they have been going on for some months. A report of a later examination in April of 1973 only reaffirms the diagnosis. He states that Claimant cannot return to heavy labor. He states that the condition is probably not permanent but only an aggravation of the degenerative disc disease.

Dr. Ronald K. Bunten, M.D., an orthopedic surgeon, testified on Claimant's behalf. Dr. Bunten saw Claimant on December 5, 1973. His diagnosis was a degenerative disc disease with persistent sciatica. He indicates that the lifting incident of February 28, 1972, precipitated or aggravated the back problems so as to create nerve impingement. However, his symptom level is relatively low. He does not feel the claimant can return to heavy work. More vigorous treatment is recommended. The doctor's opinion concerning aggravation of a preexisting condition does not seem to vary among circumstances involved so long as the factors are in existence as noted on page 36, line 18 through 25 and page 37, line 1 through 4 of his deposition. The factors noted are consistent with the findings of this Deputy Commissioner.

Dr. Donald W. Blair, M.D., an orthopedic surgeon, first saw Claimant on August 3, 1973. His diagnosis was of a lumbosacral degenerative disc disease. A possible herniated disc was noted. However, symptoms were normal. He would indicate Claimant's problems were precipitated by the incident of February 28, 1972, in accordance with the history given. Later examination noted considerable improvement. Dr. Blair notes certain locational changes of symptoms which indicate a deterioration of Claimant's disc condition.

Dr. Blair indicates Claimant's condition at present is of a permanent duration. The condition may well change following surgery. It is not clear to what Dr. Blair refers when he uses the phrase "it would not be a permanent total condition" following surgery. This Deputy Commissioner does not interpret this to mean that Claimant is presently permanently totally disabled for industrial purposes. Dr. Blair's other notations concerning Claimant's limited symptoms tend to negate this. In addition, the observations of this Deputy Commissioner of the claimant indicate little difficulty in ambulating or sitting. Other factors are available indicating disability of a lesser nature as will be discussed later in this opinion.

Dr. Dan Toriello, D.O., testified concerning acupuncture treatments rendered the claimant. He first saw Claimant on November 27, 1972. Claimant's progress is noted by Dr. Toriello as reaching a point of having no problems. He last saw Claimant prior to his deposition on October 24, 1973. His diagnosis was of a lumbosacral sprain or strain with spondylosis. He feels Claimant's lifting incident created the injury to the lumbosacral area.

Dr. Toriello indicates perhaps further examination might be necessary to explain the claimant's continuing to be off work. Work involving heavy lifting, twisting or bending is not indicated.

The various doctors' opinions are not in significant conflict on any of the factors noted above. All agree that the incident of February 28, 1972, had some resultant effect on the claimant either in precipitating problems which prior were minor or aggravating a prior condition. Dr. Bashara notes no permanency. However, he did not see Claimant at later times. Any conflict in his testimony and that of Dr. Blair is resultant in favor of Dr. Blair's findings of a permanent impairment. Dr. Bunten's diagnosis lends support to a condition which is permanent. Dr. Toriello's opinion does not address functional impairment with permanent duration without further examination. Based on all the above factors, a permanent impairment is found to exist.

Dr. Bunten and Dr. Blair note a possible nerve impingement with low symptom level. Dr. Toriello notes no symptoms but does not address nerve impingement or other problems without further examination. All doctors agree that a strain or sprain of the lumbar area existed at one time. Any conflict as to diagnosis is resolved in favor of findings of Dr. Blair and Dr. Bunten.

All doctors testifying agree Claimant should not return to heavy work such as he was performing as a diesel mechanic.

A great deal of testimony was elicited concerning the advisability of a myelogram. As far as is pertinent under the Workmen's Compensation Act, this issue was resolved by prior determination of this office.

A great deal of testimony was elicited as to the propriety of acupuncture treatments. The propriety of the acupuncture treatments does not need to be resolved. The test is not whether or not acupuncture is proper. The focus is on the propriety of the treatment tendered by the employer and insurance carrier. If adequate and proper care is tendered by the employer or insurance carrier, the claimant is not entitled to seek treatment on his own without authorization. When Claimant's problems continued, the defendants tendered the services of Dr. Blair and Dr. Bashara. Both are orthopedic surgeons. It was likewise discussed and apparently approved by the defendants at a conference with this office that the defendants might make available another orthopedic specialist. It appears Dr. Ronald K. Bunten, M.D., an orthopedic surgeon, would fit into this situation. In addition, the treatment by acupuncture was specifically denied to the claimant unless authorized by an M.D. No such authorization is indicated. Defendants are found to have complied with the dictates of §85.27, Code of Iowa, in furnishing necessary and reasonable services. The treatment by Dr. Toriello is unauthorized. The charges are disallowed.

Other bills contemplated by §85.27, Code of Iowa, have been presented. No evidence indicates tendering of care prior to the undertaking of the treatment by the claimant prior to the fall of 1972.

Some testimony indicates urgency of treatment. Testimony indicates visits to the doctors for treatment for his back. Accordingly, the bills of Dr. Leland C. Fuller, D.C., in the sum of ten dollars ($10); the charge shown by the receipt from Dr. J.A. Hayden in the sum of seven dollars ($7); the charges for treatment by Dr. Worster in the sum of five dollars ($5); and the charges for the Bates Chiropractic Clinic in the sum of four hundred forty-four and 50/100 dollars ($444.50) are sufficiently related to the February 28, 1972, injury. It is so found.

The drug bills presented and marked as Claimant's Exhibits #6 and #8 are not sufficiently identified by testimony as bills incurred as a result of the February 28, 1972, injury. Accordingly, they are not allowed.

Claimant's work history consists primarily of heavy labor as a diesel mechanic. However, Claimant is intelligent. He has had a variety of other work experiences which seems available to him where he would not be hampered by his current back difficulty. He has obtained an Iowa Real Estate License. While an interference with Claimant's industrial capacity definitely exists as a result of this injury, the capabilities of this individual indicate that the industrial disability should be twenty-five percent (25%) of the man as a whole. It is so found.

The healing period disability ends when an injured employee is capable of returning to gainful employment of any nature. It should be noted that while all doctors indicate Claimant cannot return to heavy labor, the experience of this man in other job areas, his intelligence and his low level of symptoms indicate he could perform some gainful employment at least following October 24, 1973, the date that Dr. Toriello indicates Claimant was having no problems. The period of time from Feburary 28, 1972, to October 24, 1973, is in excess of seventy-five (75) weeks. It is so found that Claimant was totally incapacitated from gainful employment up to October 24, 1973.

THEREFORE, Defendants are ordered to pay Claimant one hundred twenty-five (125) weeks of permanent partial disability benefits at the rate of fifty-nine dollars ($59) per week. Defendants are further ordered to pay the claimant seventy-five (75) weeks of healing period disability benefits at the rate of sixty-four dollars ($64) per week. Credit is to be given for disability benefits previously paid.

Defendants are ordered to pay or reimburse the claimant for the following expenses contemplated by §85.27, Code of Iowa.

Dr. Leland C. Fuller, D.C.	$ 10.00
Dr. J. A. Hayden	7.00
Dr. Worster	5.00
Bates Chiropractic Clinic	444.50

Costs of the proceeding are taxed to the defendants.

Signed and filed this 20 day of December, 1974.

ALAN R. GARDNER
Deputy Industrial Commissioner

No Appeal

Bernadine Eversoll, Claimant,

vs.

Swift Dairy & Poultry Co., Employer,
and
Royal Globe Insurance Co., Insurance Carrier,
Defendants.

Review-Reopening Decision

Mr. John D. Stonebraker, Attorney at Law, 301 Northwest Tower, Davenport, Iowa 52806, For the Claimant.

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

This is a proceeding in Review-Reopening brought by the claimant, Bernadine Eversoll, against her employer, Swift Dairy & Poultry Co., and its insurance carrier, Royal Globe Insurance Co., to recover benefits on account of an injury sustained on June 4, 1973. The matter came on for hearing before the undersigned at the courthouse in Davenport, Iowa, on April 18, 1975. The record was left open for the submission of medical testimony. The evidence was completed on April 30, 1975.

The issues to be determined in this matter are whether or not the claimant sustained compensable disability and medical expenses in addition to that previously paid as a result of a work-related injury occurring June 4, 1973; and whether or not a failure to perform certain prescribed exercises and weight reduction is such a refusal to submit to proper care as to require the suspension of workmen's compensation benefits.

A dispute has arisen as to the date of injury. Claimant states the injury occurred on April 4, 1973, and not June 4, 1973. However, doctors' records and employer's records indicate a June injury. More specifically, the employer's records indicate a June 4, 1973, injury. Claimant's illness in April of 1973, appears unrelated to this injury. The injury is found to have occurred June 4, 1973.

No question exists as to the fact that Claimant sustained an injury on the indicated date and that it resulted in at least thirty-one and three-sevenths (31 3/7) weeks of temporary total disability. The injury resulted in complaints by the claimant in her left shoulder, left knee and low back areas. Claimant testified to no prior complaints in the indicated areas.

It should be noted initially that a subsequent occurrence to Claimant's knee on December 11, 1973, was described by Claimant as a "slipping" on stairs. Such a description leads this Deputy

Commissioner to a finding that the described event was an independent occurrence unrelated to the injury of June 4, 1973. Claimant did not describe the incident as a "giving out" occurrence. The effect of this incident on any disability will be discussed when doctors' opinions are approached.

Claimant testified that she would be unable to do any kind of work. She indicates that she can't lift her arm, can't stand and has to sit on a pillow. The pain and limitation of motion are worse now than at the time of the accident.

Physicians who examined Claimant in June of 1973 indicated difficulties in the left shoulder, lower sacrum and coccygeal areas. No fractures were noted. No neurological defect was noted. In addition, Dr. G.W. Marme, M.D., noted a sprain of Claimant's left knee on the date of injury. No knee complaint was made to Dr. Saul S. Haskell, M.D. orthopedic surgeon, some two to three weeks following the injury. Contusions were noted in the occiput, shoulder and sacral areas on the date of injury.

Dr. Haskell saw Claimant in June, 1973. He anticipated no permanent impairment at that time. Dr. Marme indicated in a report dated October 23, 1973, that the earlier examination indicated no permanency.

Dr. Richard Kreiter, M.D., orthopedic surgeon, saw Claimant on September 27, 1973, on referral by Dr. Marme. The history given related primarily to left shoulder and coccygeal complaints. Some cervical complaints were noted. The only notation concerning knee complaint was a bilateral instability and that the knees were "a bit weak." The examination noted tenderness in the lower part of the back over the coccyx and mild tenderness of the sciatic notches. Claimant also had tenderness in the left shoulder and cervical areas. No knee difficulty was noted. However, exercises for the knee were prescribed.

A month later Claimant was seen with primary complaints in her left shoulder. Claimant's left knee bothered her somewhat more at that time. The knee, however, was subject to the above noted fall on December 11, 1973. The knee had black and blue areas at the time of the fall. Claimant's complaints in March of 1975 were essentially the same. A limp noted following the December injury had disappeared.

Dr. Kreiter feels Claimant has a five percent (5%) functional disability of the left upper extremity, five percent (5%) of the knee and no disability of the low back. However, Claimant does have a chronic low back problem of a ligamentous nature. Claimant's pain level is apparently not considered great by Dr. Kreiter.

Dr. Kreiter feels Claimant's left knee had a valgus deformity not traumatically induced and some minimal arthritic changes within the knee on the posterior surface of the patella. He indicates that under one concept of evaluation no functional disability to the knee is in existence as motion is normal and the ligaments are essentially stable. Apparently any impairment of any kind is based upon the presence of some degree of arthritis assumed to have occurred following the injury. He notes Claimant's second injury and similar but lesser difficulties developing in the opposite knee. Rating such a disability is a hazy thing.

The findings of Dr. Marme as to the contusions in the shoulder area are consistent with the facts Dr. Kreiter feels are necessary for Claimant's shoulder problems to be related to the traumatic injury of June 4, 1973.

Dr. John Sinning, M.D., orthopedic surgeon, saw Claimant on February 15, 1974. The history given was of a fall on Claimant's back and left side resulting in pain in the left shoulder and back. During subsequent months she had pain in her back and left arm. Her left leg was "giving way" and a history that "torn ligaments" were found by Dr. Kreiter was given.

Dr. Sinning's opinion as to the nature and origin of Claimant's shoulder is basically the same as Dr. Kreiter's. Dr. Sinning feels the condition is probably permanent but he cannot say with any degree of certainty that the condition is permanent.

Claimant's patella, or knee cap, difficulties are diagnosed essentially the same as by Dr. Kreiter. Dr. Sinning would have no way of distinguishing the part of the complaints due to the accident and the part due to normal wear and tear. The left knee is thicker than the right. This is consistent with the history of the injury. While perhaps the knee is not at a point where proper evaluation can be made, Dr. Sinning estimates left extremity impairment to be five to ten percent (5-10%) and whole body impairment to be two to five percent (2-5%). Dr Sinning attributes the tendency of the knee to give way to the injury of June 4, 1973. It should be noted Dr. Sinning was not given a history of the injury to the knee in December of 1973.

Dr. Sinning also notes some tenderness of the lumbosacral area. However, he finds no impairment in any portion of Claimant's spine.

Dr. Sinning notes that while the findings in Claimant's knee and shoulder are to be expected to result in some complaint, Claimant's complaints are out of proportion to the degree of physical finding. Dr. Sinning feels Claimant's complaints are very real to the claimant. However, Claimant's emotional reaction to the injury is the causative factor of the majority of her complaints. Psychiatric treatment is recommended.

The testimony of the doctors and history given indicates Claimant's shoulder complaints originated in the June 4, 1973, injury. It is so found.

Claimant's knee injury involves multiple factors. Dr. Kreiter's testimony seems to indicate at least a portion of Claimant's complaint as having an origin in the June 4, 1973, injury. Likewise, Dr. Sinning's testimony indicates some causation by the injury of June 4, 1973. However, as noted, Dr.

Sinning was not told of the December, 1973 knee injury until the time of his deposition nor was he ever informed that knee ligaments were in fact not found to be damaged by Dr. Kreiter. Based upon both doctors' opinions, the history of some complaint, though mild, following the injury leads this Deputy Commissioner to find that the June 4, 1973, injury has made a minor contribution to Claimant's left knee arthritic development. Most of Claimant's knee difficulties are found to be due to the December 1973 injury and natural degeneration.

No resultant impairment to Claimant's spine is found to exist as a result of this injury.

Dr. Sinning approaches the mental factors of Claimant's complaints. Dr. Kreiter's opinion omits this. Any conflict in opinion is resolved in favor of Dr. Sinning's analysis. Accordingly, some complaints having their origin in mental difficulties as a result of the instant injury are found to exist. However, any evidence as to duration so as to allow a finding of permanency involving mental difficulties is not in existence.

No conflict is found to exist in the opinions of the doctors treating Claimant immediately following the injury and the opinions of Drs. Sinning and Kreiter concerning permanency. The earlier treating physicians were in no position to give an opinion at later dates.

Both Drs. Sinning and Kreiter are somewhat hesitant to note the degree of permanency at the time of their depositions. However the estimates and opinions of the doctors indicate some likelihood of permanency in the knee and possibly the shoulder. The finding of permanency accordingly will be made.

The injury is one allowing inquiry into industrial disability as two scheduled members are involved, §85.34(2)(s), Code of Iowa. While some mental difficulties are noted as a result of the instant injury, they are not sufficiently established to be of permanent duration and are not considered in the industrial disability determination. Little is given concerning other factors bearing on Claimant's industrial disability. Claimant is in her mid-forties and performed relatively heavy tasks at the defendants' place of employment. The minor functional problems when combined with other factors lead this Deputy Commissioner to a finding that Claimant sustained a ten percent (10%) permanent partial industrial disability as a result of the June 4, 1973, injury. The December, 1973 injury and natural degeneration may cause a greater industrial disability of the claimant. These factors, as previously noted, are unrelated to the June 4, 1973, injury.

Much has been said by counsel concerning the applicability of the principle of **Stufflebean v. City of Fort Dodge,** et al, 233 Iowa 438, 9 N.W. 2d 281. This Deputy Commissioner cannot say that the claimant's conduct was so unreasonable nor resultant in sufficient detriment to her to bring into play any sanctions contemplated by the **Stufflebean** case, if the case applies to the instant circumstances.

Evidence is sufficient to show Claimant was temporarily and totally disabled for at least thirty (30) weeks. Thirty (30) weeks is sixty percent (60%) of the fifty (50) weeks of permanent partial disability found to exist.

No medical bills are outstanding.

Consistent with the findings concerning necessity of psychiatric treatment for the emotional aspects of this injury, a tender by the defendants of appropriate psychiatric care will be ordered.

THEREFORE, Defendants are ordered to pay Claimant fifty (50) weeks of permanent partial disability compensation at the rate of sixty-three dollars ($63) per week. Defendants are ordered to pay Claimant thirty (30) weeks of temporary total disability at the rate of sixty-seven and 69/100 dollars ($67.69). Credit is to be given for the thirty-one and three-sevenths (31 3/7) weeks of temporary total disability previously paid.

Defendants are ordered to hold open a tender of psychiatric care to the claimant for a period of sixty (60) days following the filing of this decision. If accepted by the claimant within the sixty (60) day period, psychiatric care shall run until the psychiatric treatment as a result of the instant injury shall no longer be necessary.

Costs of the proceeding are taxed to the defendants.

Signed and filed this 22 day of August, 1975.

ALAN R. GARDNER
Deputy Industrial Commissioner

No Appeal

Donald R. Francis, Claimant,

vs.

Chamberlain Mfg. Co., Waterloo Division, Employer, and

Bronson-Dennehy-Ulseth, Inc., Insurance Carrier, Defendants.

Review-Reopening Decision

Mr. Upton B. Kepford, Attorney at Law, P. O. Box 2575, Waterloo, Iowa 50705, For the Claimant.

Mr. Jay P. Roberts, Attorney at Law, P. O. Box 119, Waterloo, Iowa 50704, For the Defendants.

This is a proceeding in Review-Reopening brought by the claimant, Donald R. Francis, against his employer, Chamberlain Mfg. Co., Waterloo Division, and their insurance carrier, Bronson-Dennehy-Ulseth, Inc., for the recovery of benefits for injuries sustained by him on October 18, 1969. The case came on for hearing before the undersigned Deputy Industrial Commissioner on April 18, 1974, at the Black Hawk County Courthouse in Waterloo, Iowa. The record was closed on October 3, 1974.

A Memorandum of Agreement was filed and approved on December 4, 1969. Claimant was paid temporary disability at the rate of forty dollars ($40) per week from October 21, 1969, through March 31, 1970. The permanent partial disability rate is forty-seven and 50/100 dollars ($47.50) per week.

The issue to be determined is the extent of any permanent partial disability sustained by Claimant as a result of the injury of October 18, 1969.

On October 18, 1969, Claimant fell from a platform at Defendant Employer's Waterloo plant and struck the cement floor with his buttocks and a piece of steel with his neck and back. He completed the shift and reported for work the following day. On October 27, 1969, Claimant was examined by Lewis Zager, M.D., for his complaints of headaches and pain in his arm and neck. Claimant was referred to Robert H. Kyle, M.D., by Dr. Zager on or about December 15, 1969. Claimant remained under the care of Dr. Zager until March of 1970. He was subsequently examined by John R. Walker, M.D., an orthopedic surgeon, on October 12, 1973, and April 12, 1974.

Claimant's complaints at the time of the hearing were a loss of muscular control of his right arm and pain of varying intensities in his neck. He testified that he had no neck complaints or symptoms prior to the 1969 injury.

On cross-examination Claimant admitted that he was rear ended in an automobile accident at Oelwein, Iowa, on May 26, 1968. The insurance report of Iowa National Mutual Insurance Company dated October 8, 1968, noted that Claimant had complaints of numbness in his hand and a stiff neck. Claimant received fifty dollars ($50) for pain and suffering and twelve dollars ($12) for a medical examination. As to not mentioning this incident on direct examination, Claimant said he forgot about it. Claimant also testified that he hasn't been injured since the incident of October 18, 1969.

Dr. Walker testified on behalf of Claimant. The nature of Dr. Walker's examination was as follows:

> "Well, first I took a history to find out what had happened to the patient and what he was complaining of, and listed all his complaints and basically his past history. Then, of course, next I did a complete examination of his neck and a neurological examination of him completely, and then I viewed some x-rays that I had taken and looked at his laboratory studies that I had taken and eventually I formed an opinion concerning his problems."

Based on his examination, Dr. Walker diagnosed Claimant's problem as a sprain of the cervical spine superimposed on a preexisting spondylosis of the 4th, 5th and 6th cervical innerspaces. Dr. Walker on this occasion prescribed physical therapy, isometric exercises and heat.

Claimant was once again examined by Dr. Walker on April 12, 1974. X-rays on this date were essentially the same as the x-rays taken on October 12, 1973. They revealed a spondylosis of the 4th, 5th and 6th innerspaces with calcification of the intraspinal ligaments and early osteoarthritic changes.

Dr. Walker's diagnosis was as follows:

> "Well, I thought that he had a radiculitis due to a cervical disk problem. I noted that as far as x-rays were concerned, I felt that the so-called x-ray change preexisted the fall or the injury that we are talking about. I felt that though he might have had previous trouble with his neck, and I base it on x-rays particularly, not that he had complained a great deal to me about it, but I thought that he had superimposed or aggravated, started up symptoms of this radicular problem in his right hand which consisted of weakness, loss of control, and as I felt, these people very frequently show up with loss of what we call proprioception. Proprioception is that part of either the lower extremities or upper extremities or any part of the body which tells you whether you are gripping properly, whether you are in an upright position, whether you are starting to fall; in other words, the feeling you have of where your hand or leg or foot is in relation to time and space, and it has to do with coordination, too, and I felt that he had lost this, and I felt this is why he was losing paint brushes or hammers or dropping things as he had indicated to me that he had been, and I felt that this was a sign undoubtedly of probably some herniated cervical disk problem, which I actually said at the time I would feel free to go ahead and do cervical surgery, surgical spine surgery, of course, preceding with a myelogram and the proper further work up."

Dr. Walker testified that the incident of October 18, 1969, aggravated Claimant's preexisting condition of disc degeneration and was the cause of his present complaints. He estimated Claimant's permanent partial disability to be fifteen percent (15%). He also described Claimant's limitations as follows:

> "Well, he told me that paint brushes and hammers flew out of his hands or he dropped them. Obviously he is going to have to slow down or perhaps he is going--as his arm gets tired he is going to have to stop using the right arm sooner than he would. I mean his efficiency should be down for the moment's sake as well as per unit of time, I mean for the number of units of time that he can do these things. He should rest more. He is going to be of more danger to himself if he is around machines that require coordination. Then there is, of course, the matter of how he feels, the so-called loss of the joy of living or joy of working because you don't feel good and this type of thing, and it all should be considered. Without being too specific, this I believe will give you a general picture of what I feel this type of patient loses."

Concerning Claimant not giving a history of the accident of 1968, Dr. Walker stated:

> "I should say one more thing. His neck x-rays got that way from many injuries over the years, I mean little ones, bumps, sprains, falls, bruises, and the x-ray findings I am talking about, and therefore one more apparently wasn't the straw that broke the camel's back, which I am talking about the '68 rear ending. I believe, if I know people, that if they have had bad, bad trouble, I believe that they probably are going to not settle for what was it, $38.00."

No medical evidence was offered by Defendants.

The claimant has the burden of proving by a preponderance of the evidence that the injury of October 18, 1969, 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 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.

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 & Rubber Co.,** 253 Iowa 369, 112 N.W 2d 299.

The testimony of Claimant and of Dr. Walker sustained Claimant's burden of proof that the employment incident of October 18, 1969, resulted in permanent partial disability to Claimant.

Defendants' efforts to impeach the credibility of Claimant is not persuasive. No medical evidence was offered by Defendants as to the medical treatment received by Claimant following the June 20, 1968, auto accident. If the complaints of Claimant following this accident were of the magnitude Defendants would like the undersigned to believe, seemingly medical evidence should be available to corroborate their attack on the testimony of Claimant as to his complaints after the accident. Dr. Walker's testimony, as set forth previously in this opinion, placed Claimant's failure to mention the June 20, 1968, accident on direct examination in perspective.

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.,** 235 Iowa 285, 110 N.W. 2d 660.

Claimant is fifty-eight (58) years old. Prior to beginning work for Defendant Employer, Claimant worked as a contractor. Claimant worked for Defendant Employer for approximately two years. After leaving Defendant Employer he returned to the contracting business. Since 1948, Claimant has also been engaged in the insurance business. His agency primarily writes auto and household insurance.

His tax return for the years 1969-1973 reflected the following information:

	Adjusted Gross Income	Interest	Wages	Rentals	Insurance Agency	Franciscan Homes
1969	8600.07	196.89	4208.23	(Reported business income of 4194.95. No schedule C's attached)		
1970	2466.00	89.76	84.16	354.77	1211.32	725.99
1971	5140.10	87.22	1822.70	(Reported business income of 3229.68. No schedule C's attached)		
1972	8604.00	109.00	73.00	2842.67	1395.72	4144.08
1973	5533.94	191.00	0.00	2403.99	5331.70	(1194.53)

Claimant complained at the hearing of numbness in his right arm which causes lack of muscular control while he is hammering, painting, etc. He also described intermittent pain in his neck and shoulder.

Dr. Walker estimated Claimant's permanent partial disability to be fifteen percent (15%) as a result of the October 18, 1969, incident. He described the incident as an aggravation of Claimant's preexisting condition of disc degeneration. Dr. Walker also mentioned the future possibility of surgery.

Claimant's industrial asset of performing physical labor has been reduced as a result of the incident of October 18, 1969. Applying the evidence offered in this case to the considerations outlined in **Olson,** supra, Claimant has proved a fifteen percent (15%) permanent partial disability to the body as a whole.

WHEREFORE, it is found that Claimant on October 18, 1969, sustained an injury which arose out of and in the course of his employment and which resulted in permanent partial disability to the body as a whole in the amount of fifteen percent (15%). It is further found that the rate for permanent partial disability is forty-seven and 50/100 dollars ($47.50) per week.

THEREFORE, Defendants are ordered to pay Claimant seventy-five (75) weeks of permanent partial disability at the rate of forty-seven and

50/100 dollars ($47.50) per week.

Costs of the court reporter for this hearing and for the deposition of Dr. Walker 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 1 day of November, 1974.

DENNIS L. HANSSEN
Deputy Industrial Commissioner

Appealed to District Court; Decision Pending

James Dennis Fulton, Claimant,

vs.

Nichols-Homeshield, Inc., Employer,
and
Insurance Company of North America, Insurance Carrier, Defendants.

Review-Reopening Decision

Mr. Albert J. Stafne, Jr., Attorney at Law, 1827 State Street, Bettendorf, Iowa 52722, 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 in Review-Reopening brought by the claimant, James Dennis Fulton, against his employer, Nichols-Homeshield, Inc., and its insurance company, Insurance Company of North America, to recover benefits under the Iowa Workmen's Compensation Act on account of an injury sustained on February 21, 1968. The matter came on for hearing before the undersigned at the courthouse in Davenport, Iowa, on Tuesday, June 5, 1973, at 2 p.m. The record was left open for the submission of medical testimony. The record was fully submitted on April 22, 1974.

The issue to be determined in this matter is whether or not the claimant is entitled to disability compensation in addition to that awarded in a Review-Reopening Decision of December 31, 1970.

Claimant was injured February 21, 1968, when a bale of scrap aluminum fell against him. The only physical residuals of the injury appear to have been a functional impairment from a fracture involving the third and fourth lumbar vertebrae. Such was the finding of the deputy commissioner in the December 31, 1970, Review-Reopening Decision.

In the December 31, 1970, Review-Reopening Decision, the claimant was awarded a twenty percent (20%) permanent partial industrial disability. Testimony of Dr. F. Dale Wilson, M.D., general surgeon, and Dr. John E. Sinning, Jr., M.D., orthopedic surgeon, was considered. Likewise, the claimant's testimony concerning work history was given. The testimony included the fact the claimant had been working full time for the defendant employer for several years following the accident.

Neither Dr. Wilson or Dr. Sinning indicated future deterioration at the time of earlier testimony. Testimony in the previous Review-Reopening Decision was given by the claimant as to the difficulty in obtaining other employment. No clarification of the reason was given. The deputy commissioner in the previous decision made the following ruling:

> "In applying this criteria I do not necessarily interpret the words 'incapacity to earn' to apply to the present only, but believe our Supreme Court's meaning of earning capacity to be the overall, present and future, availability of the claimant in the labor market place, generally."

The reference to future availability in the market place is a definite indication to the undersigned deputy commissioner that the previous deputy commissioner considered the possible difficulty of the claimant in obtaining other employment whatever the reason. Note is made of these factors as such rulings and apparent basis for the opinions bind this deputy commissioner concerning factors which may indicate a change in condition.

In the instant proceeding, Claimant testified to numerous unsuccessful attempts at finding other employment. A rehabilitation counselor testified on Claimant's behalf. The only information given the rehabilitation counselor on inability to obtain employment apparently came from the claimant. The reasons were not apparent. What seemed apparent and of concern to the counselor was the existence of a physical impairment which qualified the claimant for rehabilitation benefits. No inference is made by this deputy commissioner from the testimony of the rehabilitation counselor and the claimant that Claimant's inability to obtain other employment is due to the injury. Any remote inference to the contrary is lessened in that substantial documentation exists in the defendant employer's records concerning mishandling of Claimant's job and his release from employment for such mishandling. Claimant has not established with sufficient weight that the inability to find other employment is due to the employment injury. The existence of possible other factors for such failure to hire by any prospective employers makes this deputy commissioner speculate as to the reasons Claimant has been unsuccessful in obtaining other employment.

Dr. Wilson and Dr. Sinning testified in this proceeding. Dr. Wilson's opinion as to any change in Claimant's physical condition is based upon a reference to a difficulty in bending over, a loss of ability to turn to the left, and a difference in leg length. Dr. Wilson explored the area of industrial disability by indicating Claimant is totally disabled industrially now that he is no longer at his job with his previous employer. Dr. Wilson incorrectly seems to assume Claimant lost his job due to physical problems. Dr. Wilson's attitude is that unless one has a "flawless back" he is unemploy-

able. This seems overly extreme. Additionally, the industrial disability is a matter for determination by this office based upon all factors in the record. Perhaps a doctor can testify to industrial disability with sufficient foundation. In this case, all factors necessary for a proper foundation were not available to Dr. Wilson. Dr. Wilson indicates that functionally, the claimant's impairment is not significantly different than the amount to which he testified previously. With this statement concerning functional impairment and with the lack of foundation to show that any change in Claimant's economic status is related to the instant injury, Dr. Wilson's testimony lessens greatly in weight.

This lessening in weight contributes to Dr. Wilson's testimony giving way to that of Dr. Sinning. It should be noted again that Dr. Sinning is an orthopedic surgeon. Dr. Sinning's testimony in this and the previous proceeding indicate Claimant's leg length problems to be unrelated to this injury. The previous decision appears to have so found. Dr. Sinning notes a bending test is inconclusive. In fact, Dr. Sinning feels that Claimant's range of motion has improved since the prior proceeding. The conflict between Dr. Sinning's testimony and that of Dr. Wilson is thus resolved in favor of Dr. Sinning. No significant functional impairment deterioration is found.

In accordance with the above findings of lack of increased functional impairment and insufficient establishment that Claimant's inability to find employment is a result of the instant injury, no compensable change of condition is found. That Claimant's economic status is drastically changed cannot be disputed. That the change is due to this injury has not been established. It should be noted that the claimant is undertaking vocational rehabilitation training which gives a brighter look to his economic future.

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 5 day of September, 1974.

ALAN R. GARDNER
Deputy Industrial Commissioner

No Appeal

William L. Gotto, Claimant,

vs.

Grothaus Express, Employer,
and
Westchester Fire Insurance Co., Insurance Carrier,
Defendants.

Review - Reopening Decision

Mr. Thomas H. Treinen, Attorney at Law, P.O. Box 367, Battle Creek, Iowa 51006, For the Claimant.

Mr. D. M. Harper, Attorney at Law, 200 Home Federal Building, Sioux City, Iowa 51101, For the Defendants.

This is a proceeding in Review-Reopening brought by the claimant, William L. Gotto, against his employer, Grothaus Express, and its insurance carrier, Westchester Fire Insurance Company, on account of an injury on June 4, 1974. A hearing before the undersigned was held on December 18, 1975. The case was fully submitted on March 22, 1976.

A Memorandum of Agreement was filed by Defendants and approved by a Deputy Industrial Commissioner on June 21, 1974. Pursuant to this memorandum, Claimant was paid temporary disability compensation at the rate of $91 per week.

There is support in the record for the following statement of facts:

Claimant was injured on June 4, 1974, while changing a truck tire for Defendant Employer. He was admitted on this date as an emergency patient at St. Vincent Hospital by Horst G. Blume, M.D., a neurosurgeon. His physical examination indicated the following:

> Heart, Lungs, Abdomen-did not reveal any abnormal findings.
>
> Examination of both legs was negative except for the left foot which was considerably swollen at its dorsal aspect and it was also quite painful, but the foot was not moved. By x-ray (sic) we know that he has multiple fractures and displacement of the head of the metatarsal 2, 3, 4 and 5.
>
> Examination of the extremities revealed multiple superficial lacerations of the dorsal aspect of the fingers, both hands and a deeper laceration at the extensor aspect of the left lower arm in its midportion which was irregular in shape and was 4 cm. in length and 2 cm. in width. There was a large pocket up to the size of a chicken egg that did not extend into the muscles of the extensor group. The examination of the middle finger of the right hand revealed a laceration measuring 11/2 cm. in length, more or less down to the tendon, but not injuring the tendon and was at the dorsal aspect and this was also, at the time of surgery, debrided, cleaned and sutured primarily.
>
> Neurological examination revealed that the patient was able to lift up both arms and there was no downward drifting and there was good strength in the lower extremities. The deep tendon reflexes were 2+ bilaterally without signs of lateralization. No tensor plantar responses. Normal sensation for all qualities.
>
> Mental examination revealed that the patient

appears to be answering questions fairly coherently and relevently (sic), but he was somewhat lethargic and was not fully oriented as to the time and was somewhat slow in his response in general.

Examination of the head revealed a 13 cm. long deep laceration over the forehead from the midforehead on the right extending over the midline to the left and the longer laceration was more on the left side in comparison to the right and it was in between the eyebrow and the hairline. The laceration was irregular in shape and the wound was badly contaminated with hair and grass particles and portion of it was plain dirt. With palpating finger but also with naked eye, one was able to see a depressed skull fracture, at least up to 3/4 of an inch deep, and there was minimal venous bleeding from the scalp edges. There was another laceration in front of it about 6 to 7 cm. in length down to the periosteum but not any injury to the bone. It was not clear if there was brain extruding out or not.

Cranial nerve examination did not reveal any abnormal findings except that the pupils were sluggishly reacting to light, but they were of middle size and there was no evidence of papilledema and he was able to look to either side well.

X-ray examination revealed (1) multiple fractures in the frontal bone on both sides of the skull with an extensive depressed skull fracture over both frontal lobes and (2) comminuted fractures of the 2nd through 4th metatarsal heads of the left foot.

Surgery was performed on this date by Dr. Blume. The operation was described by Dr. Blume as follows:

> Debridement of extensive scalp lacerations with removal of all hair particles that were even in some of the depressed skull fractures and irrigation with saline and antibiotic fluid of Garamycin and paroxide (sic). Removal of the depressed skull fractures both frontal lobes. Removal of lacerated and severely contused frontal lobe underlying the depressed skull fractures and removal of intracerebral hematoma bilaterally. Repair of lacerated brain. Repair of dura. Plastic reconstruction of skull defect with suturing of the additional scalp laceration. Debridement and suturing of the laceration, right little finger and left lower arm.

Dr. Blume testified that he removed approximately 24 pieces of bone fractures. He estimated that approximately 20-30% of both frontal lobes was destroyed or removed.

After Claimant was discharged from the hospital on June 14, 1974, Claimant continued to be a patient of Dr. Blume. Dr. Blume stated Claimant reached maximum recovery on February 18, 1975.

On September 8, 1975, Claimant was examined by Carroll B. Larson, M.D., an orthopedic surgeon. A history of injury on June 4, 1974, was noted by Dr. Larson. Dr. Larson described Claimant's complaints to be headaches, mild ache in the left foot, nervousness, and easy fatigability. His physical examination was as follows:

> Well, he was a normal appearing well developed well nourished young man who appeared about as stated age. He was very cooperative and carried out all of the commands during the operation without hesitation. At a normal gait, he could walk on tiptoe, walk tandem, walk on his heels. When he walked on one leg at a time, he was a little more uncertain of the hop on the left than on the right but he was able to do it, and he felt that it was because of the mild discomfort in the foot. His Romberg test was negative, which is a test for balance. The cranial nerves were all intact. He had normal cervical spine motion. He did have a scar at the hairline across the forehead, and under this was a palpable bony defect which felt like ridging rather than any absence of bone. His blood pressure was 130 over 80. His heart and lungs were normal. His abdomen was normal.
>
> In examining the musculoskeletal system, all joints had a normal range of motion, normal straight leg raising. He was able to do an easy sit up.
>
> Neurologically, he was entirely normal. No disturbance of alternating rhythm motion. The only positive finding was an unsustained clonus of both feet. But he had no sensory or position loss; deep reflexes were normal, and he was able to do a pass point test normally. The only positive finding in the musculoskeletal system was a deformity of his left foot which showed a splaying, which means the foot was wider than it should normally be in the forefoot and it was an increased thickness from the mid portion of the foot from the top to the bottom of the foot. He did have tenderness in the long average. He had a definite bunion, which is a protuberance of the metatarsal head of the first ray, but the big toe had normal position and normal motion.

Dr. Larson also examined Claimant's neck and found a normal range of motion.

Dr. Larson's diagnosis was a healed irregularity with scarring in the frontal area of the skull and a thickening, tenderness, and splaying of the left foot.

He testified that Claimant as a result of the injury of June 4, 1974, has a permanent partial disability. He further testified that if Claimant received physical rehabilitation he should have reached the maximum point of healing in October or November of 1975.

On September 17, 1975, Claimant was exam-

ined by Robert M. Whiteside, D.D.S., M.D.O.S., a specialist in oral maxillofacial surgery. He was referred to Dr. Whiteside by J. E. Reinking, D.D.S. The following history was noted by Dr. Whiteside:

> Part of the history included that Dr. Reinking said the man had been hit in the face by an exploding truck tire, and he had some pain to his mouth, and particularly in the regions of the lower and upper left third molars, which are Tooth 16 and 17--Teeth 16 and 17.

A diagnosis of "Possible carious exposure of the dental pulps of 16 and 17, causing this man to have pain" was made by Dr. Whiteside. He testified that the cause of Claimant's dental problem was the result of neglect and decay and not from trauma.

A report of Dr. Reinking was submitted by Claimant. His report stated:

> In all probability, none of the dental problem was a direct result of the head injury itself; but, it probably is indirectly the cause. The dental problem was caused by poor care, which most certainly could have stemmed from the patient's recovery. This depends on whether or not the patient was capable of proper oral hygiene during this period. I wouldn't state that this was actually the cause without seeing x-rays taken prior to the accident, but in all probability, this could be the initial cause of Bill's dental problem.

Dr. Blume last examined Claimant on December 1, 1975. He described Claimant's condition on this date as follows:

> He was doing in general quite well. He has been complaining of these headaches that he gets whenever he does some kind of strenuous work. It lasts for up to three days, and always originates at the head-neck junction at the base of the skull with radiating pain forward. And I told him as to what one can do for that in the future if it's persisting.
>
> And he again was complaining of the pain in the left foot area, and some of his main problem is still that he is noticing his mental impairment.

Dr. Blume testified that Claimant has a permanent partial disability as a result of the injury of June 4, 1974.

The first issue to be determined is the extent of permanent partial disability sustained by Claimant as a result of the injury of June 4, 1974.

The claimant has the burden of proving by a preponderance of the evidence that the injury of June 4, 1974, was the cause of the disability on which he bases his claim. **Lindahl v. L. O. Boggs**, 236 Iowa 296, 18 N.W. 2d 607. 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 and Drs. Blume and Larson sustained Claimant's burden of proof that the injury of June 4, 1974, caused permanent partial disability to Claimant's body as a whole. Claimant failed to sustain his burden of proof that the injury of June 4, 1974, was the cause of his dental problems. Dr. Whiteside testified that the cause for Claimant's dental problems was neglect and decay. The equivocal report of Dr. Reinking was not sufficient to overcome the testimony of Dr. Whiteside.

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 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 which must be determined. **Barton v. Nevada Poultry Co.**, 253 Iowa 285, 110 N.W. 2d 660.

Claimant is 26 years old, divorced, and the father of two children. He attended school for twelve years but did not graduate from high school. He ranked forty-ninth out of a class of forty-nine and his high school average mark was .545 on a four-point scale. Prior to working for Defendant Employer as a truck driver, Claimant worked as a farmhand, a laborer for a construction company and a meatpacking company, and a feed truck and mill operator. Except for a one to two week period, Claimant was continuously employed after high school until his injury of June 4, 1974.

Claimant described his present complaints to be severe headaches, dizziness, fatigue, and problems with his left foot. His sister, Helen Book, testified that Claimant since his injury has experienced a decreased ability to learn dates, a change in temperament, and an inability to sleep well. She further testified that she helps Claimant with the feeder pig operation and that he works 15 to 20 minutes and rests.

Dr. Blume estimated Claimant's permanent partial disability to the body as a whole to be 60 percent industrially. Dr. Blume explained the basis for his rating as follows:

> It's what the patient is performing as a farmer in his duties and all the responsibilities with this, when you have this kind of extensive brain injury. I would, if I compare this, if I would have this kind of brain injury, I would be unable to work as a neurosurgeon, because no doctor would refer any patients to me, so I would be one hundred percent disabled.

He described the disability as affecting Claimant in the performance of physical labor as follows:

> Now, I mean, he is able to perform physical labor to the extent that whenever he does a little bit more, such as lifting or doing heavier chore work, then he will get headaches; and this lasts for several days

before he is able to try again some of his labor farm work.

He is impaired in regard to his mental capacities such as concentration span, impaired ability to memorize, to concentrate, to relearn, which is handicapping the patient; and, furthermore, the patient can have at any time uncontrolled convulsions, as I mentioned previously.

Dr. Blume recommended that Claimant not return to truck driving but could partially take care of his own farm. He doubted whether Claimant would be able to perform a job requiring a forty-hour work week.

A psychometric profile test was administered to Claimant at the request of Dr. Larson. The Intelligence Quotient portion of the test revealed that Claimant was in the 25th percentile for his age group which placed him at the bottom of average normal. The Minnesota Multiphasic Psychological Inventory portion of the test demonstrated Claimant's personality inventory to be slightly abnormal. The results of the test were construed by Dr. Larson to be not related to the injury of June 4, 1974.

Dr. Larson estimated Claimant's permanent partial disability to the body as a whole to be 10%. He described his rating as follows:

> A. I believe he has a permanent partial disability of the foot, impairment of the foot, as a result of the malalignment of the healed fracture of the metatarsals.
>
> Q. Does he have any permanent disability?
>
> A. Yes, I believe he does, related to the head injury, the brain damage. I think it accounts for the present headaches that he's having and the increased sensitivity of these headaches when exposed to extraneous outside stimuli, such as he had complained about in the smells and dust and bumping.

Dr. Larson found no impairment in Claimant's ability to concentrate, memorize, or learn and thought Claimant was capable of returning to jobs previously performed by him.

On cross-examination, Dr. Larson stated that for his evaluation he reviewed no hospital records or medical reports pertaining to Claimant other than the materials prepared by his staff. He had no idea of the extent of the brain injury at the time of the June 4, 1974, injury. He indicated that he would be surprised if 20 to 30% of the frontal lobes of the brain was removed or destroyed.

Applying the evidence offered in this case in respect to Claimant's disability to the considerations outlined in **Olson** and **Barton**, supra, Claimant proved an industrial disability of 50%. The testimony of Dr. Blume concerning the physical and mental limitations of Claimant as a result of the injury was given more weight than the testimony of Dr. Larson. Dr. Larson was unaware of the extent of the brain injury at the time of the accident. Without knowing that 20 to 30% of the frontal lobes of the brain was removed or destroyed, the undersigned did not consider the rating of 10% by Dr. Larson to be realistic. Additionally, the recommendation by Dr. Larson that Claimant return to his former employment of driving a truck seemed unrealistic in light of Claimant's continuing complaints of dizziness and headaches. In addition to Claimant's physical and mental limitations as a result of the injury, his educational deficiencies and his lack of training in a vocation not involving physical labor contributed to his industrial disability. Dr. Blume's industrial disability rating was not considered by the undersigned for the reason that no foundation was provided concerning his qualifications to express an opinion about industrial disability.

The next issue to be determined is the amount of healing period compensation due Claimant as a result of the injury of June 4, 1974. Section 85.34(1), Code of Iowa, provides:

> **Healing Period**. If an employee has suffered a personal injury causing permanent partial disability for which compensation is payable as provided in subsection 2 of this section, the employer shall pay to the employee compensation for a healing period, as provided in section 85.37, beginning on the date of the injury and until he has returned to work or competent medical evidence indicates that recuperation from said injury has been accomplished, whichever comes first.

A conflict in the medical evidence existed as to when Claimant achieved recuperation from the injury of June 4, 1974. Dr. Blume testified that Claimant reached maximum recovery on February 18, 1975. Dr. Larson indicated the claimant with physical rehabilitation should have reached the maximum point of healing in October or November, 1975. No evidence was offered that Claimant received the physical rehabilitation recommended by Dr. Larson. On approximately October 1, 1975, Claimant entered into the feeder pig business with his brother-in-law.

Because of the conflict in the medical testimony, the undersigned determined that the healing period should end on October 1, 1975, the date Claimant entered the feeder pig business, i.e., the date he returned to work.

The next issue to be determined is whether Claimant should receive a partial commutation of the permanent partial disability compensation he is entitled by reason of this decision.

Section 85.45, Code of Iowa, provides that future payments of compensation may be commuted to a present worth lump sum payment when the period during which compensation can be definitely determined and when it shall be shown to the satisfaction of the industrial commissioner that such commutation will be for the best interest of the person entitled to the compensation.

Claimant testified that he desired a partial commutation in order for him to become further

established in the feeder pig business. Dr. Blume expressed the opinion that Claimant would be able to perform this type of work because he could set his own pace in performing the work. The testimony of Claimant and Dr. Blume convinced the undersigned that a partial commutation of 60 weeks would be in the best interest of Claimant.

The last issue to be determined is whether Defendants should have advanced Claimant $150 for attending the deposition of Dr. Larson in Iowa City, Iowa.

As a result of no provisions in the workmen's compensation law requiring Defendants to advance the money requested by Claimant, the undersigned found that the request lacked merit.

WHEREFORE, it is found that Claimant on June 4, 1974, 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 body as a whole. It is further found that Claimant is entitled to healing period compensation from June 5, 1974, to October 1, 1975. It is further found that the injury of June 4, 1974, was not the cause of his dental problems. It is further found that the request for one hundred and fifty dollars ($150) for attending the deposition of Dr. Larson lacks merit. It is further found that a partial commutation of the last sixty (60) weeks of permanent partial disability awarded Claimant is in his best interest.

THEREFORE, Defendants are ordered to pay Claimant two hundred and fifty (250) weeks of permanent partial disability compensation at the rate of eighty-four dollars ($84). Pursuant to Section 85.48, Code of Iowa, Defendants are further ordered to pay as a partial commutation the last sixty (60) weeks of the award of two hundred and fifty (250) weeks in a lump sum. Defendants are further ordered to pay Claimant sixty-eight and six-sevenths (68 6/7) weeks of healing period compensation at the rate of ninety-one dollars ($91) per week.

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

Costs of the court reporters for this hearing and the depositions of Drs. Blume, Whiteside, and Larson are taxed to Defendants. Statutory witness fees and expenses as provided in Sections 622.69 and 622.72, Code of Iowa, are taxed to Defendants.

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

Signed and filed this 18 day of June, 1976.

DENNIS L. HANSSEN
Deputy Industrial Commissioner

No Appeal

Charles T. Harmon, Claimant,

vs.

Black Hawk Plumbing Co., Employer,
and
Dodson Insurance Group, Insurance Carrier,
Defendants.

Review-Reopening Decision

Mr. Edward J. Gallagher, Jr., Attorney at Law, 405 East Fifth Street, Waterloo, Iowa 50705, For the Claimant.

Mr. Craig H. Mosier, Attorney at Law, P.O. Box 2486, Waterloo, Iowa 50705, For the Defendant.

This is a proceeding in Review-Reopening brought by the claimant, Charles T. Harmon, against his employer, Black Hawk Plumbing Co., and its insurance carrier, Dodson Insurance Group, to recover benefits under the Iowa Workmen's Compensation Law on account of an injury sustained on June 13, 1972. The matter came on for hearing before the undersigned at the courthouse in Waterloo, Iowa, on October 11, 1974. The record was left open for the submission of additional testimony. The record was ultimately completed on May 14, 1975.

The issue to be determined in this matter is whether or not the claimant sustained compensable disability or medical expenses as a result of an injury on June 13, 1972, when Claimant sustained multiple injuries after falling in a manhole and being struck by an endloader.

Medical evidence is not in conflict, except in the area testified to by the otolaryngologist.

Claimant's orthopedic problems were indicated by Dr. John R. Walker, M.D., orthopedic surgeon. In August, 1974, Claimant had some residual difficulty in the left knee following removal of the medial meniscus. Claimant had some low back difficulty associated with chronic lumbosacral strain with instability. Apparently, some residual difficulties in the cervical area exist. An eleven percent (11%) permanent partial disability is found by Dr. Walker due to the described difficulties. Difficulties noted in October of 1973 concerning the left sacroiliac joint are absent in 1974. Left arm and left pectoral difficulties noted at earlier times are absent in 1974. Earlier reports of Dr. Walker, when viewed with Claimant's testimony and testimony of other doctors, indicate residuals found in 1974 to be a result of the June 13, 1972, injury. Dr. Walker's findings in August of 1974 are thus found to be the difficulties of an orthopedic nature resulting from the June 13, 1972, injury. Eleven percent (11%) permanent partial disability rating is a factor to be considered with other matters in determining the industrial disability in the instant case.

It should be noted that multiple difficulties sustained were both scheduled and nonscheduled

from the June 13, 1972, injury. Accordingly, as the resultant difficulties are in areas other than a single scheduled member, the claimant is entitled to a determination of industrial disability from the multiple injuries.

Dr. Donald A. Grief, M.D., an ophthalmologist treated Claimant's eye difficulties resulting from the injury. The claimant had some difficulty with the right and left eyes. No evidence sufficient to relate the right eye difficulties to the instant injury, except as noted in the area of nystagmus is present. Claimant's left eye difficulties are due to the June 13, 1972, injury. Claimant has a "paresis of accomodation" in the left eye due to the June 13, 1972, injury. Although the doctor's report is phrased in a negative manner, it does indicate that if Claimant were doing near work constantly, headaches may follow. No percentage of disability is given. It is found that a residual in Claimant's left eye exists as a result of the June 13, 1972, injury.

Dr. Rex B. Foster, Jr., D.D.S., specializing in maxillafacial surgery, testified with reference to Claimant's difficulty with his jaw. Claimant has difficulty in moving his jaw to the left. All other motions are now normal. He indicates Claimant's disability to be one to two percent (1-2%) of the head. The head is rated at five percent (5%) of the body. It is found that a residual due to Claimant's jaw difficulties exists as a result of the June 13, 1972, injury. The ratings are factors to be considered with all other matters bearing on Claimant's industrial disability.

Claimant's hearing loss and presence of nystagmus were explored by both Dr. Thomas R. Updegraff, M.D., otolaryngologist, and Dr. Brian F. McCabe, M.D., otolaryngologist. Dr. Updegraff last saw Claimant in October of 1974. Dr. McCabe saw Claimant in November of 1974. In the area of hearing loss due to both audio and discrimination factors, the doctors are not in any serious disagreement. Both doctors found a loss of both factors to a greater degree in the left ear but within normal limits. Dr. Updegraff indicates the possibility of improvement from his earlier tests to the tests in October, 1974. The only difference in opinion is the different doctors' feelings as to effect on daily living of the audio and discriminatory loss. As in other areas these factors are to be considered in determining Claimant's industrial disability. It is thus the finding of this Deputy Commissioner that Claimant sustained some minimal hearing loss due to audio and discrimination loss.

The nystagmus or eye movements due to inner ear vestibular damage detected by electronystagmogram testing is found by both Dr. Updegraff and Dr. McCabe. Dr. McCabe finds the nystagmus, which can cause vertigo and dizziness, is present only when Claimant's eyes are closed. No change of position in nystagmus was noted. Ice water stimulus to ears indicated an equal bilateral response. Dr. McCabe feels Claimant's brain and nervous system have compensated for the damage sustained. History of vertigo attacks was not given to Dr. McCabe. He finds it significant. However, he does not indicate that such history would cause him to view the electronystagmogram any differently.

Dr. Updegraff notes positional nystagmus. The ice water stimulus test caused a definite reaction. However, he feels the problem is mild.

The two doctors both find the existence of a mild problem of nystagmus due to the injury. Dr. McCabe feels Claimant's condition is much milder than does Dr. Updegraff. As Dr. McCabe's experience in reading the electronystagmograms is greater, as the variance in history does not appear to cause a significant variance in Dr. McCabe's opinions on the nystagmus, as the brain may compensate somewhat more rapidly in a younger man than an older man, Dr. McCabe's testimony is accepted as the finding as to the extent of nystagmus present. It should be noted that different reactions occurred at different times. This is consistent with Claimant's testimony and also would make the findings of Dr. Updegraff not necessarily in conflict with those of Dr. McCabe.

It should be noted that Dr. Updegraff places a twenty-five percent (25%) disability on Claimant's audio and nystagmus problems. This is obviously an attempt at industrial rating. Such a function is given solely to this office. Dr. McCabe apparently makes no rating of functional impairment as he feels none exists. This Deputy Commissioner, however, considers that nominal effect on Claimant's ability to earn wages is present as a result of the condition found by Dr. McCabe and as indicated by Claimant's testimony.

Claimant's work history is of relatively heavy labor. He apparently has some skill as a cook. His history insofar as jobs which require concentration, indicates some which do require concentration. This includes Claimant's present employment as an auto mechanic. Claimant is young and intelligent. He has a ninth grade education.

While Claimant's physical difficulties are many, they all appear to be mild or minimal. While he has complaints, he does not feel he is unable to do anything he could not do prior to the injury. Accordingly, it is the finding of this Deputy Commissioner that the industrial disability sustained by Claimant when all factors, including the physical disability, are considered is fifteen percent (15%).

Claimant testified that he began operating a service station around August of 1972. Claimant has been paid by the defendants for the period of time from June 14, 1972, through August 1, 1972. Claimant was also paid for the period of time when he was hospitalized following knee surgery until he began work for his present employer. In addition, Claimant testified to two and one-half (2 1/2) days of lost time due to the injuries since commencing his present employment. Claimant

was hospitalized for manipulation of his jaw on May 13, 1973, and was discharged on May 16, 1973. This is a period of four (4) days of incapacity.

Except for the following bills, the evidence is uncontradicted that charges itemized in the following paragraph are related and necessary for the instant injury. It is beyond the comprehension of this Deputy Commissioner, based upon the record in this case, that the bills itemized in the following paragraph have not been paid by the workmen's compensation carrier. If a penalty for failure to pay were provided in the Iowa Workmen's Compensation Act, it would certainly be invoked in this matter. Charges for color television in the hospital stays are not allowed. The six dollar ($6) charge at Schoitz Memorial Hospital is not sufficiently identified to allow an award. While treatment by Dr. H. S. Jacobi was noted, the bill in the evidence is not identified sufficiently as the bill for the services rendered for the instant injury and cannot be allowed. The drug bills, likewise, are insufficiently identified as those due to the instant injury. Defendants, however, are strongly urged to pay any of the above bills, except the color television charges, if further investigation indicates a relationship to the instant injury.

The following bills unpaid by the defendants or portions unpaid by the defendants are found to be related to the instant injury and based upon all the evidence. As the evidence appears uncontradicted concerning the relationship to and necessity of these bills for the instant injury, a detailed discussion of the evidence is not made. It should be noted specifically that the Allen Memorial Hospital charge and the charge of Dr. Spragg are found to be necessary and related to the instant injury by admission of Defendants at the hearing.

Waterloo Surgical and Medical Group		$1160.00
Schoitz Memorial Hospital	$232.50	
(T.V. charge)	– 3.75	228.75
Schoitz Memorial Hospital	$1043.95	
(T.V. charge)	– 20.00	1023.95
Foster Oral Surgery		135.90
Dr. Donald A. Grief		7.00
Waterloo Anesthesia Group - 5/14/73		64.00
Waterloo Anesthesia Group - 11/28/73		64.00
Dr. Spragg		20.00
Allen Memorial Hospital		50.00
Dr. H.S. Jacobi		10.00
Waterloo Sickroom (crutches)		9.27

THEREFORE, Defendants are ordered to pay Claimant seventy-five (75) weeks of permanent partial disability compensation at the rate of fifty-nine dollars ($59) per week. Defendants are further ordered to pay Claimant an additional six and one-half (6 1/2) days of healing period disability compensation at the rate of sixty-four dollars ($64) per week.

Defendants are ordered to pay or reimburse the claimant for the expenses listed directly above.

Costs of the proceeding are taxed to the defendants.

Signed and filed this 30 day of September, 1975.

ALAN R. GARDNER
Deputy Industrial Commissioner

No Appeal

Dennis J. Harris, Claimant,

vs.

Cal Harris, d/b/a Cal Harris Excavating & Trucking, Employer,
and
Illinois National Insurance Co., Insurance Carrier, Defendants.

Review-Reopening Decision

Mr. Gordon E. Winders, Attorney at Law, 607 Cleaveland Building, Rock Island, Illinois 61201, 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, Dennis J. Harris, against his employer, Cal Harris, d/b/a Cal Harris Excavating and Trucking, and their insurance carrier, Illinois National Insurance Company, for the recovery of benefits for injuries sustained by him on May 19, 1970. The record was closed on December 12, 1974.

The issue to be determined is the extent of compensable disability sustained by Claimant as a result of the injury of May 19, 1970.

A Memorandum of Agreement was filed by Defendants and approved by this office on July 14, 1970. Pursuant to this Memorandum, Claimant was paid 44 weeks of temporary disability at the rate of $40.

On May 19, 1970, Claimant was injured while attempting to back an endloader off a flat bed trailer. He was immediately taken to Davenport Osteopathic Hospital. The attending physician for Claimant at the hospital was William A. Kuchera, D.O.

Claimant was transferred the following day to University of Iowa Hospitals and Clinics at Iowa City, Iowa. In his dismissal summary, Dr. Kuchera wrote the following about his examination of Claimant on May 19, 1970:

> "He was brought to us by ambulance on the morning of 5/19/70. He was semi-conscious and would talk with single word answers. He could move his hands and arms. The entire

left side of face was contused and a deep blue coloration was present over that side of the face with the left eye swollen and closed. When I first saw him, I felt the globe may have been ruptured. I could not find a left corotid pulse. He was not breathing adequately with the left lower rib cage dented inward, and he obviously had numerous rib fractures on that side. He was given Innovar and intubated. And the respirations were assisted with Bird Respirator. Blood pressure was 80 to 90 systolic and IV fluids were started to provide open vein and to support his blood pressure. Hemoglobin was initially recorded at 16.3 grams with packed cell volume 46%. The blood type was O negative. The scalp contained multiple lacerations, one large jagged laceration present over the left temporal occipital area and a smaller one near the right ear. These were cleansed and sutured. A rubber drain was placed in the left scalp wound. Skull x-rays revealed no fractures. The lungs were clear to auscultation. Chest x-ray revealed a rupture of the left lung with some subcutaneous emphysema forming and evident in the left flank. This was not associated with a pneumothorax or a hemathorax. There was no movement of the legs. Tendon reflexes were negative. There was no response to plantar stimulation. The abdominal reflexes were negative. X-ray of the chest revealed what appeared to be a fracture of the spine located below the diaphram and possibly T-12, L-1 and L-2. This was later rechecked by specific x-rays for the spine, and a fracture dislocation was located at the lumbodorsal junction. It is assumed that multiple fractures were present involving the articular portions of T-12 and L-1. There was an associated fracture involving the body of T-12 with some displacement of the fragment. A fracture was noted involving the left transverse process of L-3. X-rays of the chest had revealed multiple lateral rib fractures involving the left lower ribs, involving the lateral aspects of the 6, 7, 8, 9 and 10th ribs. There was some angulation of the fracture sites. There were also fractures involving the proximal portions of 10, 11 and 12th ribs on the left side. A fracture was noted involving the distal portion of the 11th rib. The bladder was catheterized and the tubing attached to gravity drainage. Urinary output every hour was to be recorded. 16 cc. of urine were obtained initially. This contained RBC too numerous to be counted, albumin +4, and a trace of sugar. The specific gravity was 1.026. Recheck of hemoglobin and his packed cells in a blood volume study, with the symptoms of shock and blood pressure that would not respond easily, plus abdominal rigidity forming, there was clear evidence that splenic rupture had occurred. Splenectomy was performed following transfusion of two units of blood under pressure."

Dr. Kuchera's diagnosis was:

1. Multiple lacerations of scalp;
2. Contusions of the left eye;
3. Fracture of left ribs 6,7,8,9,10,11 and 12;
4. Rupture of the left lung;
5. Rupture of the spleen;
6. Hemorrhage and shock due to ruptured spleen;
7. Fracture dislocation of spine at D-12, L1, and L-2;
8. Spinal cord injury at D-12, L-1 area; and
9. Paralysis of both legs due to spinal cord injury.

At the University of Iowa Hospitals, Claimant was treated by Herbert B. Locksley, M.D., Associate Professor of Surgery, Division of Neurosurgery. X-rays at the University were interpreted as follows:

> "X-rays of the skull and cervical spine appeared normal. Chest x-rays showed a fracture of ribs 9 to 12 on the left side and a hazy left lower lung field. The mediastinum was in mid position and showed no evidence of hemorrhage. However, there was subcutaneous emphysema over the chest. X-rays of the lumbodorsal spine showed a fracture through the body of D-12 with disruption of the pedicles and some lateral dislocation at the D12-L1 interspace. There was also about 1cm. of posterior displacements of D12 on L1. X-rays of the pelvis showed some diastasis of the sacro-illiac joint. An intravenous pyelogram was made and showed function of both kidneys with no evidence of fracture or paranephric hemorrhage."

Neurogenically, Claimant was unable to move his legs. Dr. Locksley further noted a level of hypalgesia at D12 and a saddle sensory loss which was greater on the right.

On May 21, 1970, Dr. Locksley performed a decompressive laminectomy at D12-L1. A posterior spinal fusion was accomplished by using rib grafts wired to the laminae between D11 and L1. Postoperatively, Dr. Locksley noted that Claimant began to show neurologic function and that he developed a urinary tract infection which was treated with Gantamycin.

On June 2, 1970, a hematoma was removed from his left flank area. It was noted at this time that there was a full thickness necrosis of the skin in this area. Subsquently, the left flank wound was debrided on June 4, 1970. A split thickness skin graft was applied to the left flank area on June 10, 1970, by C.E. Hartford, M.D.

On July 22, 1970, Claimant was transferred from the Division of Neurosurgery to the Division of Rehabilitation. He was discharged from the hospital on September 18, 1970, with instructions of complete bedrest. During this period of hospitalization, Claimant's treatment consisted of bedrest, bedbound therapy, and the discontinua-

tion of Coumadin and the urinary catheter. Keith J. Lassen, M.D., noted that flexion films demonstrated an instability of the fracture site which prevented progress to a sitting program.

Claimant was admitted to the Rehabilitation Service on November 4, 1970, for reevaluation of his paraplegia. After being fitted with a back brace and learning how to walk, Claimant was discharged on December 11, 1970.

A follow-up examination was performed on March 17, 1971. On this date, Maurice D. Schnell, M.D., of the Department of Orthopedics, advised Claimant that "he can return to limited work at this time as long as he only drives and does not do any lifting."

After receiving this release, Claimant returned to work. Initially, he worked only a couple of hours per day or as much as he could tolerate. Approximately four or five months later, Claimant was able to work "full time."

Follow-up examinations were performed by the Rehabilitation Department on March 17, 1971; June 30, 1971; September 29, 1971; April 5, 1972; July 5, 1972; October 4, 1972; February 7, 1973; May 2, 1973; and May 25, 1974. At the April 5, 1972, exam the claimant was instructed "to never lift anything more than 15 lb." During his last visit, he was fitted with a new brace.

An evaluation of Claimant was performed on December 5, 1973, by Sidney G. Bailey, M.D., F.A.C.S., an orthopedic surgeon. Dr. Bailey's examination was as follows:

> "The patient was disrobed except for his underwear shorts. His back bows somewhat in the lower thoracic and upper lumbar area.
>
> There is a scar, diagonal, on the right posteriorally, where a rib was resected in the fusion process.
>
> Has very deep scarred area in the lower thoracic area to the left from the mid-line around the side of the chest. This measures 8½" long, 5" at it's (sic) widest part, which is posteriorally along the spine. This shows a loss of skin and subcutaneous tissues. It has been covered with skin grafts and the floor of the defect is soft and bulgy and gives one the impression that they are pushing directly into the internal cavity.
>
> Range of motion of the back is essentially normal. That is forward, backward, side to side and twisting of the trunk. He complained of a little discomfort on the extremes. He walked on his toes and on his heels.
>
> Knee jerks---very slight reaction bilaterally.
>
> Ankle jerks were bilaterally zero.
>
> Left foot is definitely warmer than the right.
>
> The whole right buttock is numb to pin prick and there is some numbness on the left also, however it is not as wide spread as the right side.
>
> Length (sic) length----34¾" right; 34¾" left
>
> Has a long left side abdominal scar from the spleenectomy (sic).
>
> Calves 13¾" right; 14" left.
>
> Thighs---18¾" right; 19½" left.
>
> Straight leg raising, forced flexion of the thighs on the abdomen, Lesague sign are all normal in range and without pain.
>
> Toe strength, that is dorsaflexion and plantar flexion of the big toes, bilaterally normal.
>
> Patient has tactile sensation on both feet, however with a pin prick, there is loss of sensation of the toes of the left foot and spotty up over the dorsum of the foot. Sensation on the right side is normal."

Dr. Bailey estimated Claimant's permanent disability to be 60 percent of the body as a whole.

During May of 1974, an additional evalution was performed by Ralph H. Congdon, M.D., an orthopedic surgeon. Dr. Congdon's examination supported the following symptoms of Claimant as enumerated by him.

> "SENSATION: The patient notes diminished awareness of sensation in his lower extremities, especially his feet. They seem to be capable of perception of touch and pressure and less so to hot and cold discrimination. There is also an area of decreased sensation about the left lateral thigh which is quite irregular in shape and has indistinct borders. This probably does not cause him any lack of function. There is also noticed some sensory loss in and around the bathing suit distribution i.e. crest of iliac wings into peroneum.
>
> BOWEL AND BLADDER FUNCTION: The patient describes a mildly irregular bowel function pattern. He notes that without the use of medications he is capable of bowel movements every two or three days on one hand only to be followed by maybe two or three a day without change in eating habits. Bladder function is altered by the presence of urgency incontinence. The patient notes he can usually control his Sphincter tone of his bladder unless he ingests any of the diuretic like fluids namely coffee or alcohol. After the ingestion of alcohol or coffee the patient does lose Sphincter control and is incontinent.
>
> SEXUAL FUNCTION: The patient is able to attain and maintain erection. He notes recently within the last month to two that with ejaculation he has some urinary incontinence. He does report experiencing appropriate sensation with coitus.
>
> Motor function in the lower extremities is a problem because of the cramping and aching as alluded to in pain. However the patient seemingly has good control of his feet and legs. He does note that he has been able to return to work at his previous level of employment with exception of weight limit,

as imposed on him by the rehabilitative doctors in Iowa City."

Dr. Congdon assessed Claimant's permanent disability to the entire man as follows:

Loss of muscle and thoracic nerves in lower thorax and upper lumbar area	10%
Enlarged bladder	10%
Decreased Sphincter tone	5%
Sexual function	15%
Compression fracture	10%

As a result of using the combination tables, Dr. Congdon assessed Claimant's final impairment to be 45% of the entire man.

Claimant's physical complaints on the date of the hearing included numbness in the lower abdomen, right buttock, and left buttock; cramps in the right flank; lack of complete control over bladder and bowels; cramps in lower extremities; and numbness in his feet. He also testified that he has to wear a back brace while working and is limited in his physical activities due to the weight limitation of 15 pounds.

Claimant sustained his burden of proof by a preponderance of the evidence that the injury of May 19, 1970, was the cause of his disability on which he bases his claim. 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.,** 235 Iowa 285, 110 N.W. 2d 660.

Claimant, a high school graduate, is 23 years old. He began working full-time for Defendant Employer in 1969. Prior to 1969, Claimant had worked part-time for Defendant Employer during the previous three years. He presently is operating excavating equipment for Defendant Employer. Claimant testified that Defendant Employer, Cal Harris, is his father.

Claimant has encountered problems in pursuing his vocation of an operating engineer. He testified that with the lifting limitation he must ask other people to lift things for him or lift the object with a machine. In certain situations an additional man has been hired by Claimant's father to compensate for Claimant's disability. Claimant believed that he would have difficulty working for another construction company and that he cannot stay in this type of work much longer. He also indicated that he has not received any other vocational training. His hourly rate at the present time is $8.00 per hour.

Dr. Bailey and Dr. Congdon rated Claimant's disability to the body as a whole to be 60% and 45% respectively.

Although Claimant's hourly wage rate of $8.00 is considerably more than the hourly rate on the date of the injury, Claimant has sustained a reduction of earning capacity. With permanent partial disability ratings to the body as a whole in the amounts of 60% and 45% and a lifting limitation of 15 pounds, Claimant's primary industrial asset of performing duties associated with an operating engineer have been substantially reduced as a result of the incident on May 19, 1970. Additionally, Claimant with this amount of functional disabiilty no longer has the same employment mobility as a man with no disability and of the same age and qualifications. Furthermore, the testimony by Claimant indicated that he presently has a job with Defendant Employer primarily due to the paternal relationship with Cal Harris, and that he is dubious of his ability to continue this type of work. Considering the above observations, Claimant incurred an industrial disability as a result of the May 19, 1970 injuries, in the amount of 65%.

The following medical bills were stipulated by the parties to be fair and reasonable charges for the treatment of conditions resulting from the injury of May 19, 1970:

University of Iowa Hospitals and Clinics	$115.00
Medical Services	75.00
University of Iowa Hospitals and Clinics	49.08

WHEREFORE, it is found that Claimant on May 19, 1970, 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 sixty-five percent (65%) at the rate of forty-seven and 50/100 dollars ($47.50). It is further found that Defendants should pay the medical bills of $115, $75, and $49.08.

THEREFORE, Defendants are ordered to pay Claimant three hundred twenty-five (325) weeks of permanent partial disability compensation at the rate of forty-seven and 50/100 dollars ($47.50). Defendants are further ordered to pay the following bills:

University of Iowa Hospitals and Clinics	$115.00
Medical Services	75.00
University of Iowa Hospitals and Clinics	49.08

Costs of the court reporter for this hearing 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 2 day of January, 1975.

DENNIS L. HANSSEN
Deputy Industrial Commissioner

No Appeal

Charles R. Hensley, Claimant,

vs.

Meredith Corporation, Employer,
and
Aetna Life & Casualty Co., Insurance Carrier,
Defendants.

Review-Reopening Decision

Mr. William L. Kutmus, Attorney at Law, 910 Fleming Building, Des Moines, Iowa 50309, For the Claimant.

Mr. Frank T. Harrison, Attorney at Law, 510 Central Nat'l Bank Bldg., Des Moines, Iowa 50309, For the Defendants.

This is a proceeding in Review-Reopening brought by the claimant, Charles R. Hensley, against his employer Meredith Corporation, and its insurance carrier, Aetna Life & Casualty Co., to recover benefits on account of an injury sustained on June 5, 1972. The matter came on for hearing before the undersigned at the Offices of the Iowa Industrial Commissioner in Des Moines, Iowa, on Thursday, September 6, 1973, at 1:30 p.m. The record was left open for the submission of medical testimony. The record was completed on February 15, 1974.

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 sustained June 5, 1972.

The claimant testified the injury occurred when he picked up a bag of glue. Claimant felt a pop in his back. He testified he returned to work on October 17, 1972, but employment was refused. Defendants' records indicate the presentation of a release to return to work on October 17, 1972.

Evidence of the opinions of Dr. David B. McClain, D.O., an orthopedic specialist, Dr. Robert A. Hayne, M.D., a neurosurgeon, and Dr. Thomas B. Summers, M.D., a neurologist, was placed in the record.

Four reports of Dr. McClain were placed in evidence. Following an examination on December 19, 1972, Dr. McClain noted complaints of low back pain with radiation in both legs. The left leg was more severe. The history was of the June 5, 1972, glue lifting incident. Dr. McClain's impression was a herniated nucleus pulposus at L-5 on the left side. A report on a March 13, 1973, examination was virtually identical.

Dr. McClain treated the claimant in Des Moines General Hospital on June 20, 1973, and subsequent dates. He last examined the claimant July 23, 1973. Dr. McClain placed the claimant on a fifty-pound weight restriction. On August 30, 1973, Dr. McClain gave the report of six percent (6%) permanent partial disability to the body as a whole.

It is the finding of this deputy commissioner that the fair interpretation of Dr. McClain's reports would be that the claimant sustained a six percent (6%) permanent partial disability to the body as a whole as a result of the June 5, 1972, injury. A prima facie case for permanency has thus been made. However, the weight to be given Dr. McClain's testimony is weakened because of the apparent lack of history concerning prior back difficulties.

It should also be noted that while Dr. McClain stated in earlier reports that he had an "impression" of a herniated nucleus pulposus at L-5, his later reports do not express such an impression. His reports are subject to the interpretation that in light of the tests run showing no abnormalities, the herniated nucleus pulposus was no longer an impression of the doctor. The finding of this deputy commissioner is that Dr. McClain's testimony standing alone is insufficient to establish the presence of a herniated nucleus pulposus. In accordance with this finding, the cause of the permanent partial disability noted by Dr. McClain is unclear. This lack of clarity as to cause further lessens the weight to be given Dr. McClain's testimony.

Certain portions of Dr. Summers' testimony tend to corroborate Dr. McClain's finding of permanent partial disability. This indication of Dr. Summers is apparently based upon the continuation of symptoms into the summer of 1973. However, this indication of possible permanency is weakened on cross-examination when the fact that the myelographic and electromyographic studies showing no abnormalities was presented to the doctor. He indicated such lack of findings to be supportive of his diagnosis of no permanent impairment. It is felt that in looking at Dr. Summers' testimony as a whole that he feels no permanent impairment exists. It should be noted that Dr. Summers saw the claimant once on August 27, 1972. His testimony weighs little in evaluating events occurring a year later.

It should be noted that Dr. Summers' history indicates an injury date of May 12, 1972. In view of all testimony, this is found to be insignificant.

Dr. Hayne's reports, however, tend to update and corroborate Dr. Summers' diagnosis in terms of no permanent impairment. Dr. Hayne saw the claimant on May 7, 1973. Myofacial strain of the low back area with no permanent impairment is the diagnosis.

It appears that even Drs. Hayne and Summers agree that the claimant has some residuals of strain. These, however, are of a temporary nature. In view of the claimant's activity after October of 1972, and the indication of the doctors, such residuals are not totally incapacitating. Such temporary residuals which do not totally incapacitate an injured employee are unfortunately not compensable under the Iowa Workmen's Compensation Law.

Based on all of the above interpretations and findings, it is found that the greater weight of evidence concerning permanency preponderates

in the defendants' favor. Claimant's prima facie case is thus rebutted. Accordingly, any conflict in the opinions of Drs. Hayne and Summers and of Dr. McClain is resolved against Dr. McClain.

However, Claimant's testimony, Defendants' record and testimony of all doctors would indicate Claimant's entitlement to temporary total disability compensation. Claimant was initally off work from June 5, 1972, up to October 17, 1972, a period of nineteen (19) weeks. Claimant was also incapacitated by virtue of hospitalization and Dr. McClain's recommendations from June 20, 1973, to July 23, 1973, apparently as a result of this injury. This was a period of four and six-sevenths (4 6/7) weeks. The total temporary total disability compensation due Claimant is thus twenty-three and six-sevenths (23 6/7) weeks at the rate of sixty-four dollars ($64) per week.

No medical bills were introduced.

THEREFORE, defendants are ordered to pay Claimant twenty-three and six-sevenths (23 6/7) weeks of temporary total disability compensation at the rate of sixty-four dollars ($64) per week. Credit is to be given the defendants for the weeks of temporary total disability compensation previously paid.

Costs of this proceeding are taxed to the defendants.

Signed and filed this 13 day of August, 1974.

ALAN R. GARDNER
Deputy Industrial Commissioner

No Appeal

James D. Huls, Claimant,

vs.

American Oil Company, Employer, Self-Insured, Defendant.

Review-Reopening Decision

Mr. Lyle Rodenberg, Attorney at Law, 228 Pearl Street, Council Bluffs, Iowa 51501, For the Claimant.

Mr. Robert L. Ulstad, Attorney at Law, P.O. Box 1377, Fort Dodge, Iowa 50501, For the Defendant.

This is a proceeding in Review-Reopening brought by the claimant; James D. Huls, against American Oil Company, his employer, a licensed self-insurer, to recover additional benefits under the Iowa Workmen's Compensation Act by reason of an industrial injury that occurred on November 28, 1966. This matter came on for hearing before the undersigned Deputy Industrial Commissioner on March 19, 1974, at the courthouse in and for Pottawattamie County at Council Bluffs, Iowa. At the conclusion of the hearing counsel were given leave to file appropriate evidentiary medical depositions and briefs, and the last of these having been filed on October 21, 1974, the record was closed at that time.

An examination of the Industrial Commissioner's file reveals that an appropriate First Report of Injury, Memorandum of Agreement, and Form #5 have been filed. The Form #5 shows that 20 2/7 weeks healing period at the rate of $40 per week have been paid. The Form #5 further reveals that 50 weeks of permanent partial disability at the rate of $47.50 have also been paid.

The claimant, age 50, married, has worked for the defendant in its pipeline division since 1946. He now has charge of seeing to it that when the product contained in a pipeline is changed appropriate steps are taken to see that the new distillate is routed into its proper holding tank. On November 28, 1966, while loading tank cars with distillate products from the tank farm where the claimant performed his duties, he fell from a catwalk. He fell backwards, landing on his head and shoulders from a point approximately 15 feet in the air. He was hospitalized locally, and an examination by Dr. Robert H. Westfall, M.D., revealed both shoulders broken, together with neck, back and rib injuries. The claimant has been able to perform his duties without interruption since February 1, 1968.

A request for payment of a chiropractic bill and support transportation expenses was made by the claimant. No supportive evidence as to the medical need for such services was introduced.

The issue in this case is the extent of the claimant's industrial disability resulting from the industrial injury that occurred on November 28, 1966.

Defendants in their Brief and Argument take the erroneous position that the claimant's Application for Review-Reopening should be dismissed and ask this department to sustain a finding that the claimant has failed to show a "change of condition."In support of this proposition, counsel relies on **Bever v. Collins,** 242 Iowa 1192, 49 N.W. 2d 877; **Sheker v. Quealy,** 232 Iowa 429, 4 N.W. 2d 250; **Stice v. Consolidated Indiana Coal Co.,** 228 Iowa 1031, 291 N.W. 452. These cases are all distinguishable from the case at hand.

The **Bever** case concerns a fatal industrial injury in which the Supreme Court held that an original proceeding shall be commenced within two years from the date of injury. The **Sheker** matter is again a fatal case and the decision concerns itself with the Commissioner's authority to reopen a matter in which a Memorandum of Agreement has been filed.

The only case cited by counsel as primary support for his position is contained in **Stice v. Consolidated Indiana Coal Co.,**supra. Therein it was held that after a hearing during which both sides have been in a position to offer evidence and thereupon a decision, any further Application for Review-Reopening must be supported by the claimant sustaining his burden of proof showing that there has been a change in his condition since the date of the original hearing.

The cases cited above are all procedural in nature, but one thread of continuity is present in these three cases: "If the condition of the employee warrants such a review, the original award may be reviewed." What is an "original award"? The "award" referred to by defense counsel is a unilateral act on the part of the defendants to suspend permanent partial disability payments based upon a doctor's statement as to his opinion of the extent of the claimant's permanent disability. If this be the rule, then any claimant is denied an opportunity to contest the percentage of permanent partial disability and is further prevented from having an opportunity to produce evidence as to his industrial disability, if any. Therefore, this cannot be, nor is it a proper rule of law.

As a further support of this ruling, a portion of §85.34, Code of Iowa, reads as follows:

> "Whenever an evaluation of permanent disability has been made by a physician retained by the employer, and the employee believes this evaluation to be too low, he shall have the right, upon application to the commissioner and at the same time delivery of a copy thereof to the employer, to be reimbursed by the employer the reasonable fee for a subsequent examination by a physician of his own choice, and such physican chosen by the employee shall have the right to confer with and obtain from the employer-retained physician sufficient history of the injury to make a proper examination."

It follows, then, that since the legislature provided for a method whereby a claimant is given an opportunity to contest functional disability ratings procurred by the defendants, the claimant must be given the right to bring his own witnesses' opinions to the attention of the commissioner. If the defendants' statement of law is correct, then how is the claimant able to avail himself of §85.34? It is apparent that the defendants' analysis of the law is incorrect.

In this case the claimant had never been given the opportunity to testify until the hearing in Council Bluffs in March of 1974. Up until that time, the actions on the part of the defendants were entirely unilateral. The decision on the part of the defendants to pay the claimant 50 weeks permanent partial disability obviously did not meet with the claimant's approval, hence the filing of this Application for Review-Reopening.

We find as a matter of law that the claimant's burden to establish a change of condition by a preponderance of the evidence is applicable only to those cases in which a previous hearing has been had. We reject the fiction that a Memorandum of Agreement and the filing of a Form #5 then places upon the claimant a burden of showing a change of condition different from that of his physical condition as of the date of the Memorandum of Agreement as being manifestly unfair in denying him an opportunity to be heard.

As respects the claimant's extent of industrial disability, the claimant has demonstrated that he has not made the expected recovery from the 1966 injury.

The claimant, upon testifying, clearly demonstrated to the satisfaction of this deputy that he was experiencing a substantial amount of discomfort. None of the information elicited from this claimant by way of history is at variance with his direct testimony at the time of hearing and tends to confirm the claimant's subjective complaints. Dr. Robert H. Westfall, the original examining and treating physician, concludes that Claimant's permanent partial disability equates to 10% of his body as a whole. This is also true of Dr. George H. Pester who concurred in this opinion.

Dr. Carroll B. Larson, M.D., of the Comprehensive Evaluation and Rehabilitation Center, University of Iowa Hospitals at Oakdale, confirms two positive physical findings: (1) The existence of tendinitis on the right shoulder at the long head of the biceps, and (2) Interspinous tenderness in the mid-dorsal area and at the lumbosacral junction.

The claimant has established by way of objective findings that there is a basis for his subjective complaints.

The defendants argue that the claimant has not suffered an economic loss as the result of his industrial injury. They point to the record which shows without contradiction that the claimant earns more money now than he did at the time of the injury. Further, they argue that the claimant performs all of his assigned duties in a like manner. Hence the claimant has not suffered any economic disability.

"Disability" as defined by the Compensation Act, means industrial disability, although functional disability is an element to be considered. **Martin v. Skelly Oil,** 252 Iowa 128, 106 N.W. 2d 95. 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.

The evidence does, however, support a finding that the claimant is less able to perform his normal duties, and as such is entitled to appropriate consideration as to the amount of industrial disability he has sustained. It is found that the claimant has sustained an industrial disability of 25% of the body as a whole.

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 November 28, 1966, and that said industrial injury arose out of and in the course of his employment for the defendant.

(2) That the claimant has not established the need for the chiropractic treatments of Dr. Yurth of St. Joseph, Missouri, and that the defendants

are not responsible for the cost of those chiropractic treatments and the incident travel expense necessary to obtain such treatments.

(3) That as a result of the industrial injury that the claimant sustained, he has an industrial disability of twenty-five percent (25%) of the body as a whole.

WHEREFORE, it is ordered that the defendants are required to pay the claimant one hundred twenty-five (125) weeks permanent partial disability at the rate of forty-seven and 50/100 dollars ($47.50) a week, less credit for those payments previously made.

Defendants are further ordered to continue the payment of appropriate medical expenses that are causally connected to the industrial injury of November 28, 1966. Defendants are further ordered to pay the costs of these proceedings as well as those of the shorthand reporter present at the hearing.

Signed and filed this 26 day of November, 1974, at the office of the Iowa Industrial Commissioner at Des Moines.

HELMUT MUELLER
Deputy Industrial Commissioner

Appealed to District Court; Dismissed

ISSUE INDEX

Following is an index of issues of selected cases not published in this report. This index was compiled by the Industrial Commissioner's staff as an attempt to highlight those issues felt to be of interest and is not intended as a complete index of all decisions rendered by the Iowa Industrial Commissioner during the biennium.

These decisions are available for review in the Office of the Iowa Industrial Commissioner.

AGGRAVATION

Edwards, Ruby v. Nelson Syferd, D/b/a Sylvia's Restaurant and Lounge and Western Casualty & Surety Co. ..... Arb. 5-22-75
Employee aggravated preexisting osteoporosis attempting to open window in the course of her employment. Recovery 40% of the body as a whole based on the aggravation.

Eilander, Donald, v. Merchants Storage & Transfer and Home Insurance Co. and Royal-Globe Insurance Co. ..... Order 3-12-76
Employee aggravated congenital back deformity. Claimant further had permanent partial disability to the foot as a result of previous injury. A finding of healing period and permanent disability for aggravation of congenital condition. No credit for previous foot disability.

Feuring, Elmer, v. Farmers Hybrid Cos., Inc., and Travelers Insurance Co. ..... Arb. 8-15-75
Employee working in hog operation continually exposed to "hog dust" (hog dander) and urine which aggravated underlying chronic obstructive pulmonary disease entitled to permanent disability for aggravation.

Flynn, LaVerne M., v. Wilson Trailer Co. and Insurance Company of North America ... Arb. 6-6-75
Claimant sustained burden of proof of employment incident but not disability resulting therefrom as no evidence indicated a disability greater than that which preceded the incident.

Frideres, Norbert, v. Humboldt, Inc., and Employers Mutual Casualty Co. ..... Arb. 6-9-75
Employee claimed loss of sight in one eye as result of aggravation of preexisting condition when foreign body struck eye. Insufficient evidence of trauma resulted in employee's failure to sustain burden of proof of compensable injury.

Holbert, Frank H., v. Townsend Engineering Co. and Hawkeye-Security Insurance Co. ..... Arb. 4-3-75
Employee aggravated congenital spondylothesis and long-standing diabetic condition. Fifty percent industrial disability award based in part on contraindication surgery due to diabetic condition.

Latham, Nellie, v. Savery Hotel and Western Casualty & Surety Co. ..... R.R. 2-6-76
Employee aggravated arthritic condition in work-related incident. Award of 12% permanent partial disability and no healing period since employee able to work and voluntarily excluded herself from the industrial world during a part of each year.

Miller, Virgil W., v. Northern Natural Gas Co., self-insured ..... Arb. 10-24-75
Prior to injury employee suffered a number of health conditions, including a hiatus hernia successfully repaired in 1971. A 1973 injury aggravated hiatus hernia and caused costochondral separation. Compensation allowed.

Rhiner, Grover Allen, v. Rhiner Bros. Plumbing and International Fire Insurance (Crum & Forster) ..... R.R. 1-2-76
Employee aggravated an underlying condition in January, 1974. August 1, 1975, employee's leg brace caught on gear shift, causing compensable injury when employee fell. Employer's insurance carrier changed between 1974 and 1975. On October 26, 1975, employee had surgery to correct underlying condition aggravated by previously indicated injuries. Finding August injury produced healing period to date of surgery and that each incident contributed 50% to the healing period after surgery.

Rogers, Clyde B., v. Fruin-Colnon Corp./Ringland-Johnson, Inc., and U.S. Fidelity & Guaranty ..... Arb. 10-7-75
Electric shock aggravated anxiety neurosis; however, aggravation temporary only in nature.

Sutcliffe, Irvin W., v. Clyde Black and Son, Inc., and Travelers Insurance Co. ..... Arb. 4-17-75
Recovery for aggravation of preexisting arthrosclerotic heart disease and previous heart attack allowed with showing of unusual work activities creating unusual demand on claimant's circulatory system. Awarded permanent total disability.

AGREEMENT FOR SETTLEMENT

Stout, Donald, v. Klein Mfg. Co. and Employers Insurance of Wausau ..... R.R. 3-2-76
An agreement for settlement determines the claimant's physical condition on date of settlement but does not preclude review-reopening (86.34) when subsequent evidence discloses a change of claimant's condition from date of settlement.

AGRICULTURAL PURSUITS

Maxwell, Howard E., v. Marshall Packing Co. and Employers Mutual Casualty Co... Arb. 11-8-74
Employer engaged solely in agriculture with employee who devoted most of his time to agricultural pursuits engaged in moving a culvert found not to be engaged in an agricultural pursuit. Nature of the work being done is controlling factor in agricultural exclusion.

APPLIANCES AND PROSTHETICS

Myers, Lee, v. University of Northern Iowa and State of Iowa ..... R.R. 11-11-75
Eyeglasses broken in a fall and not for correction of a condition resulting from instant injury are not compensable under the Iowa Workers' Compensation Law.

APPORTIONMENT

McNaughton, Diane, et al, v. Vernon L. Hesse and Zurich-American Insurance Cos... Order 7-29-76
Decedent left surviving spouse and three children from previous marriage. Two of children receiving social security benefits entitled to smaller share of apportionment than remaining children with need for funds. $72 per week apportioned to surviving spouse, with remainder unequally apportioned to children.

Nickles, James B., v. Pulley Freight Lines, Inc., and Carriers Insurance Co. ..... Order 2-20-76
Decedent left as dependents a minor child of his first wife, and surviving spouse. Decedent required to pay child support but had failed to do so. Apportioned $20 a week for dependent child and $140 per week for surviving spouse.

Parsons, Ronald L., v. Gunnar A. Olsen Corp. and Travelers Insurance Co. ..... Order 3-13-75
Decedent left five natural children by first marriage (first wife remarried), two adopted children of second wife (second wife remarried), and surviving spouse with no children. Apportionment based upon equitable consideration, $20 per week to adopted children of second marriage and $71 per week to surviving spouse.

Thomason, Donald J., Jr., dec., by Norma Thomason, et al, and by Judith B. Thomason, et al, v. Donald J. Thomason, Sr. and Thomason Camper Sales and Travelers Insurance Co. ..... Order 8-22-74
Employee left surviving spouse with one natural child and two step-children, plus a previous wife, remarried, with four natural children. Death benefit apportioned $20 per week to the four children of first wife and $71 per week to the natural child and two step-children in custody of surviving spouse.

ARISING OUT OF

Addington, Harold R., v. Manning Community School and Employers Mutual Casualty Co. ..... Arb. 5-12-75
Employee suffered aggravation of preexisting mental disability, temporary in nature, as a direct result of perceived difficulties in his work environment. Employee allowed temporary total disability.

Burgess, Linda L., v. Sheller-Globe Corp., self-insured ..... Arb. 10-31-75
Employee sustained injury resulting in three days lost time in September, 1972. Two years later claimant experienced difficulties with her arm and shoulder. Found not compensable as employee was unable to establish a causal relationship with 1972 injury.

Grim, Ronald L., v. Lawton L. Gentry, d/b/a Good Construction Co. and Hawkeye Security Insurance Co. ..... Arb. 6-30-75
Employee's sensation of foreign body in his eye, complicated by viral irritation, not sufficient to show injury arising out of employment without showing employment-related trauma.

Harvell, Ben v. Iowa Steel and Iron Works and Iowa National Mutual Insurance Co.. Arb. 11-14-75
Claimant failed to sustain burden of low back injury arising out of employment based on lack of specific incident and medical testimony as to causation.

Schrage, Allan L., v. Houdaille Industries, Inc., Viking Pump Co. Div., and Liberty Mutual Insurance Co. ..... Arb. 8-23-74
January 25, 1973, employee claimed back injury. Aggravated by non-employment

related bowling incident of January 28, 1973. Medical evidence indicated back difficulties prior to January, 1973. Employee failed to sustain burden that disability arose out of the employment as opposed to the intervening bowling incident.

Shultz, Arza, v. Foote Mineral Co., Kemco Div., and Liberty Mutual Insurance Co. . . Arb. 1-9-75
Employee alleging hearing loss as a result of working in a 20-foot enclosure in company of welding and air hammers. Claim denied based upon lack of evidence to sustain causal relationship as exposure levels not furnished the physician.

Siebrandt, Virgil, v. Bevington & Johnson and Home Insurance Co. . . . . . Arb. 2-21-75
Employee suffered ruptured aneurysm and later a heart attack while in hospital. Claim of causation as to aneurysm based upon heavy exertion not supported by evidence. Recovery denied.

ASSUMPTION OF LIABILITY---85.1

Strub, Dean E., v. William R. Weinrich and Great West Casualty Co. . . . . . Arb. 9-13-74
Provision exists to allow voluntary coverage of certain exempt employees, but not to allow one who is not an employee to be placed under the Compensation Act.

ATTORNEY'S FEES

Parker, Terry Monroe, v. Mason & Hanger/Silas Mason Co. and Employers Insurance of Wausau . . . . . Supp. Arb. 12-4-74
Iowa Compensation Act does not provide for attorneys' fees in addition to award.

BURDEN OF PROOF

Anderson, Dustin J., v. American Beef Packers, Inc., and Transport Indemnity Co. . Arb. 7-28-75
Employee impeached by recorded telephone interview, resulting in rejection of employee's testimony on occurrence of injury. Employee failed to sustain burden necessary for recovery.

Auxier, Patricia, v. Woodward State Hospital and State of Iowa . . . . . R.R. 11-20-74
Employee's tripping incident resulted in 15% permanent partial disability to the body as a whole as a result of back injury. On medical evidence claimant failed to establish burden of proof of connecting personality problems, reaction to dye used in myelogram, ankle injury, and other physical conditions as well as a portion of the medical expense.

Blackford, Clell M., v. Hoerner Waldolf Corp. and Insurance Company of North America . . . . . Arb. 7-25-74
Employee claim of 50% disability from severe pulmonary dysfunction based on exposure to a variety of environmental toxins not sustained for lack of evidence of exposure and causal relationship.

Blattner, Max, v. Link Belt Speeder and Liberty Mutual Insurance Co. . . . . . Arb. 5-16-75
Employee failed to sustain burden of proof causally connecting injury to disability when employee failed to offer any medical evidence of such relationship.

Burris, Marvin H., v. A. J. Ream Enterprises, Inc., and U. S. Fidelity & Guaranty . . . . Arb. 9-30-75
Limitation on the right to compensation, i.e., notice or knowledge of injury (85.23) is a restriction on initial entitlement rather than a defense which must be pleaded affirmatively.

Burtlow, Melvin M., v. L. D. Kleinschmidt . . . . . Arb. 7-2-74
Employee established healing period, permanent partial disability, and medical expense on employee's testimony and letter from treating physician when defendant failed to appear.

Dellaca, Ronald, v. AMF Western Tool and Hartford Insurance Group . . . . . R.R. 8-7-74
Recovery denied on credibility of employee and a witness and medical evidence based on conflicts in description of injury.

Evans, Orin D., v. John Baxter d/b/a Wagonwheel Tavern . . . . . Arb. 8-30-74
Burden of proof of affirmative defenses rests with employer and will not sustain defense of intoxication without showing intoxication proximate cause of injury.

Flynn, LaVerne M., v. Wilson Trailer Co. and Insurance Company of North America . . . . . Arb. 6-6-75
Claimant sustained burden of proof of employment incident but not disability resulting therefrom as no evidence indicated a disability greater than that which preceded the incident.

Ford, George, v. B.W.S.C., Inc., and Iowa Mutual Insurance Co. ..... Arb. 6-16-75
Employee injured en route to work at 1:30 A.M. to pick up tools and equipment prior to reporting to job site at 8:00 A.M. Dispute on facts as to requirement on employee to secure tools and equipment. Employee did not sustain burden of injury in the course of.

Koehler, Mildred I., v. Massey Ferguson, Inc., and Sentry Insurance Co. ..... Arb. 8-19-74
Employee suffered back injuries in 1966, 1969, and 1970. The 1970 incident resulted in surgery at L4-5 and L5-S1. Employee sustained tripping incident in 1973. Employee sustained burden of proof of aggravation by 1973 incident with employee's testimony and supporting medical evidence even though employee had complaint of back problems during interval 1970-1973.

Kouri, Adrian, v. Westinghouse Electric Corp., Elevator Div., and Liberty Mutual Insurance Co. ..... Arb. 1-22-76
Injury claimed on April 20, 1973, with no treatment until after May 29, 1973, water-skiing incident. Claimant did not sustain burden of establishing injury arising out of and in the course of on April 20, 1973.

Larrew, Steven John, v. Turner Furniture Mfg. Co. and Western Insurance Co. ..... Arb. 8-15-74
Employee sustained compensable back injury. Two days later employee suffered non-industrial back injury resulting from fall on ice. Employee failed to offer medical evidence as to causation of subsequent disability and did not sustain his burden of proof.

Lawson, William N., v. Twin City Beef Co. and Travelers Insurance Co. ..... Arb. 10-15-74
Psychiatric testimony that some personality problems were result of injury and some not, not sufficient to support disability based on mental problems wherein psychiatrist unable to sort problems out.

McCauley, Wilson, v. Kay Dee Feed Co. and Maryland Insurance Co. ..... Arb. 6-17-75
Employee failed to recover on lack of medical evidence of medical causation under any of the three situations outlined by Iowa Supreme Court.

Spoonhaltz, Robert R., v. John Deere Des Moines Works, self-insured ..... Arb. 12-17-74
Employee failed in proving compensable injury based on lack of sufficient medical evidence, contradictory evidence and credibility of employee.

CASUAL EMPLOYMENT

Lickiss, Edgar Ralph, v. Duane Gutcher ..... Arb. 1-26-76
Employee, a security salesman by trade, was involved in construction of a garage on home premises of employer. Employment found to be casual employment in terms of 85.1 (2).

CHANGE OF CONDITION

Logsdon, Charles, v. Pittsburgh-Des Moines Steel and Employers Insurance of Wausau ..... R.R. 2-12-76
July 31, 1972, employee found to have 15% industrial disabilty. Disability increased to 70% on showing of significant change in condition affecting industrial disability.

Meyers, Hazel, v. Holiday Inn of Cedar Falls and Continental Casualty Co. ..... R.R. 6-17-76
Award of 12% industrial disability increased to 45% based on employee's inability to work and deterioration of physical condition.

COMMON-LAW MARRIAGE

Combs, Dale T., v. American Beef Packers Transportation, Inc., and Transport Indemnity Co. ..... Arb. 8-7-75
Surviving spouse showed common-law marriage based on a ceremony with exchange of wedding bands, co-habitation and other acts consistent with marital relationship.

COMMUTATION

Mishler, Jerry D., v. Cunningham and Limp Co. and Travelers Insurance Company . R.R. 6-11-75
Employee sustained 10% functional and refused recommended surgery. Industrial disability over the functional speculative in nature. Refusal of surgery proper basis for commutation.

Playle, Bernus Dean, v. Rolscreen Co. and Liberty Mutual Insurance Company ..... Order 8-26-75
To resolve claimant's petiton for commutation and resistance thereto, an order of

payment to employee and contract seller of claimant's house, with copy of deed to be made part of the industrial commissioner's file when transaction completed; payment of attorney's fees; and the remainder of the benefits to be paid on a weekly basis.

CREDIT FOR GROUP PLANS---85.38

Holbert, Frank H., v. Townsend Engineering Co. and Hawkeye Security Insurance Co. ..... Arb. 4-3-75
Employee received payment for sick leave under a group plan contributed partially by the employer. Group plan entitled to reimbursement from compensation recovery.

DEFAULT

Bringman, Delno O., v. Big Ben Coal Co. and Old Republic Insurance Co. ..... Order 7-26-76
Employer in default restricted to cross-examination of claimant's witnesses only in hearing.

DEFENSE--AFFIRMATIVE

Hunt, Viola M. v. Earl Mullenix d/b/a Hi Hat Tavern ..... Arb. 9-27-74
Employer failed to assert affirmative defense prior to hearing or date of decision. Defense is barred by the Rules of Practice of the Industrial Commissioner and Rules of Civil Procedure.

DEPENDENCY

Beaber, Terry, v. Board of Trustees, Mt. Pleasant Municipal Utilities and Employers Mutual Casualty Co. ..... Arb. 3-24-75
Decedent left surviving spouse and stepchild. Spouse remarried after 127 weeks. Dispute on the stepchild's right to remaining benefits based on whether stepchild is presumed to be wholly dependent (85.42) or must show actual dependency (85.44). Claimant prevailed with prima facie showing of principal support by the decedent.

Combs, Dale T., dec., v. American Beef Packers Transportation, Inc., and Transport Indemnity Co. ..... Arb. 8-7-75
Surviving spouse showed common-law marriage based on a ceremony with exchange of wedding bands, co-habitation and other acts consistent with marital relationship.

Lenaghan, Edward J., et al, v. John Godby and Farm Bureau Mutual Insurance Co. .. Arb. 1-6-76
Employee's parents, brothers and sisters found to be dependent in part on employee. Extent of dependency based upon contribution to family members not otherwise capable of earning. Twenty percent of compensation rate apportioned in equal shares to six brothers and sisters for duration of their inability to earn.

Parsons, Ronald L., v. Gunnar A. Olsen Corp. and Travelers Insurance Co. ..... Order 3-13-75
Natural children as well as adopted children qualify for benefits under 85.42 even though surviving spouse remarried and children adopted prior to employee's death.

DERMATITIS

Troendle, Elmer M., v. Penick and Ford, Ltd., and Fireman's Fund American Insurance Cos. ..... Arb. 5-13-75
Claimant sustained compensable contact dermatitis established by medical evidence based upon exposure to certain areas of the plant. Precipitating specific irritant not identified. Defendants offered no medical evidence.

DUAL PURPOSE DOCTRINE

Fredericksen, David N., dec./Lori, widow, v. Northwest Iowa Masonry, Inc., and Hawkeye Security Insurance Co. ..... Arb. 10-3-75
Employee in course of his employment on a trip with dual purpose of returning home and performing a special service for employer. Compensation allowed.

EMPLOYER-EMPLOYEE RELATIONSHIP

Allen, Joe G. v. Burl Morris d/b/a M & W Cafe & Rentals and Federated Mutual Insurance Co. ..... Arb. 4-19-76
Employee found to meet the tests of employee as established by the Iowa Supreme Court and not an independent contractor as alleged by employer.

Armstrong, George E., v. Robert J. Elliott, Inc., and Great American Insurance Co. . Arb. 2-27-76
Employee found to meet the tests of employee as established by the Iowa Supreme Court and not an independent contractor as alleged by employer.

DeRaad, Joseph Jay, v. The State of Iowa, self-insured ..... Arb. 2-17-76
Claimant, referee of a juvenile court, appointed by district court judge but paid by Woodbury County. Claimant found to be employee of Woodbury County based on tests of employer-employee relationship and activities of parties involved, even though appointed by state employee, judge.

Fredricksen, Robert, v. Clarence Novotny ..... Arb. 11-20-74
Employer's defense of joint venture and/or partnership failed based upon evidence of employer-employee relationship compared with tests of such relationship established by Iowa Supreme Court.

Grunwald, Dennis, v. Brady Motor Freight and Smith Transfer Corp. and Carriers Insurance Co. ..... Arb. 4-1-76
Employer-employee relationship not found when employee did not meet the tests of employment relationship, particularly in regard to right of selection, responsibility for payment of wages, no right to terminate relationship, and no control over work.

Huntress, Roger, v. Morton Buildings, Inc., and Bituminous Casualty Corp. ..... Arb. 2-25-76
Claimant found not to be employee based on lack of showing of responsibility for payment of wages, no right of selection or discharge, and no right to control employee's activities.

Larson, Todd A., v. Gene Larson and IMT Insurance Co. ..... Arb. 4-1-76
Claimant, eight-year-old son of employer, found to be employee on meeting the tests of employer-employee relationship as established by the Iowa Supreme Court.

Plantz, James L., v. Minnie Tjelmeland and United Fire and Casualty Co. ..... Arb. 8-19-74
Employee has burden of establishing employer-employee relationship in terms of tests set out by Iowa Supreme Court. Employee sustained burden.

Reittinger, Emil, v. J. J. Recker & Sons, Inc., and State Farm Insurance Co. ..... Arb. 4-30-76
Employee failed to establish employer-employee relationship based mainly on lack of control where some of the tests for employer-employee relationship were established. Employer further established independent contractor relationship as a defense.

Strub, Dean E., v. William R. Weinrich and Great West Casualty Co. ..... Arb. 9-13-74
Plaintiff found not to be employee where he did not meet tests of employment.

Tentinger, Lloyd, v. Donald Wold ..... Arb. 4-16-75
Truck driver found to be employee and not independent contractor based on evidence fulfilling tests of employer-employee relationship established by Iowa Supreme Court.

Thompson, Dean F., v. Alva Morton and Mallinger Truck Line, Inc., and CNA Insurance Co. ..... Arb. 2-7-75*
Claimant truck driver found to be employee of joint venture of two defendants based on shared right of selection, working relationships, Interstate Commerce Commission rates and other factors.

EXAMINATION---EMPLOYEE'S RIGHT TO

Vrana, Ernest, v. Central Telephone Co. and Zurich Insurance Co. ..... Order 7-22-75
Employer has a statutory duty to provide reasonable medical care. When not exercised, the care received is not the employee's doctor in terms of the employee's right to reimbursement for examination under 85.32(2).

GOING-AND-COMING RULE

Halstead, Daniel, Jr., v. Johnson's Texaco and Travelers Insurance Co. ..... Arb. 3-25-75
Employee away from premises on lunch hour, away from employer's control and not on a joint or special errand, is not in the course of his employment. Recovery denied.

Hatle, Dennis, v. Service Auto Glass and Home Insurance Co. ..... Arb. 7-25-75
Employee, in the course of employment, en route home while driving employer-furnished van with expenses paid. Implication trip to be within the course of employment from preceding facts.

HEALING PERIOD

Edwards, Ruby, v. Nelson Syferd d/b/a Sylvia's Restaurant and Lounge and Western Casualty and Surety Co. ..... Arb. 5-22-75
In case of aggravation of preexisting condition, the employer is responsible for the reasonable and normal medically expected period of time necessary to heal such aggravation.

Farnum, Hazel, v. Hoerner-Waldorf and Aetna Casualty and Surety Co. ..... Arb. 4-26-76
When employee is not returned to work, the alternative test of recuperation has been met when medically stabilized or the ability to return to substantially similar employment is reached.

Koehler, Mildred I., v. Massey Ferguson, Inc., and Sentry Insurance Co. ..... Arb. 8-19-74
Since employee has to certify he is able and available for work in order to receive unemployment compensation, such employee will not be entitled to healing period while drawing same.

Lalor, Raynard F., v. Franklin Mfg. Co. and Travelers Insurance Co. ..... Arb. 8-1-75
Employee released to return to light work June 1, 1974, with no light work available. Employee entitled to healing period to September 11, 1974.

Latham, Nellie, v. Savery Hotel and Western Casualty and Surety Co. ..... R.R. 2-6-76
Employee aggravated arthritic condition in work-related incident. Award of 12% permanent partial disability and no healing period since employee able to work and voluntarily excluded herself from the industrial world during a part of each year.

Rand, Larry H., v. John Deere Waterloo Tractor Works, self-insured ..... R.R. 6-22-76
A medical release to return to light work does not indicate a return to work so as to end the healing period. Alternative test of recuperation is met when employee reaches a plateau where deterioration or improvement not anticipated or employee is capable of returning to substantially similar employment.

Rhiner, Grover Allen, v. Rhiner Bros. Plumbing and International Fire Insurance (Crum & Forster) ..... R.R. 1-2-76
Employee aggravated an underlying condition on January 9, 1974. August 1, 1975, employees leg brace caught on gear shift causing compensable injury when employee fell. Employer's insurance carrier changed between 1974 and 1975. On October 26, 1975, employee had surgery to correct underlying condition aggravated by previously indicated injuries. Finding August injury produced healing period to date of surgery and that each incident contributed 50% to the healing period after surgery.

HEARING LOSS

Shultz, Arza, v. Foote Mineral Co., Kemco Div., and Liberty Mutual Insurance Co. ... Arb. 1-9-75
Employee alleging hearing loss as a result of working in a 20-foot enclosure in company of welding and air hammers. Claim denied based upon lack of evidence to sustain causal relationship as exposure levels not furnished the physician.

Van Thorson, Douglas, v. Iowa Beef Processors, Inc. and Argonaut Insurance Co. ... Arb. 9-3-75
Claimant sustained hearing loss after several hours of shooting cattle. Dispute as to proper guidelines in measurement resolved against AMA and AAOO standards and in favor of board-certified otolaryngologist.

HEART ATTACK

Benson, Kenneth W., Sr., v. National Gypsum Co. and Kemper Insurance Co. ..... Arb. 8-9-74
Decedent suffered heart attack shortly after emotional disagreement with foreman. Myocardial infarction found casually related to decedent's work activities.

Eriksen, Frances L., v. Agdrup B. Eriksen, d/b/a Eriksen Construction Co. and State Automobile & Casualty Underwriters ..... Arb. 4-30-76
Decedent failed to establish burden of aggravation of preexisting condition by failing to show either heavy exertions or unusually strenuous employment exertion.

Johnson, Lloyd W., v. Johnson Biscuit Co. and General Accident Insurance Co. ... Arb. 4-9-75
Based on lack of evidence, history conflicting with employee's testimony and violation of rule of employer and Department of Transportation, recovery for heart attack denied.

McCauley, Wilson, v. Kay Dee Feed Co. and Maryland Insurance Co. ..... Arb. 6-17-75
Employee failed to recover on lack of medical evidence of causation under any of the three situations outlined by Iowa Supreme Court.

Montgomery, Maxine Pierce, v. Iowa Ordnance Plant/Mason & Hanger and Employers Insurance of Wausau ..... Arb. 9-3-74
Finding of 35% industrial disability for myocardial infarction caused or aggravated by the employment.

Siebrandt, Virgil, v. Bevington & Johnson and Home Insurance Co. ..... Arb. 2-21-75
Employee suffered ruptured aneurysm and later a heart attack while in hospital.

Claim of causation as to aneurysm based upon heavy exertion not supported by evidence. Recovery denied.

Sutcliffe, Irvin W., v. Clyde Black and Son, Inc., and Travelers Insurance Co. . . . . . Arb. 4-17-75
Recovery for aggravation of preexisting arthrosclerotic heart disease and previous heart attack allowed with showing of unusual work activities creating unusual demand on claimant's circulatory system. Awarded permanent total disability.

HORSEPLAY

Caves, Harlan L., v. Collins Radio Co. and Employers Insurance of Wausau . . . . . Arb. 1-27-75
Employee an innocent victim of horseplay in which he did not participate entitled to benefits of the compensation act.

IN THE COURSE OF

Busche, Robert L., v. Younglove Construction Co., and Northwestern National Insurance Co. . . . . . Arb. 2-11-76
Employee caught in blizzard en route to his home after leaving his employment not in the course of same.

Ford, George, v. B.W.S.C., Inc. and Iowa Mutual Insurance Co. . . . . . Arb. 6-16-75
Employee injured en route to work at 1:30 A.M. to pick up tools and equipment prior to reporting to job site at 8:00 A.M. Dispute on facts as to requirement on employee to secure tools and equipment. Employee did not sustain burden of injury in the course of.

Halstead, Daniel, Jr., v. Johnson's Texaco and Travelers Insurance Co. . . . . . Arb. 3-25-75
Employee away from premises on lunch hour, away from employer's control and not on a joint or special errand, is not in the course of his employment. Recovery denied.

Scharf, William E., v. Hewitt Masonry and Hawkeye Security Insurance Co. . . . . . Arb. 12-31-74
Employee found to be in course of employment when traveling to a job site under conditions where employer paid travel expense and was willing to pay time involved for travel in question.

Stahle, Scott David, v. Holtzen Homes and U.S.F. & G. Co. . . . . . Arb. 6-8-76
Employee working in housing project rode his motorcycle to a separate house within the project to share coffeebreak. Employee's instructions not to engage in practice commonly disregarded, with employer's knowledge. Injury compensable and in the course of the employment.

Tidball, David W., v. Firestone Tire & Rubber Co. and Liberty Mutual Insurance Co. . . . Arb. 2-12-76
Employee union member attended union grievance meeting at plant to discuss quality control problem. When leaving the premises, employee fell from his motorcycle in the employer's parking lot and sustained an injury. Employee found in the course of his employment. Defense of unusual and rash act in operation of motorcycle not successful on finding employee was not performing a prohibited act when injured.

Welch, Freda B., v. ARA Services, Inc./HFM, Inc. and Royal Globe Insurance Co. . . . Arb. 1-26-76
After eating lunch on paid lunch hour on employer's premises, employee attempted to wash her hands in compliance with employer's instruction. With restroom in use, employee went outside, straddled a bicycle in idle manner and engaged in idle conversation with fellow employee. When leaving the bicycle to go to the now vacant restroom, employee fell sustaining injury. Injury in the course of as deviation from employment was insubstantial and result of inability to comply with employer's rule.

Wolf, Eugene P., v. Lloyd Wolf and United Fire & Casualty Co. . . . . . Arb. 4-1-76
Employee, with employer's permission, left employment to pick up his own motorcycle and return to his employment thereafter. Employee injured while engaged in this activity. Injury not in the course of employment as mission was personal and of only inconsequential benefit to the employer.

INDEPENDENT CONTRACTOR

Plantz, James L., v. Minnie Tjelmeland and United Fire and Casualty Co. . . . . . Arb. 8-19-74
Independent contractor allegation is an affirmative defense. Defendant failed to establish relationship.

INDUSTRIAL DISABILITY

Alden, Charles W., v. Oscar Mayer & Co., Self-Insured ..... R.R. 12-30-75
Testimony of management consultant concerning employability of claimant given consideration in the industrial disability awards.

Cavin, Albert C., v. John Morrell & Co., Self-Insured..... Arb. 5-12-75
Due to head injury, employee faced permanent restrictions on work involving heavy lifting, bending, standing and walking in areas of heavy machinery with functional disability estimate of 20%. Based on above and considering earning capacity, finding of 40% industrial disability.

Deal, Charles v. Collins Transfer Co., Inc. and Farmers Insurance Group..... R.R. 8-14-74
Employee able to return to occupation of truck driving with limitations on performing physical labor supports finding of industrial disability even though earnings in different employment approximately the same.

Johnson, Evamarie, v. Clarinda Mental Health Institute and State of Iowa..... R.R. 12-15-75
Injury to leg produced a condition which transcends the scheduled member and includes the body as a whole. Permanent total industrial disability awarded.

Klunder, Allyn K. v. Iowa Public Service Co., Self-insured ..... R.R. 9-3-74
Employee with permanent disability in shoulder and ankle, restricted to 75 pound lifting, established a 10% industrial disability with functional readings of 5% and 15%.

INSURANCE

Courtney, Jean M., v. Dale's Towing Service and IMT Insurance Co...... Arb. 3-27-75
Agent requested cancellation of workmen's compensation policy for non-payment of premium. Cancellation not completed in terms of requirements of rules 515.80 and 515.81. Insurer failed to sustain proof of effective cancellation.

Myres, LaVerne L., v. Peter Kiewit Sons Co. and Home Indemnity Co...... Order 3-26-76
Employer ordered to remit a fine of $150 to the State of Iowa General Fund for failure to file reports required by Chapter 86.

Strub, Dean E., v. William R. Weinrich and Great West Casualty Co...... Arb. 9-13-74
Industrial Commissioner has broad powers to do all things necessary to administer the Workmen's Compensation Act, including the power to reform insurance contracts to conform to the law.

Welter, William M., v. Edwin and Shirley R. Zelezny and Iowa Mutual Tornado Insurance Co. ..... Order 7-21-76
Defendant insurance carrier ordered to file a true correct verified copy of the workmen's compensation policy to be filed and made a part of these proceedings.

INTOXICATION

Evans, Orin D., v. John Baxter d/b/a Wagonwheel Tavern..... Arb. 8-30-74
Defense of intoxication denied, based on no showing of proximate cause between alleged drunkenness and injury to employee-bartender.

JURISDICTION

Blome, Joseph v. General Mechanical Contractors, Inc. and Western Casualty & Surety Co...... Arb. 9-16-74
Claimant, a Nebraska resident injured in Iowa, awarded compensation benefits with credit for payments made under Nebraska statute.

Felton, James H., v. C. W. Sitton Drilling Co. and Argonaut Insurance Cos...... Order 10-24-75
Determination of sufficiency of notice of appeal to district court is within the jurisdiction of the district court and not the industrial commissioner.

Grunwald, Dennis, v. Brady Motor Freight and Smith Transfer Corp. and Carriers Insurance Co. ..... Arb. 4-1-76
Iowa industrial commissioner does not have jurisdiction when accident outside of Iowa and contract of employment entered into outside of Iowa with no other factor to bring this within Iowa jurisdiction.

Hyslop, Walter N., v. Midwest Coast Transport, Inc., and St. Paul Insurance Cos ... Arb. 3-3-76
Injury in Montana with payment under South Dakota's compensation act prior to arbitration in Iowa. Industrial commissioner accepts jurisdiction based on employee's domicile with credit to be given for payments made under South Dakota act.

Simpson, Allen Kay, v. Tom Jordon Trucking, Inc., and U. S. F. & G. ..... Arb. 12-8-75
Employee hired out of state, injured in state. Finding Iowa industrial commissioner has jurisdiction based on location of accident.

Simpson, Allen Kay, v. Tom Jordan Trucking, Inc., and St. Paul Insurance Cos. .... Arb. 12-12-75
Industrial commissioner accepted jurisdiction based on facts employee regularly worked in Iowa and was domiciled in Iowa.

Taylor, Paul B., v. Best Refrigerated Express, Inc., and Transport Indemnity Co..... Order 5-1-74
Motion to dismiss overruled as industrial injury occurred within jurisdiction of the Iowa industrial commissioner. Further held that mere filings in a foreign jurisdiction insufficient cause to grant a motion to dismiss.

Wetzel, Dwight D., v. George Savannah Wilson and Farm Bureau Mutual Insurance Co...... Order 6-23-76
Special appearance of defendant overruled wherein claimant alleged contract of employment, bringing this matter within jurisdiction of the industrial commissioner. Further finding industrial commissioner has authority to administer or adjudicate disputes between parties voluntarily agreed to be bound by chapters 85 and 85A.

LIMITATIONS - 85.26

Caston, George E., v. Rath Packing Co., Self-Insured ..... Arb. 10-31-75
Due to bronchial asthma employee left employment in February, 1972, and filed application for arbitration April 23, 1974. Two-year statute in 85.26 applicable based upon failure to show claimant was unaware of condition within two years of filing of arbitration.

Clark, Virginia, v. Horn Memorial Hospital and St. Paul Fire & Marine Insurance Co...... R.R. 12-2-75
Employee's review-reopening fails as not filed within three years of last payment of compensation as provided by section 86.34. The same limitation does not apply to medical expense.

Finn, John, v. Curtis of Iowa and Truck Insurance Exchange ..... R.R. 2-27-75
Employer paid temporary disability benefits for October, 1969, injury and failed to file memorandum of agreement. Failure stopped the running limitations of 85.26. Limitation in 86.34 not applicable as no award or agreement was made.

Geery, Orba B., v. University Avenue Coal Co. and St. Paul Insurance Cos...... Arb. 4-8-76
Employee knew of injury October, 1973, gave notice to employer February 26, 1975, and filed arbitration December 30, 1975. Claim barred by lack of required notice, 85.23, and two-year limitation of 85.26.

Howard, Charles W., v. John Deere Waterloo Tractor Works, self-insured ..... Arb. 6-23-76
Arbitration filed more than two years after injury. Limitation of 85.26 is bar to recovery wherein employee did not show all four elements of estoppel to overcome the statute.

Jacobsen, Stephen L., v. Iowa Paint Mfg. Co. and Atlantic Mutual Insurance Co. ... Arb. 7-30-75
Employee injured July 18, 1972, and arbitration action filed July 30, 1974. Defense of statute of limitations prevailed as to weekly benefits due to failure to show causal relationship between injury and disability, failure to establish equitable estoppel, and failure to show payment of sick leave was payment of compensation benefits. Recovery of medical expense allowed.

Jameson, Deborah, v. Flexsteel Industries, Inc., and Employers Insurance of Wausau ..... Arb. 7-31-75
Employee injured January 16, 1973, filed application for arbitration January 29, 1975. Relief denied based upon limitation of 85.26.

Smith H. Raymond, v. Walnut Grove Products and Maryland Casualty Co. ..... Adjudication of Law Point 7-22-74
Defense of two-year statute of limitations not allowed. Employer's continuing to make wage payments for less than full performance wherein employer knew of injury and disability constitutes payment of weekly compensation for which memorandum of agreement should have been filed. Since not filed, statute did not run as per Code section 86.13.

LIMITATIONS - 86.34

Davenport, Elmer B., v. Hallett Construction Co. and Liberty Mutual Insurance Co.. R.R. 8-14-75
Review-reopening filed more than three years since last payment of compensation. Employee attempted to overcome 86.34 on equitable estoppel based on actions of a presumed claim representative on June 18, 1974 (more than three years after last

payment). Recovery not allowed based on lack of prejudice to the employee and evidence that supposed representative did not represent carrier.

Johnson, Mildred H., v. Franklin Mfg. Co. and Travelers Insurance Co. ..... Order 9-24-76
Defendants' motion to dismiss sustained on basis time allowed for review of memorandum of agreement (86.34) has expired.

Winter, David, v. St. Regis Paper Co. and Travelers Insurance Co. ..... Order 9-17-75
Medical payments under 85.27 are not subject to statute of limitations wherein decision allowing benefits exists or where agreement as to compensation has been made. This has been the case since the initiation of 85.27 in 1963.

MEDICAL CARE

Mishler, Jerry D., v. Cunningham and Limp Co. and Travelers Insurance Co. ..... R.R. 6-11-75
Employee sustained 10% functional and refused recommended surgery. Industrial disability over the functional speculative in nature. Refusal of surgery proper basis for commutation.

MEDICAL CARE - DUTY TO PROVIDE

Nelson, David Lee, v. Chevron Chemical Co., self-insured ..... Arb. 3-10-75
Employer did not fulfill duty to provide medical care as evidenced by physician's attitude, type of care offered and course of treatment.

MEDICAL CARE - EMPLOYER'S RIGHT TO CHOOSE

Dellaca, Ronald, v. AMF Western Tool and Hartford Insurance Group ..... R.R. 8-7-74
Employer designated company physician to treat employee's injury. After initial treatment, employee chose another physician without employer's consent or knowledge for nonemergency treatment. Employee not allowed to recover expense.

Russeff, William, v. Armour & Co., self-insured ..... R.R. 7-30-74
Employee incurred medical treatment, specifically not authorized by employer, in addition to treatment furnished by employer. Employee not allowed to recover unauthorized expense.

Tennis, LeRoy, v. Nebraska-Iowa General Contractors, Inc., and American Mutual Insurance Co. ..... R.R. 11-14-75
Employee with foot fractures not allowed recovery for chiropractic treatments based on fact that authorized physician was concurrently available and M.D.'s indication that manipulation of fractures are contraindicated.

Waldroup, Lawrence (Larry) A., v. Rohwer Corp. and Employers Insurance of Wausau ..... Arb. 5-25-76
Employee chose D.O. with employer's consent for initial treatment. Without consultation with employer, employee consulted D.C. for additional treatment. Recovery for expense not allowed as D.C. treatment unauthorized.

MEDICAL EVIDENCE

Anfinson, Mary, v. Alstadt & Langlas Baking Co. and AID Insurance Co. ..... R.R. 11-27-74
Stipulated medical evidence of undisplaced fracture of fibula and multiple contusions and abrasions of right leg not sufficient to support claim for disability resulting in complaints of constant headaches and pain in right leg and back.

Cook, Willie Ray, v. Rovner Sanitary Service and American Mutual Liability Insurance Co. ..... R.R. 4-30-76
Finding of no permanent partial disability based on greater weight of evidence given orthopedic surgeons who found no permanent disability over D.O. who did find evidence of permanent disability.

Garlow, Barry J., v. Best Construction Co. and Bituminous Casualty Corp. ..... Arb. 6-24-75
Employee sustained compensable injury March 23, 1973, which was found to produce aseptic necrosis approximately five months later.

Gooden, Clifford, v. Caterpillar Tractor Co., self-insured ..... R.R. 7-30-74
Although medical causation is primarily within the domain of expert medical evidence, a deputy is free to reject such testimony when medical opinion is based upon incomplete or inaccurate history.

Grafft, Martha M., v. Red Lyon Inn Inc., and Travelers Indemnity Co. and Travelers Insurance Co. ..... R.R. 6-14-76
Defendants objected to introduction of medical reports on theory that doctor's opinion in part was based upon history given by employee. Overruled on theory that medical evidence must and does rely in part on the patient's history and employee's self-serving statements.

Koehler, Mildred I., v. Massey Ferguson, Inc., and Sentry Insurance Co. . . . . . Arb. 8-19-74
Employee suffered back injuries in 1966, 1969, and 1970. The 1970 incident resulted in surgery at L4-5 and L5-S1. Employee sustained tripping incident in 1973. Employee sustained burden of proof of aggravation by 1973 incident with employee's testimony and supporting medical evidence even though employee had complaint of back problems during interval 1970-1973.

Lawson, William N., v. Twin City Beef Co. and Travelers Insurance Co. . . . . . Arb. 10-15-74
Psychiatric testimony that some personality problems were result of injury and some not, not sufficient to support disability based on mental problems wherein psychiatrist unable to sort problems out.

Martin, Linda Lee, v. Good Samaritan Center and Zurich Insurance Co. . . . . . Arb. 10-15-75
Expert medical evidence must be considered with all the other evidence bearing on causal connection. Medical evidence based on incomplete or inaccurate history rejected. Disability found on injury stipulated rather than injury in doctor's history.

McCauley, Wilson, v. Kay Dee Feed Co. and Maryland Insurance Co. . . . . . Arb. 6-17-75
Employee failed to recover on lack of medical evidence of causation under any of the three situations outlined by Iowa Supreme Court.

Nielsen, Norman L., v. Pacific Fruit Express Co., self-insured . . . . . R.R. 4-27-76
Employee sustained knee injury October 15, 1971. Back symptoms first appeared in May, 1974. Claimant established prima facie case with testimony and medical evidence with no rebutting evidence presented by defendant. Fifteen percent industrial disability awarded.

Sutcliffe, Irvin W., v. Clyde Black and Son, Inc., and Travelers Insurance Co. . . . . . Arb. 4-17-75
Medical testimony based on history of "strenuous farm work" wherein the strenuous activity was unknown to the physician resulted in little weight being given to doctor's testimony.

MEDICAL MANAGEMENT

Morris, George, v. Iowa Roofing Co. and Bituminous Casualty Corp. . . . . . Arb. 9-3-75
Employee disabled from auto accident from December, 1973, to March, 1974. Sustained work-related accident on June 15, 1974, and sought treatment from chiropractor when employer failed to provide treatment. No treatment between June 24 and December 27. M.D. examination on January 10, 1975. Was released to return to work on February 10. Under these conditions defendants' failure to provide reasonable care prevents complaint that continuing disability due to prior condition or congenital defect.

Nelson, David Lee, v. Chevron Chemical Co., self-insured . . . . . Arb. 3-10-75
Employer did not fulfill duty to provide medical care as evidenced by physician's attitude, type of care offered and course of treatment.

Nielsen, Norman L., v. Pacific Fruit Express Co., self-insured . . . . . R.R. 4-27-76
Employer did not keep open a tender of adequate medical care for employee's difficulties. Claimant can seek help from practitioners of his choice and then recover expenses for same.

MEDICAL REPORTS

Barnes, Charlotte Marie, v. Globe Union, Inc., and Employers Insurance of Wausau . . . . . Order 7-21-76
On basis of requirements of Code section 85.27, M.D.'s entire medical file ordered to be supplied to the industrial commissioner for review and order concerning admissibility of contents of same.

MEDICAL TREATMENT - EMPLOYER'S DUTY TO PROVIDE

Cason, Randall, v. Wilson & Co., self-insured . . . . . Order 11-19-74
Employer's refusal to authorize treatment by Dr. Shealy, M.D., is unreasonable. Treatment ordered along with transportation costs at 15 cents per mile.

Foreman, Ruth, v. Colonial Manors of Baxter, Inc., and Gulf Group Cos. . . . . . R.R. 3-29-76
Employee sustained compensable back injury. Recommended disc surgery refused. Medical evidence indicates a reduction to 10% of permanent partial disability if performed. Finding of 10% disability and employer's obligation to provide medical treatment satisfied.

Vrana, Ernest, v. Central Telephone Co. and Zurich Insurance Co. ..... Order 7-22-75
Employer has a statutory duty to provide reasonable medical care. When not exercised, the care received is not the employee's doctor in terms of the employee's right to reimburse for examination under section 85.32 (2).

MEDICAL TREATMENT - REFUSAL TO ACCEPT

Foreman, Ruth, v. Colonial Manors or Baxter, Inc. and Gulf Group Cos. ..... R.R. 3-29-76
Employee sustained compensable back injury. Recommended disc surgery refused. Medical evidence indicates a reduction to 10% of permanent partial disability if performed. Finding of 10% disability and employer's obligation to provide medical treatment satisfied.

MEMORANDUM OF AGREEMENT

Dellaca, Ronald, v. AMF Western Tool and Hartford Insurance Group ..... R.R. 8-7-74
Payment of compensation benefits satisfy the required agreement in regard to compensation when memorandum of agreement not filed.

Finn, John, v. Curtis of Iowa and Truck Insurance Exchange ..... R.R. 2-27-75
Employer paid temporary disability benefits for October, 1969 injury and failed to file memorandum of agreement. Failure stopped the running of limitations of 85.26. Limitation in 86.34 not applicable as no award or agreement was made.

Frazier, Marvin, v. Armstrong Rubber Co., and Liberty Mutual Insurance Co. ..... R.R. 6-22-76
A memorandum of agreement settles the questions of employer-employee relationship and injury arising out of and in the course of the employment, but not the nature and extent of the disability.

Grunwald, Dennis, v. Brady Motor Freight and Smith Transfer Corp. and Carriers Insurance Co. ..... Arb. 4-1-76
Employee claimed payment of benefits and filings in Missouri constitute agreement as to compensation as established in 86.13. Finding the use of Missouri scheme of workmen's compensation indicates no intent to enter into the contemplated agreement in Iowa.

Jacobsen, Stephen L., v. Iowa Paint Mfg. Co. and Atlantic Mutual Insurance Co. ... Arb. 7-30-75
Employee injured July 18, 1972, and arbitration action filed July 30, 1974. Defense of statute of limitations prevailed as to weekly benefits due to failure to show causal relationship between injury and disability, failure to establish equitable estoppel, and failure to show payment of sick leave was payment of compensation benefits. Recovery of medical expense allowed.

Smith, H. Raymond, v. Walnut Grove Products and Maryland Casualty Co. ..... Adjudication of Law Point 7-22-74
Defense of two-year statue of limitations not allowed. Employer's continuing to make wage payments for less than full performance wherein employer knew of injury and disability constitutes payment of weekly compensaton for which memorandum of agreement should have been filed. Since not filed, statute did not run as per Code section 86.13.

Trigg, Debbie, v. J. C. Penney Co., and Liberty Mutual Insurance Co. ..... R.R. 2-12-76
Memorandum of agreement does not foreclose inquiry into the question of rate of compensation or degree of disability.

NOTICE OF INJURY

Burris, Marvin H., v. A. J. Ream Enterprises, Inc., and U.S.F. & G. Co. ..... Arb. 9-30-75
Employer's knowledge that employee is having difficulty is not sufficient, as employer also needs notice or knowledge that such difficulties are a result of or in the course of employment. Failure of notice or knowledge of injury within ninety days of occurrence is a restriction on an initial entitlement to compensation and, in essence, a limitation on the right to compensation.

Cave, Douglas D., v. Harsco Corp. (Can-Tex) and Travelers Insurance Co. ..... Arb. 12-4-74
Employee's and witnesses' testimony of conversation between employee and foreman concerning employee's back difficulties sufficient notice wherein the foreman had no independent recollection of whether or not the conversaion occurred.

Gephart, Ruby A., v. Martha Lagel d/b/a V & L Card Shop and Home Insurance Co. . Arb. 6-17-75
Employee first became aware of possible work origins of injury in May of 1973. No notice given to employer until January 7, 1975. Recovery denied.

Hansen, Jerry V., v. Rasmussen Buick, Inc., and U.S.F. & G. Co. ..... Arb. 7-8-75
When foreman or supervisor witnesses an accident, the statutory requirement of notice or knowledge as required by 85.23 is met.

Holbert, Frank H., v. Townsend Engineering Co. and Hawkeye Security Insurance Co. ..... Arb. 4-3-75
Employee established verbal notice of injury, on the date of injury, to his foreman wherein foreman had no independent recollection of the conversation but did not doubt employee's veracity.

Hovey, Eileen v. Thomas Osier d/b/a Salon Osier and U.S. Fire and Casualty and Linda Comisky d/b/a Linda's Style Shop and Western Casualty Insurance ..... Arb. 1-28-75
The beginning of the notice period of section 85.23 is the date the claimant has knowledge of the disease or injury.

Starcevich, Rudy, v. Armstrong Rubber Co. and Liberty Mutual Insurance Co. ..... Arb. 5-27-75
Employee's report to defendant's medical department sufficient notice to meet claimant's statutory duty of section 85.23.

Turner, Sue Ann, v. John H. Breck, Inc., Div. of American Cyanamid, and Insurance Company of North America ..... Arb. 8-7-74
Lack of notice or knowledge of injury is affirmative defense. Employer did not impeach employee's credibility and sustain burden based on employee's testimony and inconsistencies in employer's records.

NOTICE OF INJURY - 85.23

Calkins, Oscar, v. Rock Island Motor Freight, self-insured ..... Arb. 3-11-76
Employer notified August 11, 1972, of injury caused by continuous exposure to toxic environment. Section 85.23 did not prevent recovery for a period 90 days prior to notice date.

Geery, Orba B., v. University Avenue Coal Co. and St. Paul Insurance Co. ..... Arb. 4-8-76
Employee knew of injury October, 1973, gave notice to employer February 26, 1975, and filed arbitration December 30, 1975. Claim barred by lack of required notice, 85.23, and two-year limitation of 85.26.

Heck, Earl L., v. George A. Hormel Co. and Liberty Mutual Insurance Co. ..... Arb. 1-30-76
"Occurrence" of injury in 85.23 is that time when injury is diagnosed or an employee in the exercise of reasonable diligence should have been made aware that a work-origin difficulty existed. Compensation denied on lack of notice.

PERMANENT PARTIAL DISABILITY

Barrett, Clarence E., Jr. v. Mars Oil Co. of Missouri and U.S.F. & G. Insurance Co. .. Arb. 11-13-74
Claimant sustained compensable back injury in April, 1973, resulting in surgery. Prior injuries resulted in cumulative 30% permanent partial disability. No increase in permanent partial disability found.

Betzold, Edward W., v. Mid-America Dairymen, Inc., and Home Insurance Co. ..... R.R. 3-23-76
Claimant sustained 5% permanent partial disability due to lifting restrictions based upon pain associated with hernia repair.

Calkins, Shirley M., v. Lusk Candy Co. and Maryland Casualty Co. ..... R.R. 1-16-76
Functional disability ratings of 15%, 15% and 43% of right upper extremity. Forty-three percent improperly took disfiguring scar into consideration. Finding 30% functional disability.

Crawford, Victor B., v. John Deere Waterloo Tractor Works, self-insured ..... R.R. 10-23-74
Employee sustained comminuted compound fracture of the femur, resulting in leg shortening and complaints of pain in leg, back and hip. Medical evidence that leg shortening affects body as a whole supported finding of industrial disability to the body as a whole.

Easley, Floyd V., v. St. Joseph Mercy Hospital and Travelers Insurance Co. and Argonaut Insurance Co. ..... R.R. 5-11-76
Claimant received awards in two arbitration and one review-reopening decision for separate injuries, all filed on May 11, 1976. Award of 10% barred by statute of limitation. Award of 50% and 10% to be paid to date of permanent total disability award and remainder to run concurrent with award of lifetime permanent total.

Edwards, Ruby, v. Nelson Syferd d/b/a Sylvia's Restaurant and Lounge and Western Casualty and Surety Co. ..... Arb. 5-22-75
Employee aggravated preexisting osteoporosis attempting to open a window in the

course of her employment. Recover 40% of the body as a whole based on the aggravation.

Hills, William L., v. Jack A. Schroder Co., Inc., and Employers Insurance of Wausau ..... R.R. 7-23-74
Injury resulting in permanent partial disability of the right lower extremity results in functional disability wherein the ability to earn wages is not a factor.

Huxford, Raymond, v. Arther H. Neumann and Sons, Inc., and Bituminous Insurance Co. ..... R.R. 3-26-76
Employee sustained leg injury which subsequently caused low back difficulties and industrial disability. Functional ratings of 25%. Twenty percent industrial award based on employee's credibility and work history subsequent to injury.

LaRue, Earl C., v. Wilson & Co., self-insured ..... R.R. 8-8-75
Employee sustained permanent scarring due to burns which increase sensitivity to heat and inability to sweat in affected areas. Finding of industrial disability of 2%. Employee not entitled to benefits under 85.32 (2) (t).

Lenz, Larry, v. Feeders Grain & Supply and Mill Mutuals ..... Arb. 1-8-75
Payment of a prior permanent partial disability award. Credit given to reduce current award of permanent disability in same body area.

Lincoln, Samuel B., v. Lowry Trucking Co. and Glenn Falls Insurance Co. ..... R.R. 4-23-75
Functional readings of 25-30% and 5% and lack of evidence of industrial disability resulted in award of 10%.

Lindeman, Harold v. Orkin Exterminating Co., Inc., and Continental Casualty Co. .. Arb. 11-1-74
Treating and examining physicians unable to rate functional disability. Finding of 40% industrial disability with suggestion that defendants may file additional review-reopening if condition changes.

McDermott, Joseph A., v. Franklin Mfg. Co. and Hartford Insurance Group ..... R.R. 12-8-75
Fifty percent industrial award based on 3% functional and evidence employee unable to find gainful employment based upon injury and mental abilities.

Mishler, Jerry D., v. Cunningham and Limp Co. and Travelers Insurance Co. ..... R.R. 6-11-75
Employee sustained 10% functional and refused recommended surgery. Industrial disability over the functional speculative in nature. Refusal of surgery proper basis for commutation.

Nielsen, Norman L., v. Pacific Fruit Express Co., self-insured ..... R.R. 4-27-76
Employee sustained knee injury October 15, 1971. Back symptoms first appeared in May, 1974. Claimant established prima facie case with testimony and medical evidence with no rebutting evidence presented by defendant. Fifteen percent industrial disability awarded.

Port, Gregory A., v. Cardis Mfg. Co., Inc. and Truck Insurance Exchange ..... R.R. 2-12-76
Employee sustained amputation of thumb, including articular cartilage of the distal end of the proximal phalanx. Disability 50% of the thumb as removal of cartilage beyond the joint not substantial loss of more than one phalange.

Russett, Jasper P., v. Craemer's Inc., and Iowa National Mutual Insurance Co. ..... R.R. 4-8-76
Compensable low back injury March 28, 1972, produced 10% functional over and above the previous 10% industrial disability. Based on age, education and employment possibilities, finding of 60% industrial disability

Starr, Gertrude T., v. Dean Lithographing Co. and Ohio Casualty Group ..... R.R. 10-23-75
Claimant sustained compensable back injury co-existent with numerous other health problems. Functional disabilities 15% and 18%, industrial disability of 23% based on evidence of limitation, age, employment mobility and eligibility for social security benefits in near future.

Turner, Sue Ann, v. John H. Breck, Inc., Div. of American Cyanamid, and Insurance Company of North America ..... Arb. 8-7-74
Although employee's industrial asset of performing physical production work damaged, claimant's failure to attempt to seek employment indicates lack of motivation to return to gainful employment.

Warburton, Wilfred C., v. General Growth Development Corp. and Aetna Casualty & Surety Co. ..... R.R. 5-16-75
Dispute as to permanent partial functional disability on ratings of 5% and 20-25% found to be 17% based on objective symptoms and employee's tendency to inflate his symptoms.

York, Walker D., v. French & Hecht Div., Kelsey-Hayes Co., self-insured ..... R.R. 9-3-74
Claimant established loss of sense of smell as a result of head injury but failed to establish aggravation of underlying hereditary disease. Two percent industrial disability based on loss of smell.

PERMANENT TOTAL DISABILITY

Easley, Floyd V., v. St. Joseph Mercy Hospital and Travelers Insurance Co. and Argonaut Insurance Co. ..... R.R. 5-11-76
Claimant received awards in two arbitration and one review-reopening decision for separate injuries, all filed on May 11, 1976. Award of 10% barred by statute of limitation. Award of 50% and 10% to be paid to date of permanent total disability award and remainder to run concurrent with award of lifetime permanent total.

Sutcliffe, Irvin W., v. Clyde Black and Son, Inc., and Travelers Insurance Co. ..... Arb. 4-17-75
Recovery for aggravation of preexisting arthrosclerotic heart disease and previous heart attack allowed with showing of unusual work activities creating unusual demand on claimant's circulatory system. Awarded permanent total disability.

PREEXISTING INJURY

Cozad, Asahel L., v. General Woodwork Co. and CNA Insurance ..... Arb. 10-7-75
Employer given credit for previous permanent partial disability on finding of subsequent industrial disability in same area.

Martin, Portia A., v. Globe Union, Inc., Centralab Div., and Employers Insurance of Wausau ..... R.R. 11-21-75
Non-work related injury of May 23, 1973. Evidence indicated complete recovery prior to January 11, 1974, compensable injury. Continuing award of healing period and medical on January 11, 1974, injury.

PREVIOUS INJURY

Barrett, Clarence E., Jr. v. Mars Oil Co. of Missouri and U.S.F. & G. Insurance Co. .. Arb. 11-13-74
Claimant sustained compensable back injury in April, 1973, resulting in surgery. Prior injuries resulted in cumulative 30% permanent partial disability. No increase in permanent partial disability found.

Blumer, Norlan, v. Metz Baking Co. and Liberty Mutual Insurance Co. ..... Arb. 5-14-76
On November 27, 1974, employee aggravated previous injury of May 1, 1973. Based on medical evidence, aggravation sufficient to support injury arising out of and in the course of.

Koehler, Mildred !., v. Massey Ferguson, Inc., and Sentry Insurance Co. ..... Arb. 8-19-74
Employee suffered back injuries in 1966, 1969, and 1970. The 1970 incident resulted in surgery at L4-5 and L5-S1. Employee sustained tripping incident in 1973. Employee sustained burden of proof of aggravation by 1973 incident with employee's testimony and supporting medical evidence even though employee had complaints of back problems during interval 1970-1973.

Lenz, Larry, v. Feeders Grain & Supply and Mill Mutuals ..... Arb. 1-8-75
Payment of a prior permanent partial disability award. Credit given to reduce current award of permanent disability in same body area.

Shepherd, William S., v. Merchants National Bank and Iowa National Mutual Insurance Co. ..... R.R. 8-1-74
January 10, 1967, employee sustained compensable injury and permanent partial disability to right leg. On review-reopening employee failed to sustain burden of showing condition of thrombophlebitis causally related to 1967 injury based on lack of sufficient mediçal evidence.

Smith, James R., v. Allied Construction Services, Inc., and Employers Mutual Casualty Co. ..... R.R. 10-21-74
Employee sustained back injury 10 to 15 years prior to instant injury. Employee was able to work but experienced some difficulties in the meantime. Finding of minimal preexisting injury based on medical evidence and intervening work history.

PROCEDURE

Borcherding, Dale, v. Iowa Beef Processors and Argonaut Insurance Co. ..... Order 4-20-76
Defendants' second application for extension of time granted for a period of 10 days after discussion of industrial commissioner's rules relative to bringing such matters to hearing.

Brudos, Allen, v. Henkel Construction Co. and Fireman's Fund American Insurance Co. ..... Order 1-9-75
Employee's motion for protective order sustained on no showing that the testimony of the particular M.D. involved is so unique and essential that such testimony could not be obtained within the borders of Iowa.

Caston, George, v. Rath Packing Co., self-insured ..... Order 6-10-74
A motion to dismiss will lie only if from a prior examination of the pleadings the statutory period of limitations has run and not where an application alleges injury arose within such period.

Egger, Alfred J., v. Cantex Industries, Inc., and Travelers Insurance Co. ..... Order 9-4-75
Defendants' motion for adjudication of law points overruled as claimant must be given opportunity to offer appropriate proof of whether or not a mutual mistake occured concerning compromise special case settlement.

Felton, James H., v. C.W. Sitton Drilling Co. and Argonaut Insurance Cos ..... Order 10-24-75
Application for rehearing denied as no right to rehearing exists for proceeding in process prior to July 1, 1975, the effective date of the Iowa Administrative Procedure Act.

Finn, John, v. Curtis of Iowa and Truck Insurance Exchange ..... R.R. 2-27-75
Employee filed review-reopening on 1969 injury wherein employer failed to file memorandum of agreement. Employer ordered to recast cause of action as arbitration as proper procedure since statute of limitation 85.26 was stopped and 86.13 did not apply for lack of agreement.

Grafft, Martha M., v. Red Lyon Inn, Inc., and Travelers Indemnity Co. and Travelers Insurance Co. ..... R.R. 6-14-76
Defendants' objection to the introduction of medical reports, under industrial commissioner's rules, on action filed October 20, 1975, overruled as action subject to industrial commissioner's rules.

Graham, Oscar B., v. Farner-Bocken Co., and Insurance Company of North America ..... Order 5-28-74
Motion to dismiss overruled as doctrine of equitable estoppel at issue.

Hutchinson, Carol, v. Beefland International and St. Paul Insurance Co. ..... Order 3-7-75
Motion to convene board of arbitration and motion to amend petition for review-reopening to a petition for arbitration overruled based on filing and approval of memorandum of agreement and provisions of Code section 86.34.

PSYCHOLOGICAL INJURY

Addington, Harold R., v. Manning Community School and Employers Mutual Casualty Co. ..... Arb. 5-12-75
Employee suffered aggravation of preexisting mental disability, temporary in nature, as a direct result of perceived difficulties in his work environment. Employee allowed temporary total disability.

Lawson, William N., v. Twin City Beef Co. and Travelers Insurance Co. ..... Arb. 10-15-74
Psychiatric testimony that some personality problems were result of injury and some not, not sufficient to support disability based on mental problems wherein psychiatrist unable to sort problems out.

Mann, John W., v. Inland Mills, Inc., and Truck Insurance Exchange ..... R.R. 3-29-76
Employee sustained multiple injuries, including head injury which produced personality changes. Personality changes basis of industrial disability of 25% of the body as a whole.

Marasco, Michael C., v. Iowa Liquor Control Commission and State of Iowa ..... Arb. & R.R. 7-19-74
Employee alleged, amongst many problems, psychiatric injury and disability resulting from physical compensable injury. Psychiatrist's testimony that injury gave method of expression of psychological problems but not significant cause of psychological problems. Awarded 3% industrial for mental disability. Additional compensation for other injuries.

Van Note, Phillip, v. Firestone Tire & Rubber Co., and Liberty Mutual Insurance Co. ..... R.R. 9-5-75
Employee's underlying psychological problems aggravated by work-related injury although aggravation not sufficient to be source of employee's difficulty.

SEASONAL EMPLOYMENT

Henderson, Harry R., v. Fred Carlson Co. and Insurance Company of North America ..... Arb. 9-30-74

Employee engaged in truck driving for road contractor whose construction operations were normally suspended during a portion of the year. Employee's occupation found to be truck driver and non-seasonal.

SECOND INJURY FUND

Anderson, Dale B., v. Vilas Feed Mill and Employers Mutual ..... Order 3-2-76
Employee sustained partial loss of right hand in 1963 and partial loss of right arm in 1973. As both injuries to same member, employee not allowed to maintain action against Second Injury Fund.

Anderson, Dale B., v. Vilas Feed Mill and Employers Mutual ..... Order 6-7-76
Claim made against Second Injury Fund based upon injury to upper extremity and hearing loss. Dismissed as not proper basis for claim against Second Injury Fund.

Asay, Jim D., v. Industrial Engineering Co. and Travelers Insurance Co...... Order 2-24-76
Employee sustained permanent injury to right upper extremity. Left upper extremity disabled as a result of polio. Employee allowed to maintain action against Second Injury Fund.

Auch, Dwane W., v. Iowa Window & Bldg. Maintenance and Liberty Mutual Insurance Co. and Second Injury Fund of Iowa ..... R.R. 3-11-76
Claimant sustained minimal disability to elbow in 1965 and injury to both knees in 1971. Due to lack of medical problems and employment picture between 1965 and 1971, no additional industrial disability found over that resulting from the 1971 injury. No recovery against Second Injury Fund.

Ulven, Charles A., v. Mac's Chevrolet-Pontiac, Inc., and Iowa National Mutual Insurance Co...... Order 3-31-75
Employee sustained functional permanent partial of 22½% of left arm October 5, 1973. Employee had lost right arm in a farm accident 30 years ago. Order of payment from Second Injury Fund of 72% in $84 weekly payments until such time as payments complete.

SUBSEQUENT INJURY

Butler, Melvin L., v. Dye Produce Co. and Employers Mutual Casualty ..... R.R. 10-23-75
On February 19, 1970, employee suffered compensable injury resulting in temporary total disability. September 3, 1970, employee fell at his residence as a result of inability to move normally due to previous injury and medication being taken for same. Recovery allowed.

Kouri, Adrian, v. Westinghouse Electric Corp., Elevator Div., and Liberty Mutual Insurance Co. ..... Arb. 1-22-76
Injury claimed on April 20, 1973, with no treatment until after May 29, 1973, water-skiing incident. Claimant did not sustain burden of establishing injury arising out of and in the course of on April 20, 1973.

Wason, John C., v. William T. Schultz..... Suppl. Arb. 10-1-74
While on crutches recovering from job-related injury, employee fell, causing subsequent injury. Subsequent injury held to be direct and natural result of primary injury, as same was result of impaired mobility.

RATE COMPUTATION

Goolsby, Aaron, v. Jackson Construction Co. and Employers Mutual Casualty Co. . Arb. 3-30-76
Employee's compensation should be computed under section 85.36 (7). Since no evidence offered of work available to other employees in similar occupation for 13 weeks, rate determined by dividing earnings of this employee by the number of weeks worked ($1,038 divided by 7 3/7 weeks equals $139.73 gross weekly wage).

Henderson, Harry R., v. Fred Carlson Co. and Insurance Company of North America . . Arb. 9-30-74
Employee engaged in truck driving for road contractor whose construction operations were normally suspended during a portion of the year. Employee's occupation found to be truck driver and non-seasonal.

Larson, Todd A., v. Gene Larson and IMT Insurance Co...... Arb. 4-1-76
Average wage of $7.48 per week for a period of 43 weeks. Gross weekly wage should be determined according to section 85.36 (10) with gross weekly wage of $45 per week and compensation rate of $31.45.

Lenghan, Edward J., et al, v. John Godby and Farm Bureau Mutual Insurance Co. . . . Arb. 1-6-76
Based on "part-time" employment, rate computed under 85.36 (10) using average wage of average wage earner in that particular class of work. (Note: 85.36 (10) amended effective July 1, 1974)

Trigg, Debbie, v. J. C. Penney Co. and Liberty Mutual Insurance Co. ..... R.R. 2-12-76
Gross weekly wage computed under 85.36 (10) was improper as subsection 7 should control. Employee worked irregular hours which prevented her from accepting other employment except on an incidental basis. On evidence submitted claimant's average work week adopted as the number of hours when work was available to other employees in similar occupation.

REHABILITATION

Dovell, Robert L., v. Iowa Roofing Co. and Bituminous Casualty Corp. ..... Arb. 8-20-75
Employee not entitled to benefits under 85.70 as no permanent disability is found to exist.

Rand, Larry H., v. John Deere Waterloo Tractor Works, self-insured ..... R.R. 6-22-76
Employer's failure to provide physical rehabilitation extended the claimant's healing period beyond what would have otherwise been necessary.

Stewart, Gregory James, v. Edko Mfg., Inc. and Aetna Life & Casualty Co. ..... Order 9-10-76
Defendant ordered to arrange appropriate course of physical therapy on showing of employee's need for same. Employer further ordered to pay meal expense and mileage for such treatment.

REHABILITATION BENEFIT - 85.70

Hirsch, Randall Martin, v. All American Transport and CNA Insurance Co. ..... R.R. 11-3-75
Claimant entitled to $20 per week for 26 weeks based on attendance at an institution recognized by the state for vocational rehabilitation.

REVIEW - 86.13

Finn, John, v. Curtis of Iowa and Truck Insurance Exchange ..... R.R. 2-27-75
Employer paid temporary disability benefits for October, 1969, injury and failed to file memorandum of agreement. Failure stopped the running limitations of 85.26. Limitation in 86.34 not applicable as no award or agreement was made.

TEMPORARY TOTAL DISABILITY

Morris, George, v. Iowa Roofing Co. and Bituminous Casualty Corp. ..... Arb. 9-3-75
Employee disabled from auto accident from December, 1973, to March, 1974. Sustained work-related accident on June 15, 1974, and sought treatment from chiropractor when employer failed to provide treatment. No treatment between June 24 and December 27. M.D. examination on January 10, 1975. Was released to return to work on February 10. Under these conditions defendants' failure to provide reasonable care prevents complaint that continuing disability due to prior condition or congenital defect.

Nelson, David Lee, v. Chevron Chemical Co., self-insured ..... Arb. 3-10-75
Employee released to light work; not available. Employee entitled to temporary total disability benefits. Employee's refusal to submit to examination proper basis to suspend compensation during such refusal.

Strong, Rita, v. Amana Refrigeration and Liberty Mutual Insurance Co. ..... Arb. 5-18-76
Entitlement to temporary total disability ceases when an injured employee is capable of return to any gainful employment. However, refusal of employer to allow claimant to return to light work, when such light work is available, gives rise to an inference that claimant was temporarily totally disabled from all gainful employment.

Willingham, Thomas Lazell, v. Red Jacket Mfg. Co. and Travelers Insurance Co. ... R.R. 10-24-74
Temporary total disability benefits are to be paid during the incapacity from gainful employment due to instant injury. Incarceration in prison ends responsibility for temporary total disability.

THIRD-PARTY LIABILITY

Hirsch, Randall Martin, v. All American Transport and CNA Insurance Co. ..... R.R. 11-3-75
Employee signed third-party release without provision to reimburse workers compensation insurer. Finding the insurer is entitled to exert its subrogation right against the insurer of the third party.

THREE-HUNDRED DAY RULE

Auxier, Patricia, v. Woodward State Hospital and State of Iowa ..... R.R. 11-20-74
With earnings of $373 per month, proper method of determining compensation rate is: $373 × 12 = $4,476 ÷ 52 = $86.08 × 2/3 = $57.39. Rate subject to maximum limitation of $56 per week based upon injury of May 26, 1971.

Butler, Robert, v. Town of Charter Oak, Iowa, and Continental Western Insurance Co. ..... Arb. 12-4-74
Employee, elected councilman, paid $15 per meeting for 18-20 meetings per year. Injured while performing electrical work at the town pumphouse. Employee entitled to be compensated on same basis as regular electrical workers in that locality. $23.10 per day earning entitled employee to maximum rate of $68 healing period and $63 permanent partial disability.

TOXIC ENVIRONMENT

Blackford, Clell M., v. Hoerner Waldorf Corp. and Insurance Company of North America ..... Arb. 7-25-74
Employee claim of 50% disability from severe pulmonary dysfunction based on exposure to a variety of environmental toxins not sustained for lack of evidence of exposure and causal relationship.

Feuring, Elmer, v. Farmers Hybrid Cos., Inc., and Travelers Insurance Co. ..... Arb. 8-15-75
Employee working in hog operation continually exposed to "hog dust" (hog dander) and urine which aggravated underlying chronic obstructive pulmonary disease entitled to a permanent disability for aggravation.

Keller, Marcia R., v. Red Jacket Mfg. Co. and Travelers Insurance Co. ..... R.R. 5-26-76
Employee sustained compensable dermatitis, temporary in nature, as a result of exposure to epoxy resins in employment. Concurrent injury, vocal cord polyps, did not arise out of the employment but resulted from vocal cord abuse and use of cigarettes.

Lindeman, Harold, v. Orkin Exterminating Co., Inc., and Continental Casualty Co. .. Arb. 11-1-74
Claimant sustained compensable injury and industrial disability as a result of five-and-one-half year exposure to chemicals used in his employment.

WILLFUL INJURY

Cady, Redginald DeWayne, dec., Roberta Kay, widow, v. Cedar Rapids Community School and Bituminous Casualty Corp. ..... Arb. 4-30-76
Employee killed by fellow-employee who was mentally deranged. Act found not to be within the scope of willful injury for reasons personal to employee; compensable.

RESULTS ON CASES APPEALED DURING THE LAST BIENNIUM

File No.

11864 **CHARLES ARCHIBALD—VS—JIMMY NANTISTA**
Review Reopening Decision appealed to District Court by Defendant
Dismissed

11814 **DONALD ASHLOCK —VS— WALL STREET MISSION/GOODWILL INDUSTRIES**
Review Reopening Decision appealed to District Court by Defendant
Affirmed

11841 **ALVA BARRETT —VS— MOUNT ARBOR NURSERIES**
Review Reopening Decision appealed to District Court by Defendant
Affirmed

11160 **HOWARD BITTERS —VS— GILBERT BUILDERS**
Review Reopening Decision appealed to District Court by Defendant
Dismissed

12158 **JAMES BURKETT —VS— LAREW COMPANY**
Review Reopening Decision appealed to District Court by Defendant
Affirmed

11675 **FRANK CARDA, SR. —VS— SOO TRACTOR SWEEPRAKE CO., INC.**
Review Reopening Decision appealed to District Court by Claimant
Pending

12051 **TIMOTHY CHAPMAN —VS— MID—CONTINENT, INC.**
Review Reopening Decision appealed to District Court by Claimant
Remanded To Deputy / Settled

11658 **CHARLES COLLINS —VS— BRUCE MOTOR FREIGHT**
Review Reopening Decision appealed to District Court by Claimant
Dismissed

11419 **JOSEPH COSTANZO —VS— VICTORIA CLEANERS**
Review Reopening Decision appealed to District Court by Claimant
Dismissed

11868 **FRANK COURTNEY —VS— UNITED BUCKINGHAM FREIGHT**
Review Reopening Decision appealed to District Court by Claimant
Dismissed

11699 **HUBERT CRAGG —VS— LEWIS BROS. WELDING CO.**
Review Reopening Decision appealed to District Court by Claimant
Dismissed

10985 **DORIS DAVIS —VS— SACRED HEART HOSPITAL**
Review Reopening Decision appealed to District Court by Defendant
Dismissed

11313 **FRANCES DAVIS —VS— GREAT PLAINS BAG**
Review Reopening Decision appealed to District Court by Defendant
Dismissed

13042 **JOHN DAVIS —VS— JOHN DEERE WATERLOO TRACTOR WORKS**
Review Reopening Decision appealed to District Court by Claimant
Dismissed

11837 **MICHAEL DENNIS —VS— ELIASON & KNUTH**
Review Reopening Decision appealed to District Court by Claimant
Dismissed

11993 **LARRY ELLIS —VS— ARMSTRONG RUBBER COMPANY**
Review Reopening Decision appealed to District Court by Claimant
Dismissed

8152 **FRED B. HAGER —VS— EMPLOYERS MUTUAL CASUALTY COMPANY**
Review Reopening Decision appealed to District Court by Defendant
Affirmed

9144 **ROGER W. HENRY —VS— RATH PACKING COMPANY**
Review Reopening Decision appealed to District Court by Claimant
Remanded

11873 **HILDA HERTZBERG —VS— CORN BLOSSOM FOODS, INC.**
Review Reopening Decision appealed to District Court by Claimant
Pending

11482 **WILLIAM D. HOFFMAN —VS— SHENANDOAH NURSERIES**
Review Reopening Decision appealed to District Court by Defendant
Pending

12237 **WARREN HOIT —VS— HELLMAN TRUCKING CO., INC.**
Review Reopening Decision appealed to Industrial Commissioner by Defendant
Dismissed

11569 **HERBERT W. HOOVER —VS— MASON AND HANGER**
Review Reopening Decision appealed to District Court by Claimant
Affirmed

11128 **CHARLES G. LOGSDON —VS— PITTSBURGH—DES MOINES STEEL**
Review Reopening Decision appealed to District Court by Claimant
Dismissed

11397 **JAMES J. McNEAL —VS— MIDWEST WRECKING COMPANY**
Review Reopening Decision appealed to District Court by Claimant
Dismissed

10916 **MAXIMILIANO MARTINEZ —VS— H J HEINZ COMPANY**
Review Reopening Decision appealed to District Court by Defendant
Dismissed

11338 **WOODROW NORTON —VS— QUAD CITY CONSTRUCTION COMPANY**
Review Reopening Decision appealed to District Court by Claimant
Motion to Dismiss Sustained
Appeal to Supreme Court Dismissed

10097 **SALLY NYBERG —VS— FRANK'S PLASTERING COMPANY**
Review Reopening Decision appealed to District Court by Defendant
Dismissed

11480 **LEROY PETERS —VS— HUGHES STEEL ERECTION**
Review Reopening Decision appealed to District Court by Claimant
Pending

13049 **ROBERT PILCHER —VS— PHILLIP LAUX**
Review Reopening Decision appealed to District Court by Defendant
Dismissed

12289 **JOHN R. PORTER —VS— CONTINENTAL BRIDGE COMPANY**
Review Reopening Decision appealed to District Court by Claimant/Defendant
Affirmed
Appeal to Supreme Court Affirmed

12070 **HUGH RAY —VS— ONLEY REFRIGERATED TRANSPORTATION, INC.**
Review Reopening Decision appealed to District Court by Claimant
Pending

11670 **CLYDE ROBY —VS— JOHN DEERE WATERLOO TRACTOR**
Review Reopening Decision appealed to District Court by Claimant/Defendant
Affirmed

11202 **ALBERT L. SAFFELL —VS— PITTSBURGH—DES MOINES STEEL**
Review Reopening Decision appealed to District Court by Claimant
Dismissed

11332 **PHYLLIS SAYER —VS— PLAINS POULTRY FARMS**
Review Reopening Decision appealed to District Court by Claimant
Affirmed

11086 **AUSTIN D. SMITH —VS— SAYLOR FEED AND GRAIN**
Review Reopening Decision appealed to District Court by Defendant
Pending

12064 **GEORGE SMITH —VS— JORGE CONSTRUCTION COMPANY**
Review Reopening Decision appealed to District Court by Claimant
Dismissed

11382 **MILDRED YANNEY —VS— JOHNSON BISCUIT COMPANY**
Review Reopening Decision appealed to District Court by Defendant
Affirmed

12032 **JERRY VAN GERPEN —VS— FASHION—PAR HOMES**
Review Reopening Decision appealed to District Court by Defendant
Affirmed

10525 **J. J. VAN LENGEN —VS— WAGNER MANUFACTURING COMPANY**
Review Reopening Decision appealed to District Court by Claimant
Pending

11979 **BRUCE WELLS —VS— JOBBERS SUPPLY COMPANY**
Review Reopening Decision appealed to District Court by Claimant
Pending

10280 **CHARLES E. BIGGS, JR. —VS— TOM BICK d/b/a RITE—WAY BLDG. MAINTENANCE**
Review Decision appealed to District Court by Defendant
Dismissed

11520 **MURLIN BURCH —VS— RATH PACKING**
Arbitration Decision appealed to District Court by Defendant
Dismissed

10561 **KENNETH M. EWING —VS— HYGRADE FOOD PRODUCTS CORP.**
Review Decision appealed to District Court by Claimant
Pending

11970 **KENT HANSON —VS— ROCK ISLAND MOTOR TRANSIT COMPANY**
Review Decision appealed to District Court by Claimant
Affirmed

11659 **JOAN HELLE —VS— GLOBE LIFE AND ACCIDENT**
Review Decision appealed to District Court by Claimant
Reversed and Remanded

11717 **RONALD HOOVER —VS— JOHNSON MACHINE WORKS**
Review Decision appealed to District Court by Claimant
Affirmed

11940 **DUELLA ANN JONES—VS—IOWA METHODIST HOSPITAL**
Review Decision appealed to District Court by Defendant
Dismissed

11171 **ROBERT G. McDOWELL —VS— THE TOWN OF CLARKSVILLE**
Review Decisions appealed to District Court by Claimant
Reversed
Appeal to Supreme Court Reversed and Remanded

11334 **HAZEL MEYERS —VS— HOLIDAY INN OF CEDAR FALLS**
Review Decision appealed to District Court by Defendant
Affirmed

10688 **CHESTER MYERS —VS— HONEGGERS AND COMPANY**
Review Decision appealed to District Court by Claimant
Affirmed

10829 **LINDA SUE NELSON —VS— JOHN B. HEBERT d/b/a DUG OUT LOUNGE**
Review Decision appealed to District Court by Claimant
Affirmed

11305 **ALBERT PARSONS —VS— JOHN J. WEBER d/b/a JAYVE MANUFACTURING COMPANY**
Review Decision appealed to District Court by Defendant
Pending

11545 **BETTY J. SEEGER —VS— HOWARDS RADIO AND TV**
Review Decision appealed to District Court by Defendant
Affirmed
Appeal to Supreme Court Dismissed

11451 **LEO SONDAG —VS— FERRIS HARDWARE**
Review Decision appealed to District Court by Claimant
Affirmed, Reversed & Remanded
Appeal to Supreme Court Affirmed, Reversed and Remanded

10537 **LOIS TEICHERT —VS— BOSS HOTELS, INC.**
Review Decision appealed to District Court by Claimant
Dismissed

11108 **NINA L. VAUGHN —VS— BISHOPS BUFFET**
Review Decision appealed to District Court by Claimant
Pending

10254 **LEROY WILEY —VS— CHERRY BURRELL CORP.**
Review Decision appealed to District Court by Claimant
Dismissed

11220 **CHARLES WILSON —VS— HENRY FOSENBERG**
Review Decision appealed to District Court by Claimant
Remanded

13172 **DONALD WOOD —VS— MASSEY FERGUSON, INC.**
Review Decision appealed to District Court by Defendant
Dismissed

12046 **IDA FAY WOOD —VS— CUMMINGS AND COMPANY, INC.**
Review Decision appealed to District Court by Defendant
Affirmed