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State of Iowa

1978

ROBERT D. RAY

Governor

THIRTY-THIRD BIENNIAL REPORT OF THE

Industrial

Commissioner

For the Period Ending June 30, 1978

and

REPORT ON DECISIONS

ON SELECTED CASES

ROBERT C. LANDESS

Industrial Commissioner

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STATE OF IOWA

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

Dear Governor Ray:

In accordance with Iowa Code Section 86.9, the Thirty-third Biennial Report of the Iowa Industrial Commissioner covering the period from July 1, 1976 through June 30, 1977 is submitted.

Contained in this report are a review of agency objectives, synopsis of the legislative, executive and judicial functions of the agency and a summary of receipts and disbursements.

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

Respectfully submitted,

ROBERT C. LANDESS
Industrial Commissioner

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AGENCY PERSONNEL

Robert C. Landess	Industrial Commissioner
Milton L. Test	Asst. Industrial Commissioner
Joseph M. Bauer	Deputy Industrial Commissioner
David E. Linquist	Deputy Industrial Commissioner
Dennis L. Hanssen	Deputy Industrial Commissioner
Barry Moranville	Deputy Industrial Commissioner
Helmut Mueller	Deputy Industrial Commissioner
Judith Ann Higgs	Legal Analyst
Laura M. Heemstra	Claim Analyst
Leonard C. Ewald	Employment Restoration Counselor
JoAnn Anderson Montgomery	Law Clerk
Robert N. Hendershot, II	Law Clerk
Kay Collier	Secretary to the Commissioner
Ruth McLaughlin	Office Manager
Mary Peterson	Docket Clerk
Marjorie Connors	Stenographer
Judy Hubbard	Stenographer
Rose Ricke	Stenographer
Jackie Walden	Stenographer
Madalyn Krohn	Records Clerk/Stenographer
Elaine Augustin	Records Clerk
Mae Barker	Records Clerk
Geri Friest	Records Clerk
Carol Genochio	Records Clerk
Janet Griffin	Records Clerk
Pam Harnack	Records Clerk
Sandra VanMaanen	Records Clerk
Sharon West	Records Clerk

THE AGENCY

The Iowa Industrial Commissioner is an administration agency charged with the administration of the Workers' Compensation Law as set out in Iowa Code chapters 85, 85A, 86, 87 and applicable portions of 17A. The Iowa Workers' Compensation Law provides benefits to employees who suffer injury, disease or death arising out of and in the course of employment. Those entitled to compensation under the act may receive payments for medical and related expenses and for temporary and permanent disability. In the case of a death, dependents are awarded benefits.

Frequently the injured worker and the employer are able to agree on the amount of compensation. In those cases a Memorandum of Agreement is filed with the agency. If an agreement cannot be reached, a hearing is held before a deputy commissioner. The deputy commissioner renders a proposed decision which becomes the final decision of the agency unless it is appealed to the commissioner. When a proposed decision is appealed, the commissioner reviews the entire record and either adopts the decision of the deputy, remands the case to the deputy or enters a decision reaching a result different from that entered by the deputy. The commissioner's decision can be appealed to the District Court and ultimately to the Iowa Supreme Court.

The administration of the Workers' Compensation Law falls into four primary subdivisions — legislation, compliance administration, employment restoration and adjudication. These will be discussed in greater depth in the materials which follow.

REVIEW OF AGENCY OBJECTIVES

The 32nd biennial report of the Industrial Commissioner established the following as agency objectives 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 the injured employee.
4. Develop and implement data processing and microfilm systems to efficiently handle information flow and record keeping.
5. Develop and implement statistical information systems as a basis for management decision making.
6. Develop and implement statistical information systems to provide information for other units and private users.
7. Separate judicial and administrative functions to insure in partial judicial decisions.
8. Improve the intra-agency appeal process to provide timely resolution of appeals.

With slight modification as will appear here after these agency objectives remain appropriate for the Industrial Commissioner.

To accomplish these objectives the Industrial Commissioner's budget requested in 1977:

	Budget Request	Full Time Equivalent Positions
7-1-77 to 7-1-78	$780,675	36.05
7-1-78 to 7-1-79	$767,386	41.05

Legislative appropriations for the 77 to 79 biennial period are as follows:

	Appropriation	Full Time Equivalent Positions
7-1-77 to 7-1-78	$470,822	26.05
7-1-78 to 7-1-79	$686,970	31.55

The fiscal 77/78 appropriation was 60.31% of the original budget request. Fiscal 78/79 appropriation is 89.52% of the budget request.

LEGISLATION

The following legislative changes have been made in the last biennium:

PROCEDURE. The primary legislative changes in this biennial period were procedural with an attempt being made to remove problem areas. How notices authorized or required by Chapters 85A, 86, 87 and 17A of the code may be served or delivered to the secretary of state or other authorized persons was clarified. (Iowa Code §85.3) Statutes of limitations were consolidated. (Iowa Code §85.26) The situations in which compromise settlement agreements may be used was expanded. However, where weekly benefits have been paid, no compromise settlement resulting in a final disposition can affect medical benefits unless the general applicability of the workers' compensation law is the issue. (Iowa Code §85.35) The limitation on the number of deputies was removed. (Iowa Code §86.2) The ability to delegate authority by the commissioner to the deputy

industrial commissioners was broadened. (Iowa Code §86.3) The type of inquiry appropriate in contested cases has been elucidated. (Iowa Code §86.14) Procedural conflicts with the Administrative Procedure Act were rectified. (Iowa Code §86.18) Provisions for the reporting of proceedings were placed in the same section with shorthand reporters made the custodians of their notes. (Iowa Code §86.19) Appeal procedures within the agency were merged. (Iowa Code §86.24) Procedure and venue for judicial review were established. (Iowa Code §86.26) Circumstances under which a decision or order of the industrial commissioner's office may be taken to district court for enforcement were updated. (Iowa Code §86.42)

PENALTIES. Other amendments make it a simple misdemeanor for an employer to refuse to furnish a statement of earnings to an employee or his representative upon request (Iowa Code §85.41), to withhold from an employee any amount for the purpose of providing workers' compensation coverage (Iowa Code §85.54), to fail to post notice when there has been a failure to insure (Iowa Code §87.2), and to fail to insure a mining operation (Iowa Code §87.14). It is likewise a simple misdemeanor for a candidate for appointment as commissioner to promise to appoint a person to a position within his authority in exchange for assistance in obtaining the appointment (Iowa Code §86.5) and for a commissioner or his appointee to espouse the election or appointment of a candidate for political office. (Iowa Code §86.4)

TIME AND RATE. The date on which compensation becomes due was changed from the fifteenth to the eleventh day after the injury. (Iowa Code §85.30) The seven day waiting period was changed to a three day with the waiting period compensation of three days payable at once if the disability extends beyond fourteen days. (Iowa Code §§85.32-.33 and 86.11) Weekly benefits to which a claimant is entitled for death, permanent total disability, healing period and temporary disability were raised to one hundred thirty-three and a third percent of the state average weekly wage. (Iowa Code §§85.31, 85.34(3), and 85.37) Maximum weekly benefits for permanent partial disability were raised to one hundred twenty-two and two-thirds percent of the state average weekly wage.

SECOND INJURY FUND. The amount of contribution by an employer or its insurance carrier to the second injury fund was increased from $100 to $1000 in each death case. The ceiling on the fund was raised to $100,000 instead of $50,000 with a floor of $50,000 as opposed to $30,000.

INMATES. Workers' compensation was made the exclusive remedy for an injured inmate of a state state institution who was included in the definition of workman or employee. (Iowa Code §§ 85.61(2) and 88.3) The basis for computing the benefits to inmates was established. Inmates are excluded from the provisions allowing commutation of future payments to a present worth lump sum. (Iowa Code §85.45)

COMPLIANCE ADMINISTRATION

The basic functions of the compliance administration program are to:

1. Monitor claim practices to assure that compensation claims are properly and adequately handled.
2. Act as an information source for employees, employers, their representatives and other segments of the general public who have an interest in workers' compensation.

The industrial commissioner's compliance administration program has been staffed by five clerk-typists with part-time assistance of the assistant industrial commissioner as required. On July 1, 1976 a claim analyst and one additional clerk-typist were added to this program. An additional half-time person has been added since that time. The claim analyst handles requests for assistance from employees, employers, insurance companies, unions, doctors and attorneys. Functioning in the nature of an ombudsman, the claim analyst is able to help parties avoid litigation and counsel them as to their rights and responsibilities under the law.

During fiscal 76/77 approximately 43 percent and during fiscal 77/78 approximately 28 percent of the industrial commissioner's budget was devoted to the compliance administration function.

Effective July 1, 1977 the waiting period, to be eligible for benefits, was reduced from seven days to three days. A 30 to 35 percent increase in the number of compensable claims due to this change in the law was anticipated. Although the agency has one year's experience following this change, with the lack of statistical capabilities it is unable to accurately determine the validity of this estimate. First reports of injury filed indicate reported claims increasing, as follows:

1975/76	1976/77	1977/78
17,548	20,024	28,480

These reports along with accompanying documents must be verified and processed. The increased work loan resulting from this change, coupled with the existing work load prior to the change, has overburdened the compliance administration program.

The agency is relying upon the development of a data processing system to assist the compliance administration program. A number of delays and setbacks in the development of this program have been experienced. As of June 30, 1978, it appears the use of data processing is still many months in the future.

It is anticipated that additional claim analysts will be added to this program in early 1979. The combination of the data processing system with the additional personnel should aid in accomplishing the goals established for the compliance program. Additionally, penalties for failure to conform to the provisions of the law probably would aid the compliance administration.

A microfilm system to alleviate the problem of records storage has been implemented. Involvement of the deputy

industrial commissioners in the compliance administration has been reduced enabling them to devote more time to their primary function of adjudication.

Statistical Data
Injury Reports Received For Biennial Period

July 1, 1976 to June 30, 1977:

New Reports:		21,479
First Reports	20,024	
(Includes 167 fatalities)		
Re-openings	1,455	
Closings:		19,361
Lost No Time	2,574	
Denied	370	
Payment and Form 5	15,537	
Closed to Litigation	880	

July 1, 1977 to June 30, 1978:

New Reports:		29,855
First Reports	28,480	
(Includes 164 fatalities)		
Re-openings	1,375	
Closings:		27,164
Lost No Time	2,157	
Denied	504	
Payment and Form 5	23,453	
Closed to Litigation	1,050	

EMPLOYMENT RESTORATION

During fiscal 76/77 approximately seven percent and during fiscal 77/78 approximately eleven percent of this industrial commissioner's total budget were spent on exployment restoration. The industrial commissioner's 32nd biennial report pointed out a number of problems in rehabilitation of the industrially disabled. Due to limitation of funds the industrial commissioner's rehabilitation program continues to be conducted primarily by one person.

The industrial commissioner's employment restoration counselor deals with not only injured workers but also with attorneys, insurance companies, doctors, vocational rehabilitation counselors and therapists, as well as furnishing expertise to those within the agency itself. The counselor can advise employees of their legal rights and refer them to appropriate sources of treatment so that the restoration of the ability to work objective can be met. Because it is known that rehabilitation should begin at the earliest possible moment after the injury, the counselor's early intervention in cases where rehabilitation is appropriate is vital. The counselor follows up on cases to see that a disabled employee is receiving the kind of treatment which will restore the ability to pursue gainful employment.

ADJUDICATION

The judicial function is to resolve all disputes under the Workers' Compensation Act through contested case proceedings. Decisions of the deputies are appealable de novo to the industrial commissioner. The industrial commissioner's decision is appealable to the district court. The program is currently staffed by five deputy commissioners and six clerk-typists. In addition, a major portion of the industrial commissioner's time and that of his secretary and law clerks is devoted to this function. Recently added to this function was a legal analyst.

During fiscal 76/77 approximately fifty percent and during fiscal 77/78 approximately sixty-one percent of the industrial commissioner's budget was devoted to the judicial function. The statistics which follow reveal that the commissioner is being called upon to resolve an increasing number of disputed claims.

Arbitrations

July 1, 1976 to June 30, 1977

Cases carried over from previous year	266	
Arbitrations filed	425	
Arbitrations dismissed		49
Arbitration decisions		122
Arbitrations settled		203
Arbitrations carried over to July 1, 1977*		317
	691	691

July 1, 1977 to June 30, 1978

Cases carried over from previous year	317	
Arbitrations filed	539	
Arbitrations dismissed		67
Arbitration decisions		137
Arbitrations settled		221
Arbitrations carried over to July 1, 1978*		431
	856	856

Reopenings

July 1, 1976 to June 30, 1977

Cases carried over from previous year	219	
Reopenings filed	412	
Reopenings dismissed		68
Reopening decisions		123
Reopenings settled		177
Reopenings carried over to July 1, 1977*		263
	631	631

July 1, 1977 to June 30, 1978

Cases carried over from previous year	263	
Reopenings filed	460	
Reopenings dismissed		63
Reopenings decisions		143
Reopenings settled		209
Reopenings carried over to July 1, 1978*		308
	723	723

*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 1976-1977		July 1 1977-1978	
Cases carried over from previous year	58		80	
Review/appeal petitions filed	103		128	
Review/appeals dismissed		19		18
Review/appeal decisions filed		58		108
Review/appeals settled		4		16
Review/appeals carried over*		80		66
	161	161	208	208
Judicial Reviews to District Court		23		52
Cases appealed to Supreme Court		2		13

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

Analysis of Contested Case Filing During Biennium

Year Ending	Arbitration	Review-Reopening	Reviews/Appeals
June 30, 1976	329	329	65
June 30, 1977	425	412	103
June 30, 1978	539	460	128
Increase 1976-77	96	83	38
Increase 1977-78	114	48	25
Increase 1976-78	210	131	63
% Increase 1976-77	29%	25%	58%
% Increase 1977-78	27%	12%	24%
% Increase 1976-78	64%	40%	97%

	Case Load Per Deputy	
June 30, 1976	188	(3.5 deputies)
June 30, 1977	209.25	(4 deputies)
June 30, 1978	249.75	(4 deputies)
Increase 76-77	21.25	11%
Increase 77-78	40.5	19%
Increase 76-78	61.25	25%

Four deputies hear arbitration and review-reopening cases. The commissioner hears reviews or appeals.

The major goals established in the judicial program which were designed to deal with increasing hearing requests were:

1. Development of a judicial administration unit.
2. Expansion of the pre-trial program with a goal of 80% of all hearings being preceded by a pre-trial.

Although these goals have been accomplished, the commissioner still lacks ability to provide the timely resolution of disputes under the Iowa Workers' Compensation Act. Additional deputy industrial commissioners may be needed as hearing officers to meet the increasing demand for hearings.

Particular success has been achieved with the prehearing program. The overall advantage of prehearing conferences is that of saving time. Serious settlement negotiations often follow such a conference, thus avoiding the time and expense of a hearing. The information provided for the prehearing order helps to cut down the time necessary for the hearing in that issues are clearly defined and less time is wasted on irrelevant matters at the hearing. Another advantage is that the deputy industrial commissioner assigned to prehearing conferences is allowed to talk informally as he will not be involved in the adjudication of the case. This informality gives the attorneys and parties an opportunity for a frank and realistic discussion of the case.

At the present time, each of the hearing sites outside of Des Moines is visited every nine weeks. A proposed hearing schedule is sent out about six weeks before the hearing. Along with the proposed hearing schedule is a like schedule of prehearing conferences which are held about three weeks in advance of the actual hearings. At these prehearing conferences a deputy industrial commissioner discusses the issues and assists the parties in putting the conflict into perspective. Medical information is exchanged. Then the status of settlement negotiations is discussed. If settlements are negotiated they must be approved by the commissioner or a deputy in order to be effective. Finally, if the case appears ready for hearing, details as to the number of witnesses to be produced and the required time for the hearing are handled. A hearing date and alternate date are selected and a prehearing order is completed. The parties are advised of the exact hearing time during the week prior to the actual hearing.

SUMMARY OF RECEIPTS AND DISBURSEMENTS

July 1, 1976 to June 30, 1977

	Appropriation and/or Receipts	Disbursements	Balance June 30, 1977
SALARIES, GENERAL OFFICE AND MAINTENANCE -- Schedule 1	$330,760.96	$330,691.88	$69.08
PEACE OFFICERS -- Schedule 2	11,989.48	11,989.48	
	$342,750.44	$342,681.36	$69.08

Payment of Workers' Compensation benefits for employees of the State of Iowa, including the Department of Transportation was transferred to the office of the Iowa State Comptroller on July 1, 1976. Therefore, those expenditures are no longer reported here.

Second Injury Fund

	Appropriation and/or Receipts	Disbursements	Balance June 30, 1977
Balance July 1, 1976	$ 30,578.15		
Interest on Investments	1,515.10		
Death Assessments	8,800.00		
Third Party Settlements	604.60		
Warrant Cancellation	341.20		
Paid to Claimants		$ 26,975.07	
Balance Carried Forward			$14,863.98

Schedule 1
Salaries, General Office and Maintenance

	Appropriation and/or Receipts	Disbursements	Balance June 30, 1977
Appropriation	$328,253.00		
Receipts	784.99		
Refunds	1,722.97		
Salaries		$247,378.83	
Social Security (State's Share)		12,466.13	
Retirement (State's Share)		11,253:56	
Hospital Benefits (State's Share)		4,188.02	
Life Insurance (State's Share)		672.00	
Disability Insurance (State's Share)		1,535.44	
Travel		6,392.42	
General Office		16,765.84	
Printing		7,470.45	
Telephone		4,451.23	
Building Rental and Utilities		18,117.96	
Balance Reverted to General Revenue			$69.08
	$330,760.96	$330,691.88	$69.08

Schedule 2
Claims for Peace Officers Under Section 85.62

Claims	$11,989.48

SUMMARY OF RECEIPTS AND DISBURSEMENTS

July 1, 1977 to June 30, 1978

	Appropriation and/or Receipts	Disbursements	Balance June 30, 1978
SALAIRES, GENERAL OFFICE AND MAINTENANCE -- Schedule 1	$472,875.49	$461,641.88	$11,233.61
PEACE OFFICERS -- Schedule 2	5,679.76	5,679.76	
	$478,555.25	$467,321.64	$11,233.61

All unpaid obligations for fiscal '78 have not yet been billed, therefore this report is an estimate of the final disbursements.

Second Injury Fund

	Appropriation and/or Receipts	Disbursements	Balance June 30, 1978
Balance July 1, 1977	$ 14,863.98		
Interest on Investments	942.32		
Death Assessments	9,000.00		
Paid to Claimants		$ 12,695.84	
Balance Carried Forward			$12,110.46

Schedule 1

Salaries, General Office and Maintenance

	Appropriation and/or Receipts	Disbursements	Balance June 30, 1978
Appropriation	$470,822.00		
Receipts	1,644.89		
Refunds	408.60		
Salaries		$311,589.89	
Social Security (State's Share)		16,567.04	
Retirement (State's Share)		15,382.10	
Hospital Insurance (State's Share)		7,458.48	
Life Insurance (State's Share)		1,441.00	
Disability Insurance (State's Share)		1,891.41	
Travel		11,912.57	
General Office		26,630.80	
Printing		8,926.68	
Telephone		7,937.25	
Building Rental and Utilities		21,800.24	
Hearing Expense		3.17	
Equipment		30,101.25	
Balance Reverted to General Revenue			$11,233.61
	$472,875.49	$461,641.88	$11,233.61

Schedule 2

Claims for Peace Officers Under Section 85.62

Claims	$5,679.76

PREFACE TO DECISIONS

The decisions, rulings and orders published in this section have been selected from those filed by the commissioner on appeal and the deputy industrial commissioners in arbitration and review-reopening proceedings during the last biennial period. Additional decisions are on file at the office of the industrial commissioner. The decisions published here have been indexed and cross-referenced for the convenience of the reader. Following these materials is a capsulized listing of other decisions, rulings and orders filed by the commissioner during the biennium. Also included is a report on the disposition of appealed decisions which were published in the previous biennial report.

ACTIONS – LIMITATIONS

Estate of Paul I. Wilson, deceased,
by JEWELL WILSON, Administrator,

Claimant,

vs.

IDEAL CONCRETE COMPANY,

Employer,

and

AID INSURANCE COMPANY,

Insurance Carrier,
Defendants.

Order

NOW on this 30 day of January, 1978, defendants' motion to dismiss comes on for ruling.

An examination of the pleadings indicates that on May 4, 1974, the claimant was fatally injured in an automobile accident, which for the purposes of this ruling, is to be considered as arising out of and in the course of claimant's employment with the defendant employer. Death occurred apparently instantaneously. Defendants have paid the $1,000.00 burial benefit required by §85.28, Code of Iowa. Defendants' motion to dismiss and the claimant's response thereto indicate two issues: whether or not the payment of the $1,000.00 funeral benefit of §85.28 is such a payment as would toll the two year statute of limitations of §85.26 of the Code, pursuant to the provisions of §86.13 of the Code, thus allowing claimant to maintain an action in review-reopening for death benefits; and whether or not the claimant's estate, administered by Jewell Wilson, the alleged surviving spouse, is the proper party to seek death benefits.

When an employee is killed in an injury arising out of and in the course of his employment, the workers' compensation statutes provide specifically for the persons who are to receive benefits under the Iowa Workers' Compensation Law. Section 85.31 indicates that payment is to be made to certain specified individuals. Individuals entitled to receive death benefits are further defined under §85.42, 43, and 44 of the Code of Iowa. In none of the reference sections is the estate of the deceased concerned. The individuals named in the referenced sections are entitled to benefits in their own right. Accordingly, the estate of the deceased is not a proper party in this proceeding. The heading on the application for review-reopening designates the estate as the party. However, paragraph 22 of the petition indicates that the relationship of the "claimant" is the spouse. In allowing liberality of pleading, such an allegation might well be sufficient except for the other issue involved in the instant case which is unfortuantely, dispositive of this action.

It may well be argued that there is not "reopening" right as contemplated by §86.34, Code of 1973, in a death case, *Davey v. Norwood White Coal Co.,* 195 Ia. 459, 192 N.W. 304; *Bever v. Collins,* 242 Ia. 1192, 49 N.W. 2d 877. If so, then the three year statute of limitations of that section is of no benefit to claimant. Even if such a right were recognized only the last payment of "weekly" compensation, as opposed to payments of other compensation under the workers' compensation law, has been recognized as the payment basis for the three year period, *Rankin v. National Carbide Co.,* 254 Ia. 611, 118 N.W. 570. Likewise, a payment of compensation is required under §86.13, Code of 1973, in order to toll the two year statute of limitations of §85.26, Code of 1973. It thus appears that no payment of "weekly compensation", which is of benefit to claimant insofar as it affects claimant's right to bring this proceeding, has been made. If claimant's petition was filed over two years from the date of injury causing the death, claimant's action is barred by the two year statute of limitations of §85.26, Code of 1973, as an original action untimely filed.

The injury, as previously noted, occurred May 4, 1974. The petition for review-reopening was filed March 18, 1977. A proof of service on the petition for review-reopening, indicates that on March 17, 1977, claimant's counsel deposited a copy of the petition in the United States mail, certified return receipt requested. The actual date of delivery is unknown. Of necessity, the delivery date would have to follow March 17, 1977. Both the date of the filing of the original notice and petition with the industrial commission, and the delivery upon the employer of the original notice and petition, would be without the two year period ending on May 4, 1976. It is therefore the finding of this deputy industrial commissioner that the claimant's application for review-reopening was not timely filed under the requirements of §85.26, Code of 1973.

THEREFORE, the defendants' motion to dismiss must be sustained. Claimant's application for review-reopening, filed March 18, 1977, is dismissed.

* * *

Signed and filed this 30 day of January, 1978.

ALAN R. GARDNER
Deputy Industrial Commissioner

Appealed to Commissioner; Affirmed.

Additional cases

ADOPTED CHILDREN – DEPENDENCY

CLEMA BENTON OSTWINKLE for
TIFFANY TIANA BENTON,

Claimant,

vs.

M. P. KLUCK & SONS,

Employer,

and

BITUMINOUS INSURANCE COMPANIES,

Insurance Carrier,
Defendants.

Appeal Order of Dependency and Apportionment

This is a proceeding brought by the defendants, M. P. Kluck & Sons, employer, and Bituminous Insurance Companies, insurance carrier, for review of an April 1, 1977 order of dependency and apportionment wherein claimant, Clema Benton Ostwinkle, on behalf of Tiffany Tiana Benton was awarded a share of death benefits for the death of Charles Benton.

* * *

Clema Benton Ostwinkle was the wife of Charles Benton who was fatally injured as the result of a fall on September 24, 1973 which arose out of and in the course of his employment. At the date of Charles's death, the members of his household included his spouse, Clema; an adopted child, Kimshiro Lee; and an infant whom the Bentons intended to adopt, Tiffany Tiana. Tiffany, who was born October 19, 1972, was placed in decedent's home by Hillcrest Services, a licensed child placement agency, on October 25, 1972 following release by the biological mother to the agency. The Bentons entered into a contractural relationship with Hillcrest which entailed paying a thousand dollar fee and an understanding that the adoption would be finalized at the end of the one year supervisory period. Tiffany had been in the Benton household for eleven months at the time of Charles Benton's death. During that eleven month period the Bentons paid all costs for the support and maintenance of Tiffany. Mrs. Benton as a single parent was allowed to adopt Tiffany on October 25, 1973.

On November 13, 1973 M. P. Kluck & Sons and Bituminous Insurance Companies filed a memorandum of agreement whereby Clema Benton was paid $91 per week. These payments continued until Clema's marriage to John R. Ostwinkle on August 8, 1975.

The issue here under adjudication is whether or not Tiffany, who was not adopted by decedent at the time of his death, is entitled to share death benefits with Kimshiro, an adopted child.

This issue has not been addressed by the Iowa Supreme Court; however, the Minnesota Supreme Court considered a virtually identical situation in *Varchmin v. District Court,* 158 N.W. 250 (Minn. 1916). In *Varchmin,* too, the decedent and his spouse had taken a child into their home. Decedent was killed in the course of his employment in October of 1913. Two months later his spouse adopted the child; and, after a passage of almost two years' time, she remarried. A claim was then made in the child's behalf. Minnesota Statute subdivision 9 §8208 is similar to Iowa law in providing:

> In case of remarriage of a widow without children, she shall receive a lump sum settlement equal to one-half of the amount of the compensation remaining unpaid. In case of remarriage of a widow who has dependent children, the unpaid balance of compensation which would otherwise become due to her, shall be paid to such children.

The Minnesota Supreme Court at 251 denied benefits to the child saying that "[t]he statute must be construed as having reference and application to conditions existing at the time of death of the workman and not to relationships created by the widow after his death."

The supreme court of New York has considered a factually similar problem in *Landon v. Motorola, Inc.,* 38 A.D.2d 18, 326 N.Y.S.2d 960 (1971). In *Landon* the decedent and his spouse had initiated adoption proceedings in March after bringing the child into their home in February of 1968. Decedent was fatally injured in an industrial accident in June of that year. Approximately three months later the surviving spouse was permitted to adopt the child as a single parent. In reaching its decision, the court initially noted that adoption was unknown at common law and that the rights of the adopted child are statutorily created. The court decided that the date of death is the date on which dependency should be determined.

New Jersey is a third jurisdiction which has denied benefits to a child not legally adopted by the employee at the time of his death. In *Stellmah v. Hinterdon Cooperative G.L.F. Service, Inc.,* 88 N.J. Super. 131, 211 A.2d 201 (1965), the superior court found the child who had been placed for adoption in decedent's home was unquestionably wholly dependent on decedent. The court said that dependency was not the sole factor to be examined. It was also necessary that the dependency fall within one of the relationships specified by New Jersey law.

Under Iowa Code §85.31 death benefits are to be paid by the employer to dependents who were wholly dependent at the time of the fatal injury. Covered in this section are the spouse until remarriage, children, and other dependents, defined by §85.44. Section 85.42 says that a child or children at particular ages or with physical or mental incapacities will be presumed conclusively wholly dependent on this employee. This section additionally says "[a]n adopted child or children shall be regarded the same as issue of the body." Iowa Code §§85.43 and 85.44 are also relevant and set forth below:

85.43 Payment to spouse. If the deceased employee leaves a surviving spouse qualified under the provisions of section 85.42, the full compensation shall be paid to her or him, as provided in section 85.31; provided that where a deceased employee leave a surviving spouse and a dependent child or children the industrial commissioner may make an order of record for an equitable apportionment of the compensation payments.

If the spouse dies, the benefits shall be paid to the person or persons wholly dependent on deceased, if any, share and share alike. If there are none wholly dependent, then such benefits shall be paid to partial dependents, if any in proportion to their dependency for the periods provided in section 85.31.

If the deceased leaves dependent child or children who was or were such at the time of the injury, and the surviving spouse remarries, then and in such case, the payments shall be paid to the proper compensation trustee for the use and benefit of such dependent child or children for the period provided in section 85.31.

85.44 Payment to actual dependents. In all other cases, a dependent shall be one actually dependent or mentally or physically incapacitated from earning. Such status shall be determined in accordance with the facts as of the date of the injury. In such cases if there is more than one person, the compensation benefit shall be equally divided among them. If there is no one wholly dependent and more than one person partially dependent, the compensation benefit shall be divided among them in the proportion each dependency bears to their aggregate dependency.

In this case, it is unnecessary to make the determination made by the Minnesota Supreme Court in *Varchim,* supra, that the controlling time period is the time of the workman's death. Iowa Code §85.43 deals with a "dependent child or children who was or were such *at the time of the injury* . . . ." (emphasis added)

Applying Iowa law, the two part test used by the New Jersey court in *Stellmah,* supra, becomes appropriate. It is beyond challenge that at the time of Charles Benton's death, Tiffany was, indeed, wholly dependent upon him for support thereby meeting the test of dependency in fact. However, Tiffany is precluded by provisions of the Iowa law from receiving benefits. She was not conclusively presumed a dependent under §85.42. She was not an adopted child of the decedent at the time of his death. When §§85.43 and 85.44 are read together, it becomes clear that those actually dependent are entitled to benefits only when there are no dependent children. As Kimshiro qualifies as a dependent child, Tiffany must be denied benefits. It should be noted that in the event Kimshiro no longer qualifies for benefits, Tiffany may then be able to do so.

THEREFORE, the order of the deputy is hereby vacated.

It is found and held that Tiffany Tiana Benton, although a dependent in fact, is not at this time entitled to share in death benefits under Iowa Code §§85.31 or 85.42-44.

* * *

Signed and filed this 19 day of July, 1977.

ROBERT C. LANDESS
Industrial Commissioner

No appeal.

AGGRAVATION – INTRINSIC BRONCHIAL ASTHMA

DONNA M. MOTT,

Claimant,

vs.

CLINTON ENGINES,

Employer,

and

AETNA LIFE & CASUALTY,

Insurance Carrier,
Defendants.

Arbitration Decision

This is a proceeding in arbitration brought by Donna M. Mott, the claimant, against Clinton Engines, her employer, and Aetna Life & Casualty Company, its insurance carrier, to recover benefits under the Iowa Occupational Disease Law by virtue of a disablement which occurred on May 1, 1975.

* * *

The claimant, age 43, married, with one child dependent upon her, had worked for the defendant employer for 22 years as an assembler of small engines and outboard motors. Beginning in 1963 the claimant had had a series of work-related problems concerning contact dermatitis as well as pneumonia and irritation of the respiratory tract. The claimant was earning $146 per week and worked at her station for the last time on May 1, 1975. (transcript, page 36, line 1)

The claimant reported this abnormal skin condition to the first aid department "many many times before I was sent to a doctor." (transcript, page 7, line 3) Gerhard Grundberg, M.D., saw the claimant during September, October, November and December of 1963 for treatment of the contact dermatitis and reported as follows:

> When I first saw her in my office September 24, 1963 she had contact dermatitis of both hands. Her treatment was injections of Decadron and Sol. Calc. Gluc. 10%. She received the injections during the months October, November, and December.
>
> During 1964 she was seen several times and treated in the office for other illnesses but not for the contact dermatitis. On October 8, 1965 until October 27, 1965 she was hospitalized in Jackson County Public Hospital because of extensive right peri-hilar and

lower lung field pneumonia on the right. On 11-2-65 she was complaining of itching and shaking of the arms. She received Benabryl capsules and injection of Calc., B. Complex and Liver. On 11-27-65, left arm medial aspect below the elbow dermatitis. Depo-Medrol 40 mg i.m. was given. In 1966 she was seen only on 2 occasions for allergy. On September 23 and November 11, and in 1967 she was seen once, May 20, for her skin disease and received Depo-Medrol i.m. In 1968 she was seen and treated for allergic dermatitis of both lower arms July 8, 10, and 26. In 1969 she was seen once on May 21. In 1970 once on January 12. In 1971 she was seen 4 times in the office January 9, March 6, June 14, and June 18. She was hospitalized for Acute respiratory infection from August 4, 1971 to August 8, 1971.

She was treated in 1972 for allergic dermatitis on May 16, 22, and 30, June 6, 10, 16 and 21. In 1973 she was hospitalized in Jackson County Public Hospital from 3-6-73 to 3-31-73 — Infection of the gastrointestinal tract, allergic eczema of the hands. In July of 1973 was hospitalized from the 8 thru the 18 for severe allergic contact dermatitis and cellulitis of both feet and lower legs and circumscribed areas on hands, abdomen and chest. In 1974 she was hospitalized from 1-23 to February 15 for polyneuritis and arthritis, and from October 4 to October 12 for Acute asthmatic bronchitis and arthritis of the spine. Also from October 22 to October 24 for acute urinary tract infection.

In 1975, May 2 to May 12, she was hospitalized for Occupational allergy affecting respiratory tract and skin.

This summary is given on request of Donna Mott and her husband John Mott and was asked to have most in the summary what is pertaining to the illiness (sic) of her skin and respiratory tract due to her job in Clinton Engines Cooperation (sic) of Maquoketa, Iowa.

She was treated for her dermatitis by Dr. Robert L. Barton.

On page 27, line 4, of his deposition, Dr. Gerhard Grundberg connects the claimant's condition to her employment activities and exposure to chemicals.

The claimant sought assistance from J. G. Brehm, M.D., of Dubuque, Iowa, who referred her to George Bedell, M.D., Staff, Division of Pulmonary Diseases, University of Iowa Hospitals and Clinics, Iowa City, Iowa, whose report was contained in the deposition of Donald P. Morgan, M.D., Morgan's Exhibit #2:

> Your patient was seen in the Pulmonary Clinic on June 11, 1975, with the following diagnoses: 1) intrinsic bronchial asthma and 2) bronchitis and bronchial irritation, secondary to exposure to chemicals at work.
>
> The patient has shortness of breath, secondary to chemical exposure at work. There have been several episodes of pneumonia in the last 6 years. On May 1, she had an exposure to the chemicals which caused hospitalization in Maquoketa, May 2-12, 1975. Then in Dubuque she was hospitalized for 4 days. She went to Dubuque with an acute asthmatic attack on Friday May 30.
>
> Physical examination revealed a well developed, well nourished, alert and cooperative woman with a blood pressure of 130/80 and pulse 60. Weight was 130 pounds and height 67 inches. The general physical examination was normal.
>
> Laboratory: CBC revealed an MCHC of 33, MCH 30, MCV 89, Hematocrit 39, hemoglobin 13.0, RBC 4.4, and WBC 5200. The chest x-ray PA and lateral revealed a healthy chest. Pulmonary function tests revealed a vital capacity of 3960 ml (113%), FEV_1 2.84 (102%), MMEF 2.44 (72%), and diffusing capacity 23 ml (94%). PO_2 was 81 and PCO_2 40 with a pH of 7.47. After bronchodilation: vital capacity 3930 ml, FEV_1 3.22 (115%), and MMEF 3.33 (98%).
>
> The following recommendations were made: 1) may resume full activity and return to work on August 1, 1975, 2) the patient is not to be exposed to the fumes at all -- keep the patient out of the lower unit for outboard engines, 3) regular diet, 4) Aminophylline, 200 mg 4 times per day, and 5) Medihaler-Iso, 2 inhallations (sic) PRN.

The issue requiring attention is whether or not the claimant has sustained her burden of proof in establishing that her disablement as of May 1, 1975 was caused by the exposure she sustained while in the course of her employment.

The defendants produced Robert N. Corning of Corning Laboratories, Cedar Falls, Iowa, a consulting engineer. Mr. Corning testified that he made a professional study of the defendant employer's premises as to types of pollution after having been retained to do so in November 1975. The test done by Mr. Corning in an attempt to ascertain the presence of the amount of hazardous chemicals on the parts being handled by the claimant is rejected as being done under abnormal conditions. The primary source of information used by Mr. Corning in the preparation of his report was the rinse water into which the parts were dipped after being immersed in the "Alodine" solution. This record indicates that the water samples were gathered by the defendant employer and not by Mr. Corning. This record fails to reveal the condition of the rinse water, particularly the length of time the rinse water had been used in the production process prior to the taking of the sample. Mr. Corning was unfamiliar with the rinse tank in question in that he did not know if the tank was one calling for continuous overflow or a still rinse tank. In short, the test done by Mr. Corning is rejected because the samples used were not representative of the conditions under which the claimant was required to perform.

It follows, then, that the testimony of Donald P. Morgan, M.D., Assistant Professor of Preventative Medicine at the University of Iowa Medical School must also be rejected, since Dr. Morgan's medical opinion is based entirely on the results of Mr. Corning's tests.

The additional medical opinions of George Noble Bedell, M.D., a professor of University Hospitals, Iowa City, Iowa, and the director of the Pulmonary Disease Division of

Internal Medicine were introduced by way of an evidentiary deposition.

Dr. Bedell testified that the claimant's illness from May 1, 1975 to August 1, 1975 was caused by exposure to chemicals at work. (deposition, page 30, line 7) In further testimony the doctor expressed the medical opinion that the claimant was suffering from intrinsic bronchial asthma as part of the claimant's physiological makeup. (deposition, page 20, line 8) Dr. Bedell also testified that the claimant's condition was not caused by the claimant's employment, but that she should refrain from working in proximity to irritant chemicals which exacerbate the asthma. (deposition, page 32, line 24)

Dr. Bedell's testimony and report are given the greater weight in this decision.

The claimant has sustained her burden of proof in establishing that her inability to work for thirteen weeks and one day was caused by her exposure to irritant chemicals at her place of employment. *Lindahl v. L. O. Boggs,* 236 Iowa 296, 18 N.W.2d 607.

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 has intrinsic bronchial asthma.
2. That said condition was not caused by the claimant's employment activities.
3. That the exposure to irritant chemicals at the claimant's place of employment exacerbated the preexisting condition.
4. That as a result of such aggravation the claimant was unable to perform acts of gainful employment from May 1, 1975 until August 1, 1975.

* * *

Signed and filed this 9 day of June, 1977.

HELMUT MUELLER
Deputy Industrial Commissioner

No appeal.

AGRICULTURAL EMPLOYEES

DWIGHT D. WETZEL,

Claimant,

vs.

GEORGE SAVANNAH WILSON,

Employer,

and

FARM BUREAU MUTUAL,

Insurance Carrier,
Defendants.

Decision on Appeal

This is a proceeding appealing an arbitration decision filed February 24, 1977 wherein claimant was awarded healing period benefits and medical expenses for an industrial injury which he received October 29, 1975. On February 24, 1977, defendant George Savannah Wilson, employer, and Farm Bureau Mutual, insurance carrier, filed an appeal of that decision. On March 3, 1977 the decision was also appealed by Dwight D. Wetzel, claimant on the specific ground that the rate of compensation and the length of healing period found by the deputy industrial commissioner were improper.

* * *

On October 29, 1975, claimant, a young farmer, was severely injured when the tractor which he was using to pick up a large bale of hay overturned. From the time of his high school graduation in 1971 until the time of the accident, claimant had been employed on a part-time basis by defendant to work in the fields and with livestock in exchange for an hourly wage ranging from $1.75 to $2.00 and for free use of defendant's equipment.

An oral arrangement was entered into involving defendant; claimant; and Bud Chamberlain, a farm owner. According to the terms of the agreement, defendant was to cut and windrow hay and to supply two tractors and one bale carrier and claimant was to bale the hay and to supply a bale carrier and pickup to harvest hay located in three or four fields encompassing around 100 acres of Chamberlain's land. On October 29, claimant spoke with defendant at the gas station at Bedford. Claimant asked defendant if he wanted his bales hauled home. After one load was hauled for defendant, claimant was loading another bale. The tractor brakes locked and the tractor overturned severely injurying claimant.

Defendants' answer citing Iowa Code §85.1(3) alleged that he neither had paid $2,500 to employees engaged in agriculture nor had he employed any one individual for more than thirteen consecutive weeks. As §85.1(3) has been amended several times since 1973, it is important to note the specific provisions in effect on the date of injury. Section 85.1 as in effect on October 29, 1975 provides:

> Except as provided in subsection 5 of this section, 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, except that commencing January 1, 1974, this chapter shall apply to such persons if at the time of injury such person is employed by an employer:
>
> a. Whose total cash payments to one or more such persons amounted to two thousand five hundred dollars or more during the preceding calendar year, or
>
> b. Who employs at least one person regularly. An employer shall be deemed to employ a person regularly if he employs at least one person for forty hours or more per week for thirteen consecutive weeks during any part of the preceding twelve months.

c. For purposes of paragraphs "a" and "b" of this subsection, commencing January 1, 1975, the following shall not be included within the classification of persons engaged in agriculture: (1) the spouse of the employer or spouse residing on the premises of the employer, and (2) any person engaged in agriculture as an owner-operator or tenant-operator or spouse or relatives of either residing on the premises of such owner-operator or tenant-operator, while exchanging labor with an employer, or spouse, or relatives of either residing on the premises of such employer, for the mutual benefit of any or all such persons.

The question raised here is whether or not defendant is excluded from manditorily providing workers' compensation coverage to employees.

Employee is defined in Iowa Code §85.61(2) as "a person who has entered into the employment of, or works under contract of service, express or implied, or apprenticeship, for an employer . . . ." Persons who are not included in the employee classification are found in Iowa Code §85.61(3) which lists at subsection (b) "[a]n Independent contractor."

The Iowa Supreme Court has consistently applied the criteria it set out in *Hjerleid v. State,* 229 Iowa 818, 826, 295 N.W. 139, 143 (1940) to determine the existence of an employer-employee relationship. Those criteria are:

(1) the right of selection, or to employ at will;
(2) responsibility for the payment of wages by the employer;
(3) the right to discharge or terminate the relationship;
(4) the right to control the work; and
(5) is the party sought to be held as employer the responsible authority in charge of the work or for whose benefit the work is performed.

In *Usgaard v. Silver Crest Golf Club,* 256 Iowa 453, 456, 127 N.W.2d 636, 638 (1964). the Supreme Court of Iowa indicated that in addition to the five criteria from *Hjerleid,* supra, there is an "overriding element of the intention of the parties as to the relationship they are creating."

The Restatement (Second) of Agency §200(2) (1957) lists ten factors to consider in determining whether one acting for another is an independent contractor or a servant. The majority of these factors were recognized by the Iowa Supreme Court in *Mallinger v. Webster City Oil Co.,* 211 Iowa 847, 851, 234 N.W. 254, 256-257 (1931) which says:

> An independent contractor under the quite universal rule may be defined as one who carries on an independent business and contracts to do a piece of work according to his own methods, subject to the employer's control only as to results. The commonly recognized tests of such a relationship are, although not necessarily concurrent or each in itself controlling: (1) The existence of a contract for the performance by a person of a certain piece or kind of work at a fixed price; (2) independent nature of his business or of his distinct calling; (3) his employment of assistants with the right to supervise their activities; (4) his obligation to furnish necessary tools, supplies, and materials; (5) his right to control the progress of the work, except as to final results; (6) the time for which the workman is employed; (7) the method of payment, whether by time or by job; (8) whether the work is part of the regular business of the employer.

A final test comes from *Hassebroch v. Weaver Construction Company,* 246 Iowa 622, 628, 67 N.W.2d 549, 553 (1954) in which the supreme court said that "[t]he principal accepted test of an independent contractor is that he is free to determine for himself the manner in which the specified result shall be accomplished." "[I]t is for the triers of fact to determine whether or not there is a sufficient group of favorable factors to establish the relation." *Daggett v. Nebraska-Eastern Express, Inc.,* 252 Iowa 341, 348, 197 N.W.2d 102, 107 (1961) quoting *The Restatement (Second) of Agency* §220(2), comment c (1957).

Defendant employer's 1974 tax return lists $1,780 as "labor hired." Defendants allege that the deputy industrial commissioner erred in his finding that the following payments listed as machine hire and as repairs and maintenance were wages to employees which added to the sum for labor hired resulted in total cash payment to "employees" of $2,724.88, thereby taking the defendant out of the exception provided by §85.1(3).

Carl Baldwin	$ 99.00	—combining corn
Jack Summerhaze	$ 90.00	—combining corn
William Larson	$100.00	—baling hay
Roland Wilson	$140.00	—combining oats
Roland Wilson	$ 36.00	—combining beans
Jim Irvin	$ 93.00	—baling hay
James Morehouse	$211.50	—combining beans
Robert Warnecke	$ 66.25	—baling corn stalks
Dwight Wetzel	$164.50	—combining corn
Charlie Owens	$210.00	—mending fences

There is no support in the record for the conclusion that the ordinary custom contractor does not engage in a contract of service for the amounts set out above.

Representative depositions from some of the people listed above are on file. Carl Baldwin described himself as a custom farmer who worked for a number of farmers and who combined corn for defendant using his own machine with a pay rate of $10 or $11 per acre. He selected the time the work which was to harvest a specific acreage was to be done and the method with which to do it without consultation with the defendant. Roland Wilson, defendant's son, who was originally a custom combiner and who now supplemented his income from his own farm by doing custom farming for others, testified similarly. Wilson had allowed his hired man to run his machine on custom jobs.

Claimant did baling for others. He was asked on cross-examination if he considered himself to be an independent contractor when he was baling. He responded that he did. Defendant stated in regard to the harvesting of his corn that he paid claimant who used his own machine a set price per acre. Because of these factors defendant included the sum paid to claimant for this work under machine hire as opposed to adding it to claimant's wages for the year. Defendant's relationship to those performing custom work on his farm is exemplified thusly:

"You can't tell a custom operator how to do anything. If you got to doing that, first thing you know, you couldn't hire him. He has his way of doing things." Applying each element set out in *Mallinger,* supra, to the work done by the custom farmer, results in a finding that such persons are independent contractors.

Depositions of Marvin Salen, operator of L. R. Vogt Seed Co., Inc.; Maurice Bailey, repairman; and Floyd H. Van Reenan, retail feed dealer were submitted on appeal. The deputy commissioner found correctly that payments made to Van Reenan, Vogt Seed Co., and Peve Feeds were made to independent contractors.

The deposition of Charles Curtis Owens was presented on appeal as a sum of $210 paid to him by defendant and had been included in defendant's tax return as repairs and maintenance. A partition fence had been built between the property of Owens and defendant. Two of Owens' trees fell over on Wilson's fence line. Owens recounted the arrangements to repair the fence.

> I think one morning we were having coffee together, and I approached him on the idea that we should get together and get the trees off, or cut them down, or do something with them. He said -- he suggested -- I said, "Well, now, if you don't have the time, I am not doing anything, and I will do it, but I will do it whenever I feel like it," and he said that was all right.

Owens repaired the fence using his own tools, selecting the time, electing his own method, and choosing the materials he wished to use. The record now refutes the findings of the deputy regarding Owens. Although it would appear that Owens was not acting as an employee of the defendant, it is unnecessary to determine whether Owens was acting as an employee or as an independent contractor when he fixed the fence as the $210 added to $1,780 previously listed as hired labor would still not amount to the requisite $2,500.

The record does not contain evidence to show that defendant employed anyone for forty hours or more per week for thirteen consecutive weeks during the twelve months preceding the injury.

It has often been said that the workers' compensation act is to be liberally construed to extend its beneficent purpose to every employee who can fairly be brought within it. This is the law that is to be construed liberally and not the facts. The facts are to be judged by applying the applicable law to them. Nowhere is it indicated that facts should be liberally construed in favor of a claimant. The claimant has the burden of proof by a preponderance of the evidence to establish that he is entitled to benefits under the workers' compensation law. In this case there is no contention with regard to the status of the claimant at the time of the injury. He was an employee at the time of the incident in question. However, since agricultural employment is exempt from coverage under the act, unless one of two conditions is met, the fact that he is an employee would not as a matter of law entitle him to benefits unless one or the other of the conditions requiring the employer to provide workers' compensation coverage to his employees is met. Although the claimant argues that in considering whether or not the employer is mandatorily required to provide workers' compensation because he paid to "persons" in excess of $2,500 in the previous calendar year, it is believed that the word "persons" being conditioned by the word "such" preceding it in §85.1(3)(a) refers it to the persons which are referred to in the first paragraph of §85.1(3). Reading the whole first paragraph of §85.1(3) in its entirety, it is apparent that the persons engaged in agriculture to which they refer are "such persons" as are "employed by an employer". Claimant argues that the contingent workers' compensation endorsement is the same as purchasing a "valid workmen's compensation insurance" as provided in §85.1(5) and thereby a voluntary election to provide coverage under the act.

When the law was changed January 1, 1974 to modify the total exclusion of agricultural employees from the mandatory provisions of coverage, there was a great deal of concern that an agricultural employer could become subject to the mandatory provisions of coverage during a policy period without being cognizant of it until it was too late. Prior to this time, agricultural workers were excluded from the mandatory coverage provisions and employers provided for some benefits to their employees through medical payments and liability coverage of their farm liability policies and in some instances accident and disability policies.

Two areas of concern with the mandatory coverage conditions were (1) that the agricultural employer would have a farm liability policy that would cover a period other than a calendar year and that on January 1 it would be discovered that during the previous calendar year he had paid $2,500 cash payroll to his agricultural employees, and (2) that sometime during a policy period an agricultural employer would have need to hire one person regularly for thirteen consecutive weeks although he had not anticipated doing so at the beginning of the policy period.

For this reason, major writers of farm insurance were encouraged to provide coverage to provide for these contingencies. Most of the major writers provided this contingent endorsement to their farm liability policy holders for minimal or no premium.

Claimant's exhibit 9 which is the declarations of the Country Squire IV policy in effect at the time of claimant's injury indicates under coverage N which is the contingent workmen's compensation endorsement that no premium was paid for this endorsement. This is so when the rate for a minimum workers' compensation policy covering agricultural employees was into the hundreds of dollars. It is not ascertainable how this could be considered to be the "purchase and acceptance of valid workmen's compensation insurance." The contingent endorsement which is provided by the insurance carrier in this instance at no cost to the insured is a service which they provided to cover the situations considered above.

Since none of the requisite conditions are shown to exist, the terms of the contingent workmen's compensation endorsement did not become operative.

* * *

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

* * *

Signed and filed this 27 day of October, 1977.

ROBERT C. LANDESS
Industrial Commissioner

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

Additional Cases

ALTERNATE CARE

JACK K. JAY,

Claimant,

vs.

FIRESTONE TIRE AND RUBBER CO.,

Employer,

and

LIBERTY MUTUAL INSURANCE CO.,

Insurance Carrier,
Defendants.

Review of Order

This is a proceeding brought by Firestone Tire and Rubber Company, defendant employer, and Liberty Mutual Insurance Company, its insurance carrier, pursuant to §86.24 of the Code of Iowa, for review of an order of the deputy industrial commissioner requiring defendant employer to provide hospital services and reasonable and necessary transportation from Des Moines to Mayo Clinic, Rochester, Minnesota and return.

Jack K. Jay, claimant, has suffered an injury arising out of and in the course of his employment with defendant employer and had received medical attention from Joe Fellows, M.D., throughout the summer months of 1975, including hospitalization from August 13, 1975 to September 6, 1975. On September 22, 1975 Dr. Fellows advised claimant to seek further medical evaluation of his condition at either the University Hospital in Iowa City, Iowa or the Mayo Clinic in Rochester, Minnesota. His advice was based on the feeling that he had nothing further to offer the claimant at that time, but that, in fairness to claimant, a complete examination for his back difficulty should be carried out at a medical center.

An appointment was arranged for claimant to be examined at University Hospitals in Iowa City on December 16, 1975. Claimant was admitted to Mercy Hospital in Des Moines, on November 16, 1975 under the care of John T. Bakody, M.D., who performed a radiofrequency facet rhizotomy on claimant. Claimant was discharged from Mercy Hospital on December 14 and failed to keep his appointment in Iowa City two days later. A second appointment at University Hospitals was subsequently arranged for January 16, 1976, but again the appointment was not kept as claimant was suffering from a flare-up of prostate trouble at that time. Although defendant employer continued the offer to provide the medical services available at the University Hospitals in Iowa City or the services of doctors in Des Moines, claimant preferred to go to the Mayo Clinic and an appointment was arranged with Richard N. Stauffer, M.D., an orthopedic surgeon associated with the Mayo Clinic, for February 20, 1976. On February 2, claimant's attorney was told by James Brackett, a claim adjuster for defendant insurance carrier, that medical treatment at the Mayo Clinic was not authorized, but that treatment at the University of Iowa Hospitals was authorized. This conversation was confirmed by a letter dated February 3, 1976 and that same day claimant filed application for an order requiring defendants to provide professional and hospital services at the Mayo Clinic. The application came on for hearing before the deputy industrial commissioner on February 10, 1976.

At the hearing, claimant admitted that there was no professional basis for his refusal to go to Iowa City for treatment, that he did not feel the care in Iowa City was inadequate, but that he felt he might be able to get better care in Rochester and he preferred to go there. Defendant employer affirmed at the hearing its willingness to provide medical care either in Des Moines or in Iowa City and its refusal to authorize treatment at the Mayo Clinic. No evidence was presented as to the urgency of the situation other than claimant's statement that he was suffering severe pain in his back and foot. No pending appointments were shown to have been made at University Hospitals or in Des Moines. The deputy industrial commissioner, noting the closeness of the date for the appointment at the Mayo Clinic, and feeling he was presented with a medical emergency, sustained claimant's application and dictated the order into the record from which this appeal is taken. Notice of the appeal was also dictated into the record at the time of the hearing, claimant being given at that time notice of the appeal and notice of defendant's continued refusal to authorize examination and treatment at the Mayo Clinic.

After the hearing, claimant decided to rely on the order of the deputy commissioner and go to Mayo Clinic for his personally scheduled appointment to be examined by Dr. Stauffer on February 20, 1976. After the examination, Dr. Stauffer felt surgery was in order and this was performed a few days later. In a letter to claimant's attorney dated September 21, 1976, Dr. Stauffer reported seeing claimant in orthopedic consultation on February 20, 1976 and briefly described the nature of the subsequent surgery. He went on to say, "I feel that the surgical treatment rendered was necessary and appropriate. However, I do not feel that we can reasonably categorize Mr. Jay's condition at the time we initially saw him as a 'medical emergency.' There was certainly no life-threating condition which demanded emergent or urgent treatment at that point."

Section 85.27, Code of Iowa, provides inter alia, "the employer . . . shall furnish reasonable surgical, medical, osteopathic, chiropractic, podiatrial, physical rehabilitation, nursing, ambulance and hospital services and supplies therefor." An injured employee is not free to choose his own physican if he desires benefits under this section,

except in unusual cases of emergency. Opinion Attorney General, 1962, P. 271. Ordinarily, the employer may select the physician which he furnishes, provided such services are reasonable under the circumstances, although some circumstances, such as a medical emergency, may require that the employee select his own physician. Opinion Attorney General, 1916, P. 46. For a general discussion, see also C.J.S. Workmen's Compensation Section 273, et seq. and Larson's Workmen's Compensation Laws, §61.12.

This case presents no question of defendants' willingness to provide reasonable and necessary medical services – the services of nearly all the facilities available either in Des Moines or Iowa City were offered. Neither is there any question of defendants' refusal to authorize the services at Mayo Clinic for, regardless of the first date notice of such refusal may or may not have been given, it was certainly clear on February 2, February 3 and again at the hearing on February 10 that defendant did not authorize the trip to Mayo. The only issue in this case is whether the evidence supports the deputy commissioner's determination of a medical emergency at the time of the hearing so as to warrant forcing defendant to provide the services of the Mayo Clinic which it did not choose to provide.

The record fairly discloses that at the time of the hearing, claimant had been suffering from the injury for more than twelve months; claimant had received extensive medical attention for his injury, a great deal of which was provided by defendant employer; claimant had already undergone surgery twice for the problem; claimant had been advised to seek a complete examination at a clinic; no further surgery or other drastic treatment had been prescribed at the time of the hearing; defendant employer had manifested its refusal to authorize treatment at Mayo Clinic and its willingness to provide the same services at other competent medical facilities; claimant had no reservations as to the quality of care available in Iowa City other than his feeling that the Mayo Clinic might be better. There was no showing that there would be unreasonable delays in obtaining services at other facilities. Dr. Stauffer examined claimant ten days after the hearing and found no medical emergency at that time.

Since further medical care was offered by the defendants, it does not seem appropriate that they should pay nothing for the medical care that claimant received. On the other hand, since reasonable medical care had been and was continuing to be offered by defendants, they should not have to stand the expense of claimant's choice of care which, although competent, was not authorized nor necessary on an emergency basis.

Defendants should have the opportunity to have supplied to them the complete medical records of claimant's care at Mayo Clinic and have the opportunity to submit the records to a comparable doctor or doctors at University Hospitals in Iowa City to determine the reasonableness and necessity for the care received at Mayo Clinic and if determined to be reasonable and necessary, the comparative cost for such care at University Hospitals.

* * *

Signed and filed this 1st day of March, 1977.

ROBERT C. LANDESS
Industrial Commissioner

No appeal.

APPEALS – WITHIN AGENCY

ROBERT H. STEENBLOCK,

Claimant,

vs.

CENTRAL SOYA CO., INC.,

Employer,

and

ZURICH-AMERICAN INS. COS.,

Insurance Carrier,
Defendants.

Ruling

NOW on this 16 day of February, 1977 the matter of claimant's resistance to defendants' appeal to the industrial commissioner from a review-reopening decision of the deputy industrial commissioner comes on for determination.

The sole issue to be determined is the right of the industrial commissioner to hear an appeal from a review-reopening decision. Claimant contends that a review-reopening decision cannot be appealed to the industrial commissioner but only to the district court and in support of his contention cites a ruling of the Iowa District Court in and for Sac County, Iowa filed June 21, 1976 in the case of *Rockwell Community School System, et al. v. Industrial Commissioner, et al.*

As a caveat, several things should be mentioned about the case cited as authority for claimant's contention.

1. The petition for judicial review and as a result, the ruling were improperly captioned. See §86.29, Code of Iowa.

2. The industrial commissioner although a named party to the judicial review was given no notice of the hearing.

3. No copy of the ruling was provided to the industrial commissioner either as a party or as required by Rule of Civil Procedure 82(f).

4. The last paragraph of the ruling stated:

> Neither party furnished or called to the attention of the court an administrative rule that requires a contrary decision. If such exists it should be submitted within 5 days after the filing of this ruling.

5. The industrial commissioner first became aware of the existence of this ruling on January 27, 1977.

This proceeding was commenced (November 14, 1975) subsequent to the effective date (July 1, 1975) of the Iowa Administrative Procedure Act and is therefore subject to its conditions.

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.

A deputy industrial commissioner was the presiding officer at the review-reopening hearing from which this appeal is taken. Section 17A.15(3) indicates a proposed decision becomes a final decision *unless there is an appeal to,* a review on motion of, *the agency within the time provided by rule.* Rule 500-4.27, Iowa Administrative Code, was adopted for this purpose.

In the case sub judice, we have a review-reopening hearing, presided by a deputy industrial commissioner, i.e. "presiding officer", who issued a proposed decision entitled "Review–Reopening Decision." That proposed decision would have become a final decision under §17A.15(3) with the passage of time (the time for filing notice of appeal) *but for* the appeal of defendants to the industrial commissioner (i.e., the "agency"). The appeal has stayed the proposed decision of the presiding officer from becoming a final decision. Section 17A.15(3) further provides that, "On appeal from or review of the proposed decision, the agency (the industrial commissioner) has all the power which it would have in initially making the final decision except as it may limit the issues on notice to the parties or by rule."

Section 86.34 which deals with review-reopening proceedings provides that judicial review of action of the industrial commissioner or a deputy commissioner on a review of award or settlement may be sought in accordance with the terms of the Iowa Administrative Procedure Act. Unless the provisions of §86.3 are shown to exist, then a deputy commissioner is considered a "hearing officer" rather than "agency member" under the IAPA and therefore judicial review of the decision of a deputy in a review-reopening proceeding could not take place *in accordance with the terms of the IAPA* until all administrative remedies had been exhausted.

THEREFORE, claimant's motion to dismiss defendants' appeal of the review-reopening decision is denied.

Signed and filed this 16 day of February, 1977.

ROBERT C. LANDESS
Industrial Commissioner

No appeal.

Additional Cases

APPEALS – WITHIN AGENCY
ADDITIONAL EVIDENCE

DOUGLAS GENE HEIDEMAN,

Claimant,

vs.

JOHN DEERE WATERLOO TRACTOR WORKS,

Employer,
Self-Insured,
Defendant.

Order

On November 24, 1976 an arbitration decision was filed in this matter which awarded claimant seventy-five weeks of industrial disability at the rate of $84 per week along with healing period benefits.

On December 6, 1976 both claimant and defendant appealed. The following day defendant sought to submit additional evidence.

The nature of the additional evidence defendant seeks to submit is such that could have been available for consideration by the deputy industrial commissioner.

It would appear that the additional evidence, had it been presented to the deputy, might have changed the complexion of the case and might have altered the outcome of the arbitration decision. Neither party, here, requested a rehearing as provided by Rule 500-4.24 of the Iowa Administrative Code. If the industrial commissioner were to hear the additional evidence defendant wishes to present, he would be, in effect, hearing a case different from that presented to the deputy industrial commissioner.

If parties are allowed to submit additional evidence which radically alters the original case, the tendency will be for parties to take their chances in the original hearing, to accumulate a plethora of evidence directed at the deficiencies discovered in the original hearing and to convert the appeal into a rehearing. Such a procedure could result in the industrial commissioner "rehearing" all of the cases of all of the deputies which is both impractical and contrary

to the intent of the law. This office is neither organized nor staffed to allow such a practice to exist.

THEREFORE, this matter is assigned to the deputy who conducted the original hearing for a rehearing to include the reception of the requested additional evidence. Nothing herein is intended to deny the right of either party to appeal from the decision of the deputy commissioner on rehearing.

Signed and filed this 23 day of May, 1977.

ROBERT C. LANDESS
Industrial Commissioner

No appeal.

APPEALS – WITHIN AGENCY – DISMISSAL

EARL SHELBY,

Claimant,

vs.

IOWA SCHOOL FOR THE DEAF,

Employer,

and

THE STATE OF IOWA,

Insurance Carrier,
Defendants.

Order

NOW on this 23 day of March, 1978 the matter of defendants' request for order dismissing appeal for lack of prosecution and for failure to comply with the rules and directives of the Iowa Industrial Commissioner comes on for determination.

An arbitration decision was filed in this matter on April 18, 1977, wherein defendants were ordered to pay a medical bill. On May 5, 1977, claimant petitioned for review. On May 6, 1977, claimant's counsel was notified by this office to file a transcript of the arbitration hearing. On July 6, 1977, defendants' counsel wrote to claimant's counsel reminding him that no transcript had been filed. Another reminder was mailed on January 10, 1978. This office mailed a letter to claimant's counsel dated February 24, 1978 which said:

> Iowa Code §86.24 as in effect at the time this action was commenced provided a "transcript of the arbitration proceeding shall be provided by the party requesting review at his cost and shall be filed with the industrial commissioner within thirty days after filing the petition for review." Rule 500-4.30 also provides that "[w]hen an appeal to or review on motion of the commissioner is taken pursuant to 4.27 or 4.29, a transcript of the proceedings taken before the industrial commissioner shall be filed with the industrial commissioner within thirty days after the notice of appeal is filed with the industrial commissioner.
>
> You filed a notice of appeal in this matter on May 5, 1977. As of this date, no transcript of the arbitration proceeding has been filed. If you are not planning to file a transcript, do you wish to dismiss your appeal or do you wich a hearing to be conducted without a transcript? Please advise this office of the action you elect to take by March 17, 1978.

A request for an order dismissing appeal for lack of prosecution and failure to comply with the rules and directives of the Iowa Industrial Commissioner was filed by defendants March 22, 1978, requesting that claimant's appeal be dismissed. No response has been received on behalf of the claimant to the letter from this office of February 24, 1978.

THEREFORE, defendants' motion to dismiss is sustained.

Signed and filed this 23 day of March, 1978.

ROBERT C. LANDESS
Industrial Commissioner

No appeal.

Additional Cases

APPORTIONMENT

BRAZOS TRANSPORT COMPANY,

Employer,

and

EMPLOYERS MUTAL CASUALTY COMPANY,

Insurance Carrier,
Defendants,

vs.

MARGARET E. SIMPSON WHIPPLE, PAMELA SUE CAQUELIN, CLAIR LAVERNE CAQUELIN, BILLY DEAN CAQUELIN, ROBERT LEE CAQUELIN, RODGER LYNN CAQUELIN, KATHY DARLENE CAQUELIN AND MILDRED IRENE WELLHAM JOHNSTON, AND ALL OTHER PERSONS CLAIMING UNDER THE IOWA COMPENSATION ACT BY REASON OF THE DEATH OF JOHN CAQUELIN,

Claimants.

MILDRED CAQUELIN,

Claimant,

vs.

BRAZOS TRANSPORT COMPANY,

Employer,

and

EMPLOYERS CASUALTY COMPANY,

Insurance Carrier,
Defendants.

Order of Apportionment

This is a proceeding in Equitable Apportionment brought by the employer and insurance carrier, Brazos Transport Company and Employers Mutual Casualty Company against all persons claiming benefits under the Iowa Workmen's Compensation Act by reason of the death of John Caquelin. It is also a proceeding brought by the claimant, Mildred Caquelin against Brazos Transport Company, the employer, and Employers Casualty Company, the insurance carrier, to recover benefits under Section 85.43, Code of Iowa.

* * *

An examination of the commissioner's file reveals that a memorandum of agreement was approved in this case on January 31, 1974 revealing that John Caquelin died from injuries sustained arising out of and in the course of his employment on October 10, 1973. The relationship of the decedent with each of the claimants will be discussed in this decision. The relationships will be discussed in chronological narrative.

The record supports the following findings of fact, to wit:

On December 29, 1959, John Caquelin married Margaret Simpson. The issue of this marriage were Robert Lee, born October 13, 1960 and Rodger Lynn, born January 20, 1962. On October 25, 1960 John Caquelin adopted Margaret's children which were born of a prior marriage including the claimant Billy Caquelin, born December 21, 1956.

Claimants Pamela Sue Caquelin, Clair Laverne Caquelin and Kathy Darlene Caquelin were over age eighteen or emancipated and are apparently making no claim for benefits under the Workmen's Compensation Act.

Margaret and John lived together as husband and wife until December 8, 1969 at which time they were divorced. Margaret subsequently remarried and now bears the surname Whipple.

John, then on active duty as an enlisted man in the Air Force, had occasion to be stationed at Gunter Air Force Base, Alabama.

Mildred Johnston and John met in early 1972 through an apparent mail-order "lonely hearts club". They were married ceremonially on February 19, 1972. Mildred lived in Mableton, Georgia and John commuted on weekends to be with his bride. He apparently lived at the enlisted quarters at Gunter Air Force Base during the week. John and Mildred kept their financial affairs separate, although Mildred did assume John's surname and obtain a dependent's Air Force Identification Card.

Sometime in the spring of 1972, the marriage of John and Mildred deteriorated and the couple apparently separated and eventially became divorced, by virtue of a decree of The Circuit Court of Montgomery County, Alabama. Proper jurisdiction was apparently had by John's domicile at Gunter Air Force Base in Alabama. The decree of divorce was rendered on August 1, 1972.

John returned to Mildred's house shortly after the entry of the divorce decree in Alabama. The nature of their relationship was much the same in that John and Mildred kept their financial affairs separate and John commuted. The utilities at Mildred's home were, at all times pertinent hereto, in John's name. Mildred was not dependent upon John.

In October, 1972, John told Mildred that he planned to return to Iowa following his retirement from the United States Air Force on December 1, 1972. Mildred was reluctant to leave and decided to stay behind, apparently fearing that the on-again, off-again relationship would be continued in Iowa's unfamiliar environment. Mildred feared that the loss of her home and retirement benefits outweighed her affection for John. John moved out, never communicating with Mildred, returned to Iowa following his retirement, held himself out as single and died in an accident on October 10, 1973. That John Caquelin died as a result of injuries arising out of and in the course of his employment is undisputed.

Mildred heard of John's death after his burial, by virtue of a letter written by Shirley Sorenson, John's sister who during the period of ceremonial marriage between John and Mildred, was Mildred's "contact" with John's family.

The issue in this case is whether the apparent cohabitation which took place between John Caquelin and Mildred Caquelin between August, 1972 and October, 1972 was a common law marriage, thus entitling Mildred Caquelin to survivor's benefits under the Iowa Workmen's Compensation Act.

Since the entire relationship between John and Mildred Caquelin took place in the state of Georgia, we must look to the laws of that state to determine whether John and Mildred Caquelin were married at the time of John's death. A marriage which is legal where made is legal everywhere. Op. Attorney Gen. 1911-1912, p. 560. Throughout these proceedings, it is apparent that the law of Georgia is controlling with regard to the nature of the relationship existing between John and Mildred Caquelin between August and October, 1972.

The law of Georgia will be followed to the extent that the elements of proof needed to establish a common law marriage in that state will be followed. However, the burdens established by the Iowa Courts will be followed with respect to the burden of proof and procedure. We are deciding upon the Iowa Workmen's Compensation Law and the burden must rest with those asserting claims in accordance with the wealth of findings of the Iowa Supreme Court.

There is no presumption that persons are married. Accordingly, the burden of proving a marriage rests on the party who asserts it, particularly where a common law marriage is asserted. *In re Estate of Fisher,* 176 NW2d 801 (Iowa, 1970).

to the intent of the law. This office is neither organized nor staffed to allow such a practice to exist.

THEREFORE, this matter is assigned to the deputy who conducted the original hearing for a rehearing to include the reception of the requested additional evidence. Nothing herein is intended to deny the right of either party to appeal from the decision of the deputy commissioner on rehearing.

Signed and filed this 23 day of May, 1977.

ROBERT C. LANDESS
Industrial Commissioner

No appeal.

APPEALS – WITHIN AGENCY – DISMISSAL

EARL SHELBY,

Claimant,

vs.

IOWA SCHOOL FOR THE DEAF,

Employer,

and

THE STATE OF IOWA,

Insurance Carrier,
Defendants.

Order

NOW on this 23 day of March, 1978 the matter of defendants' request for order dismissing appeal for lack of prosecution and for failure to comply with the rules and directives of the Iowa Industrial Commissioner comes on for determination.

An arbitration decision was filed in this matter on April 18, 1977, wherein defendants were ordered to pay a medical bill. On May 5, 1977, claimant petitioned for review. On May 6, 1977, claimant's counsel was notified by this office to file a transcript of the arbitration hearing. On July 6, 1977, defendants' counsel wrote to claimant's counsel reminding him that no transcript had been filed. Another reminder was mailed on January 10, 1978. This office mailed a letter to claimant's counsel dated February 24, 1978 which said:

> Iowa Code §86.24 as in effect at the time this action was commenced provided a "transcript of the arbitration proceeding shall be provided by the party requesting review at his cost and shall be filed with the industrial commissioner within thirty days after filing the petition for review." Rule 500-4.30 also provides that "[w]hen an appeal to or review on motion of the commissioner is taken pursuant to 4.27 or 4.29, a transcript of the proceedings taken before the industrial commissioner shall be filed with the industrial commissioner within thirty days after the notice of appeal is filed with the industrial commissioner.
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A request for an order dismissing appeal for lack of prosecution and failure to comply with the rules and directives of the Iowa Industrial Commissioner was filed by defendants March 22, 1978, requesting that claimant's appeal be dismissed. No response has been received on behalf of the claimant to the letter from this office of February 24, 1978.

THEREFORE, defendants' motion to dismiss is sustained.

Signed and filed this 23 day of March, 1978.

ROBERT C. LANDESS
Industrial Commissioner

No appeal.

Additional Cases

APPEARANCES

APPORTIONMENT

BRAZOS TRANSPORT COMPANY,

Employer,

and

EMPLOYERS MUTAL CASUALTY COMPANY,

Insurance Carrier,
Defendants,

vs.

MARGARET E. SIMPSON WHIPPLE, PAMELA SUE CAQUELIN, CLAIR LAVERNE CAQUELIN, BILLY DEAN CAQUELIN, ROBERT LEE CAQUELIN, RODGER LYNN CAQUELIN, KATHY DARLENE CAQUELIN AND MILDRED IRENE WELLHAM JOHNSTON, AND ALL OTHER PERSONS CLAIMING UNDER THE IOWA COMPENSATION ACT BY REASON OF THE DEATH OF JOHN CAQUELIN,

Claimants.

MILDRED CAQUELIN,

Claimant,

vs.

BRAZOS TRANSPORT COMPANY,

Employer,

and

EMPLOYERS CASUALTY COMPANY,

Insurance Carrier,
Defendants.

Order of Apportionment

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* * *

An examination of the commissioner's file reveals that a memorandum of agreement was approved in this case on January 31, 1974 revealing that John Caquelin died from injuries sustained arising out of and in the course of his employment on October 10, 1973. The relationship of the decedent with each of the claimants will be discussed in this decision. The relationships will be discussed in chronological narrative.

The record supports the following findings of fact, to wit:

On December 29, 1959, John Caquelin married Margaret Simpson. The issue of this marriage were Robert Lee, born October 13, 1960 and Rodger Lynn, born January 20, 1962. On October 25, 1960 John Caquelin adopted Margaret's children which were born of a prior marriage including the claimant Billy Caquelin, born December 21, 1956.

Claimants Pamela Sue Caquelin, Clair Laverne Caquelin and Kathy Darlene Caquelin were over age eighteen or emancipated and are apparently making no claim for benefits under the Workmen's Compensation Act.

Margaret and John lived together as husband and wife until December 8, 1969 at which time they were divorced. Margaret subsequently remarried and now bears the surname Whipple.

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Mildred Johnston and John met in early 1972 through an apparent mail-order "lonely hearts club". They were married ceremonially on February 19, 1972. Mildred lived in Mableton, Georgia and John commuted on weekends to be with his bride. He apparently lived at the enlisted quarters at Gunter Air Force Base during the week. John and Mildred kept their financial affairs separate, although Mildred did assume John's surname and obtain a dependent's Air Force Identification Card.

Sometime in the spring of 1972, the marriage of John and Mildred deteriorated and the couple apparently separated and eventially became divorced, by virtue of a decree of The Circuit Court of Montgomery County, Alabama. Proper jurisdiction was apparently had by John's domicile at Gunter Air Force Base in Alabama. The decree of divorce was rendered on August 1, 1972.

John returned to Mildred's house shortly after the entry of the divorce decree in Alabama. The nature of their relationship was much the same in that John and Mildred kept their financial affairs separate and John commuted. The utilities at Mildred's home were, at all times pertinent hereto, in John's name. Mildred was not dependent upon John.

In October, 1972, John told Mildred that he planned to return to Iowa following his retirement from the United States Air Force on December 1, 1972. Mildred was reluctant to leave and decided to stay behind, apparently fearing that the on-again, off-again relationship would be continued in Iowa's unfamiliar environment. Mildred feared that the loss of her home and retirement benefits outweighed her affection for John. John moved out, never communicating with Mildred, returned to Iowa following his retirement, held himself out as single and died in an accident on October 10, 1973. That John Caquelin died as a result of injuries arising out of and in the course of his employment is undisputed.

Mildred heard of John's death after his burial, by virtue of a letter written by Shirley Sorenson, John's sister who during the period of ceremonial marriage between John and Mildred, was Mildred's "contact" with John's family.

The issue in this case is whether the apparent cohabitation which took place between John Caquelin and Mildred Caquelin between August, 1972 and October, 1972 was a common law marriage, thus entitling Mildred Caquelin to survivor's benefits under the Iowa Workmen's Compensation Act.

Since the entire relationship between John and Mildred Caquelin took place in the state of Georgia, we must look to the laws of that state to determine whether John and Mildred Caquelin were married at the time of John's death. A marriage which is legal where made is legal everywhere. Op. Attorney Gen. 1911-1912, p. 560. Throughout these proceedings, it is apparent that the law of Georgia is controlling with regard to the nature of the relationship existing between John and Mildred Caquelin between August and October, 1972.

The law of Georgia will be followed to the extent that the elements of proof needed to establish a common law marriage in that state will be followed. However, the burdens established by the Iowa Courts will be followed with respect to the burden of proof and procedure. We are deciding upon the Iowa Workmen's Compensation Law and the burden must rest with those asserting claims in accordance with the wealth of findings of the Iowa Supreme Court.

There is no presumption that persons are married. Accordingly, the burden of proving a marriage rests on the party who asserts it, particularly where a common law marriage is asserted. *In re Estate of Fisher,* 176 NW2d 801 (Iowa, 1970).

Georgia Code Section 53-101 states that in order to have a valid marriage within Georgia there must be: 1. Parties able to contract; 2. An actual contract; and 3. Consummation according to law.

The dissent in *Lefkoff v. Sicro,* 189 Ga. 554, 6 SE2d 687, 133 ALR 738 (1939), later adpted in *Drewry v. State,* 208 Ga. 239, 65 SE2d 916 (1951) sets out the essentials of such an informal marriage in Georgia.

An agreement may be inferred from the cohabitation and reputation unless there is other evidence indicating that such an agreement was not present. In order for a relationship based upon repute and cohabitation to obtain the status of marriage at least one of the parties must have believed in good faith that their marital agreement made them husband and wife. *Drewry v. State,* supra; *Kersey v. Gardner,* 264 F. Supp. 887 (M.D., Ga. 1967). Under the law of Georgia, an agreement may be inferred from cohabitation and reputation unless there is other evidence indicating that agreement was not present. Ibid.

All that is required under the law of Georgia to establish is that the parties who are able to contract a marriage enter into an agreement *per verba de praesenti* and consummate that agreement by cohabitation. *Hayes v. Hayes,* 306 Ga. App. 88, 88 SE2d 306 (1955).

The undersigned took much evidence at the hearing subject to the objections of the counsel. If all is received, we must still look at the behavior of the parties as the guiding factor in making findings.

The evidence is uncontroverted that the parties assumed some sort of a relationship during the late summer and early fall of 1973. The words of the parties in the formation of the second relationship bear some relevance of the probable motives of the parties. The relevant portions of this testimony is set out below:

> Q. Did you indicate to him whether you considered yourself to be husband and wife?
>
> A. Yes.
>
> Q. What did you say in that regard?
>
> A. I would go along with him. If he considered himself married, I did too.
>
> Q. At that point in time when he asked you about learning of the divorce, did you assume that you were divorced, or think you weren't divorced, or what was your state of mind at that time.
>
> A. I really didn't know whether we were or not at that time.

The response to the last inquiry is relevant in that it sets the tone of a mercurial relationship.

Coupling the behavior of the parties, namely, the apparent lack of an indication of any permanence of the relationship in the minds of the parties to the relationship as exhibited by their behavior with the equivocal words noted above, it is apparent that Mildred Caquelin's claim must fail.

Mildred Caquelin's claim is based on behavior which is inconsistent with the behavior of parties who are married. The inconsistency of asserting such a claim can be seen by the lack of contact between the parties between the decedent's departure in October, 1973 to his death in October, 1974. Further buttressing this inconsistency is the holding out of the decedent as a single man upon his return to Iowa. The record, therefore, leads to the conclusion that such an agreement *per verba de praesenti* was not present in the case subjudice. The claimant's testimony reveals that she didn't know whether the parties were married or not. There is also sufficient evidence in the record to indicate that there was no agreement of marriage between the parties. *Hersey,* supra.

The probative value of the behavior of John and Mildred dictates the result. The claimant Mildred made no attempt to contact John in the one year interim between leaving and death. She knew his whereabouts at Gunter Air Force Base and had a contact with the decedent's family in Iowa. Neither of these avenues were approached which shows the casualness with which the parties viewed the relationship.

The claimant Mildred Caquelin's claim must therefore fail.

The claim of the minor children of the decedent is valid, however. No evidence was adduced at the hearing which rebuts the finding that the claimant's Billy Caquelin, Robert Lee Caquelin, and Rodger Lynn Caquelin were dependent upon the decedent.

Section 85.31, Code of Iowa, states in pertinent part:

> 85.31 Death cases--dependents.
>
> 1. When death results from the injury, the employer shall pay the dependents who were wholly dependent on the earnings of the employee for support at the time of his injury, during their lifetime, compensation upon the basis of eighty percent per week of the employee's average weekly spendable earnings, commencing from the date of his death as follows:
>
> To any child of the deceased until the child shall reach the age of eighteen, provided that a child beyond eighteen years of age shall receive benefits to the age of twenty-five if actually dependent, and the fact that a child is under twenty-five years of age and is enrolled as a full-time student in any accredited educational institution shall be a prima facie showing of actual dependency.

It is therefore apparent that the children mentioned above should receive payments pursuant to this section of the Code. The evidence adduced from the testimony of Margaret Whipple shows that the aforementioned children of the decedent were dependent upon the decedent.

WHEREFORE, the claim of the claimant Mildred Caquelin is denied. The claim of the minor dependents, Billy Dean Caquelin, Robert Lee Caquelin and Rodger Lynn Caquelin has been established.

* * *

Signed and filed this 8th day of December, 1976.

JOSEPH M. BAUER
Deputy Industrial Commissioner

Appealed to Commissioner; Dismissed.

Additional cases:

out of' his employment." *Burt v. John Deere Waterloo Tractor Works,* 247 Iowa 691, 73 N.W.2d 732, 737 (1956). It is important to note that an employer hires an employee subject to any active or dormant health impairments existing prior to employment. *Ziegler v. U.S. Gypsum Co.,* 252 Iowa 613, 106 N.W.2d 167 (1961). While a claimant is not entitled to compensation for the results of a preexisting injury or disease, the claimant is entitled to compensation to the extent of the injury if the preexisting injury or disease is aggravated, accelerated, worsened or "lighted up". *Yeager v. Firestone Tire & Rubber Co.,* 253 Iowa 369, 112 N.W.2d 299 (1961). *Musselman v. Central Telephone Co.,* 261 Iowa 352, 154 N.W.2d 128.

The Iowa Supreme Court in *Pace v. Appanoose County,* 184 Iowa 498, 168 N.W. 916 (1918), quoted with approval the language of *McNicol v. Patterson Wild and Co.,* 215 Mass. 497, 102 N.E. 697, as follows:

> An injury 'arises out of' the employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Under this test, if the injury can be seen to have followed as a natural incident of the work, and to have been contemplated by a reasonable person familiar with the whole situation, as a result of the exposure occasioned by the nature of the employment, then it arises 'out of' the employment. But it excludes an injury which cannot fairly be traced to the employment as a contributing proximate cause, and which comes from a hazard to which the workman would have been equally exposed apart from the employment. The causative danger must be peculiar to the work, and not common to the neighborhood . . . It needs not to have been foreseen or expected, but after the event, it must appear to have had its origin in a risk connected with the employment, and to have flowed from that source as a rational consequence.

Whether an injury or disease had a direct causal connection with the employment or arose independently thereof is essentially within the domain of expert testimony. *Bradshaw v. Iowa Methodist Hospital,* 251 Iowa 375, 101 N.W.2d 167 (1960). However, expert medical evidence must be considered with all other evidence introduced bearing on the causal connection. *Burt v. John Deere Waterloo Tractor Works,* 247 Iowa 691, 73 N.W.2d 732 (1956). While the mere possibility of a causal connection is not sufficient to support an award, if the 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). Note also that the opinion of experts need not be couched in definite, positive or unequivocal language. *Dickinson v. Mailliard,* 175 N.W.2d 588 (Iowa 1970). See also *Becker v. D. & E. Distributing Co.,* 247 N.W.2d 727 (Iowa 1976). Expert medical testimony was provided by Norman W. Hoover, M.D. orthopedic surgeon who first saw claimant on October 27, 1975. He found at that time pain in the left leg with diminished ankle reflection. A myelogram was made. The doctor's presumptive diagnosis based on the myelogram was a major disk protrusion. Exploration during surgery which consisted of a laminectomy and disk removal followed by a lumbar fusion, however, disclosed an extruded fragment of disk. Dr. Hoover discussed disk surgery generally:

> All one ever removes from a disk is the soft degenerated part of it. We wish we could remove a whole disk because it would save us lots of future problems in many cases. But the fact is that the disk is made up of fibrocartilage substance, which changes in consistency in a progressive spectrum from the periphery to the center, the soft center and almost rubber-hard peripheral margin, and the material which extrudes, of course, or protrudes is the soft center. So, we clean out everything we can get, but we are startled sometimes at the next operation to find out how much we didn't get the last time.

He distinguished a protruded from an extruded disk as follows:

> A protruded disk is a bulging disk in which the disk material is contained beneath the ligaments laying over the back surface of the vertebral bodies in such a manner that there is a lump of disk which is still under a ligament, but looks very much like a boil. It's obviously not, it doesn't contain pus, it contains disk material, but it looks like a boil under the skin. An extruded disk on the other hand is one that has actually penetrated the ligament and, therefore, the fragment of which lays free outside the disk space and within the canal which normally contains the spinal nerve roots.

He further differentiated the symptoms and pain:

> A protrusion almost always has at least a component of back pain and is often only back pain. There may, of course, be a protrusion large enough so that an overlying nerve root is also being irritated by it, but the stretching of the ligament seems to cause pain in the back so that a protrusion causes back pain and may cause leg pain. An extrusion almost always causes pain only in the leg in the direction of the nerve root; the back pain having been relieved when the extrusion occurs.

The progression would be:

> . . . back pain followed by leg pain followed by relief of back pain, and you can say in that circumstance that first there was a protrusion which was relatively small, then a larger protrusion which caused the pain to extend from the back to the leg, and then an extrusion of fragment with pain left only in the leg, the back pain having been relieved. When that sequence of history is given, you can practically say that the patient has an extrusion; that he had a protrusion which ruptured.

The doctor believed that compression of the first sacral nerve root by the extruded fragment was causing claimant's leg pain. Based on his experience with similar cases, the doctor testified that claimant's condition was caused by

some "unguarded bending, twisting motion of the spine" exemplified by:

> Twisting one's back getting in or out of a vehicle. This is a common cause. Lifting a garage door, picking up a pencil from the floor, getting up suddenly from a chair, particularly twisting to reach the side, as one does sometimes reaching from a low sofa to a coffee table. Any kind of a twisting, bending motion seems to be most likely to cause such an injury, more likely than a heavy lift after proper positioning.

The doctor's records indicated that claimant had told him that pain had begun at work, but that he was unaware of a cause. Dr. Hoover testified that claimant told him "that he had not had any specific injury on the morning that his pain began."

Defendants argue that claimant experienced no unusual occurrence or incident on the day of his injury. The Iowa Workmen's Compensation Act does not require an unusual incident. *Almquist v. Shenandoah Nurseries,* 218 Iowa 24, 254 N.W. 35 (1934). However, it is to be noted that just because a condition reaches the point of disablement while an employee is at work does not make that condition compensable. "It is only when there is a direct causal connection between exertion of the employment and the injury that a compensable award can be made." *Musselman v. Central Telephone Co.,* supra. The burden of proof is upon the claimant to establish his case by a preponderance of the evidence. *Almquist v. Shenandoah Nurseries,* Supra; *Lindahl v. L. O. Boggs,* 236 Iowa 296, 18 N.W.2d 607 (1945). The burden is not discharged by creating an equipoise. *Griffith v. Cole Brothers,* 183 Iowa 415, 165 N.W. 577 (1918). Claimant may sustain his burden by the use of circumstantial evidence, but such evidence is governed by the rules which ordinarily apply to that class of evidence. *Haverly v. Union Construction Co.,* 236 Iowa 278, 18 N.W.2d 629 (1945). In order to establish a proposition by circumstantial evidence, the evidence must be such as to make the claimant's theory reasonably probable, not merely possible, and more probable than any other theory based on the evidence, but the evidence need not exclude every other possible theory. *Latham v. Des Moines Electric Co.,* 229 Iowa 1199, 296 N.W. 375 (1941). *Jennings v. Farmers Mutual Ins. Ass'n.,* 260 Iowa 279, 149 N.W.2d 298 (1967). Dr. Hoover's testimony relating to causation which is set out above appears to indicate that many common human activities could be the causative factor in this sort of injury. Here there is insufficient evidence to support a conclusion that claimant's injury arose out of his employment.

* * *

Signed and filed this 1st day of February, 1978.

ROBERT C. LANDESS
Industrial Commissioner

Appealed to District Court; Pending.

ARISING OUT OF – EMPLOYER'S PARTY

STEVEN R. FAUST,

Claimant,

vs.

CITY OF DUBUQUE,

Employer,

and

HAWKEYE-SECURITY INSURANCE COMPANY,

Insurance Carrier,
Defendants.

Arbitration Decision

This is a proceeding in arbitration brought by Steven R. Faust, the claimant, against City of Dubuque, his employer, and Hawkeye-Security Insurance Company, the insurance carrier, to recover benefits under the Iowa Workmen's Compensation Act by virtue of an alleged industrial injury which occurred December 19, 1975.

* * *

The parties stipulated that the issue in this case would be limited to whether or not the injury sustained by the claimant arose out of his employment activities for the defendant employer.

There is substantial evidence contained in this record to support the following findings of facts, to wit:

Claimant, age 25, began to work for the defendant employer on May 3, 1972 as a laborer. On December 19, 1975, the claimant attended a Christmas party sponsored by the defendant employer and located at the city garage at 505 Adams Street, Dubuque, Iowa. William Kenyon, the claimant's immediate supervisor, purchased three cases of beer for consumption by the participants at the party. Some donated whiskey was also served and consumed by the claimant.

The claimant's motor vehicle operator's license was under suspension during this period of time and it was for this reason that a co-employee, Michael Whitfield, took possession of the claimant's ignition keys as the claimant attempted to leave the party. Mr. Whitfield stated that he and some of the other persons present were of the opinion that the claimant should not be allowed to drive his car for the reasons that "Well, I didn't want to see him drive the car on account of I didn't want to see him get hurt," (deposition, page 22, line 19), and "I didn't want to see him goof that [operator's license] up." (Deposition, page 23, line 1)

Mr. Whitfield further testified that after he had removed the keys from the claimant's ignition, taking them back into the garage, the claimant began to assault him in an apparent attempt to regain custody of the keys. Mr. Whitfield struck the claimant in self-defense against the attack, knocking the claimant to the floor, causing the claimant's head injury.

William Kenyon, claimant's immediate superior, testified that the claimant appeared inebriated (transcript, page 55, line 2), and corroborated the testimony of Michael Whit-

field relating the disagreement over possession of the keys.

Ernest Leroy Husemann, claimant's foreman, was a witness to the altercation between the claimant and Whitfield (transcript, page 67, line 2), and again confirmed that the disagreement was over the possession of the claimant's keys.

> To be compensable an employee's injury must occur "in the course of employment" and also "arise out of it." The burden rests on the claimant to establish those factors. *Sister Mary Benedict v. St. Mary Corp.*, 255 Iowa 847, 124 N.W.2d 548.

The Iowa Supreme Court analyzes the issue of "arising out of" at great length in *Crees v. Sheldahl Telephone Co.*, 250 Iowa 292, 139 N.W.2d 190 (Iowa 1965), and while the primary issue in this decision involved the "coming and going" rule, the thread of continuity contained therein is that the claimant must be engaged in the performance of his duties at the time of the injury.

In this case, the claimant was attending a Christmas party given by his employer in recognition of a good year's work done, with obvious benefits inuring to the employer. The claimant consumed some alcoholic beverages during his attendance at the party, which altered his judgment. No affirmative defense of intoxication is urged, however.

The claimant attempted to leave the party driving his own car. His fellow-employees knew that his operator's license was under suspension, and when reason failed, a co-employee took custody of the keys. In an altercation begun by the claimant in an attempt to retrieve his keys, an injury resulted. Based upon the rationale in *Sister Mary Benedict* and *Crees*, supra, the claimant's injury did not arise out of his duties for the defendant employer. That is, the altercation was not incident to any of claimant's employment functions, even when one considers the activities at the Christmas parties to be a legitimate employment function; the altercation did not arise from the party.

WHEREFORE, it is ordered that the claimant take nothing further from these proceedings.

* * *

Signed and filed this 14 day of March, 1978.

HELMUT MUELLER
Deputy Industrial Commissioner

No appeal.

ARISING OUT OF – GASTROINTESTINAL BLEEDING

BETTY LALOR,

Claimant,

vs.

KEM MANUFACTURING CORPORATION,

Employer,

and

BITUMINOUS CASUALTY INS. CO.,

Insurance Carrier,
Defendants.

Decision on Appeal

This is a proceeding brought by the defendant employer, Kem Manufacturing Corporation, and its insurance carrier, Bituminous Casualty Insurance Company, pursuant to Iowa Code §85.24 for review of an arbitration decision filed July 26, 1976 wherein the claimant, Betty Lalor, spouse of deceased John Lalor, was awarded $97.00 per week in death benefits.

* * *

Decedent John Lalor, who was a traveling seller of industrial cleaning supplies, received a weekly draw of $230.00 with an additional monthly sum if his earned commission exceeded the amounts of the weekly draws. During a road trip in November of 1974, Lalor suffered melena and was hospitalized by his family physician, William C. Robb, M.D. Decedent was discharged November 12, 1975. Lalor received his weekly draw during this period of hospitalization. On November 18, 1974 he resumed traveling for Kem.

Decedent's duties included calling on established accounts and seeking out new business. It was Lalor's practice to leave home on Sunday night or Monday morning and to stay in motels until his return to his home at the end of the week. Decedent paid his own travel expenses and the cost of samples or gifts to his customers. Lalor had traveled to Cedar Falls, Iowa, where he made calls on January 27 and 28. On January 29, 1975 he became ill. The manager of the motel at which he was staying entered Lalor's room January 30 and, upon observing that Lalor was ill, called Lalor's wife. Mrs. Lalor arrived in Cedar Falls and immediately arranged for her husband to be transported to the hospital where he died a short time later. The death certificate listed shock due to upper gastrointestinal bleeding and a probable duodenal ulcer as the immediate cause of death.

The issue presented by this case is whether or not Lalor's death arose out of and in the course of his employment.

In order to receive compensation Lalor must prove by a preponderance of the evidence that her spouse's injury arose out of and in the course of his employment. *Musselman v. Central Telephone Co.*, 261 Iowa 362, 154 N.W.2d 128 (1967). "In the course of" the employment refers to time, place and circumstances of the injury. *McClure v. Union County*, 188 N.W.2d 283 (1971). "An injury occurs in the course of employment when it is within the period of employment, at a place where the employer reasonably may be performing his duties, while he is fulfilling those duties or engaged in doing something incidental thereto." *Bushing v. Iowa Railway & Light Co.*, 208 Iowa 1010, 1018, 226 N.W. 719, 723 (1929).

The general rule as to traveling employees is found in 1 Larson, *Workmen's Compensation Law*, §25.00 at 5-172 (1972) which states that "[e]mployees whose work entails travel away from the employer's premises are held in the majority of jurisdictions to be within the course of their employment continuously during the trip, except when a

distinct departure on a personal errand is shown."

As decedent was a salesman, it is not doubted that he traveled to Cedar Falls to call on his employer's customers, that it was his duty to solicit business for his employer, and that his records show he had contacted customers and had obtained orders on January 27 and 28. Lalor's death occurred in the course of his employment.

In addition to proving that an injury happened in the course of employment, claimant must show that it arose out of the employment. *McClure v. Union County,* supra. "Arising out of" suggests a causal relationship between the employment and the injury. *Crowe v. DeSoto Consolidated School District,* 246 Iowa 402, 68 N.W.2d 63 (1955). When "there is sufficient evidence to support the conclusion that there was reasonable probability claimant's condition . . . was caused or contributed to by his employment, there can be no question of its 'arising out of' his employment." *Burt v. John Deere Waterloo Tractor Works,* 247 Iowa 691, 73 N.W.2d 732, 737 (1956). It is important to note that an employer hires an employee subject to any active or dormant health impairments existing prior to employment. *Ziegler v. U. S. Gypsum Co.,* 252 Iowa 613, 106 N.W.2d 167 (1961). While a claimant is not entitled to compensation for the results of a preexisting injury or disease the claimant is entitled to compensation to the extent of the injury if the preexisting injury or disease is aggravated, accelerated, worsened or "lighted up". *Yeager v. Firestone Tire & Rubber Co.,* 253 Iowa 369, 112 N.W.2d 299 (1961).

> However, a disease which under any rational work is likely to progress so as to finally disable an employee does not become a "personal injury" under our Workmen's Compensation Act merely because it reaches a point of disablement while work for an employer is being pursued. It is only when there is a direct causal connection between exertion of the employment and the injury that a compensation award can be made. The question is whether the diseased condition was the cause, or whether the employment was a proximate contributing cause.

Musselman v. Central Telephone Co., supra, at page 132.

Establishing causal connection is within the domain of expert testimony. *Bradshaw v. Iowa Methodist Hospital,* 251 Iowa 375, 101 N.W. 2d 167 (1960). The experts testifying in the case sub judice included William C. Robb, M.D.; Russell A. Dean, M.D.; Paul From, M.D.; Mark D. Ravreby, M.D.; and Robert Victor Levetan, Director of Research for Kem.

Dr. Robb, called as claimant's witness, had been the Lalor family physician for a number of years and was Lalor's attending physician during a July, 1972 hospitalization for chronic obstructive pulmonary disease and cor pulmonale triggered by an acute respiratory infection. The doctor's final diagnosis contained finding of hepatic congestion. Dr. Robb, aware at that time that decedent had liver problems, testified Lalor "was a binge drinker, and he would drink large amounts of booze for periods of time, stop eating, and then he would start throwing up and get gastritis, and then he would dry himself out and start eating again. . . ." The doctor said he was unable to make a differential diagnosis at that time because cor pulmonale could cause an enlarged liver, too. In November, 1974 Lalor returned to the hospital with an admission's diagnosis of melena, advanced chronic obstructive pulmonary disease and cor pulmonale with chronic fibrillation. The discharge diagnosis listed upper G-I bleeding, jaundice secondary to hepatic cirrhosis, chronic obstructive pulmonary disease, and chronic cor pulmonale and auricular fibrillation. Lalor's instructions on discharge were related to his pulmonary problems and were to work to the point he became short of breath and not beyond. His medications were digoxin, ferrous sulfate, Maalox and Gelusil; and he was given an ulcer diet. Dr. Robb additionally testified, "[W]e warned him that if he developed any symptoms of bleeding, that he should be seen immediately." Tests performed at the Kersten Clinic subsequent to the November hospitalization showed an advanced cirrhosis of the liver. Although Dr. Robb said a biopsy would be needed for certainity, he seemed to eliminate chronic Hepatitis as a cause of the cirrhosis as Lalor had no prior history of the disease. The doctor said, "Work activites per se had no bearing on it [the liver problem] at all. . . .," and he could not correlate any type of work with an upper GI bleed.

Dr. Dean, the attending physician at the time of Lalor's death at Sartori Hospital, was called by claimant. The doctor filled out a report for Northwestern Life Insurance Company on which he indicated that decedent's death did not arise out of his employment. While Dr. Dean believed that Lalor would have had a better chance of surviving if he had sought medical attention earlier, the doctor said this would be true "regardless of this particular man's past history or work. . . ."

Dr. From, whose speciality is internal medicine and whose testimony was based on his review of the medical records, was called by the defendant. His testimony relating to hepatic cirrhosis is enlightening.

> That's a condition of the liver which basically indicates hardening of the liver. It is due to the laying down of fibrous tissues in the liver, usually as a consequence of long-term irritation of the liver, and almost always from a chemical, although it can be bacterial or viral in origin. The chemicals, the one most common of all throughout the world is alcohol, ethyl alcohol. Other chemicals such as certain drugs incurred by the liver which over a long period of time may irritate the liver, certain toxins such as carbotetrachloride can cause this. Certain parasites, bacteria, viruses can cause this, but always it would be ethyl alcohol that leads to cirrhosis statistically.

Dr. From testified that he was "not entirely" able to relate the upper gastrointestinal bleeding to the cirrhosis problem as there might be a number of conditions related to cirrhosis. In response to a question as to whether a prescribed convalescence period or rest period would be proper treatment following decedent's hospitalization in November, 1974 Dr. From did not think rest of the entire body would make a difference nor did he think specific instructions to avoid physical activities were needed. The doctor did not believe there was "any connection between that work [decedent's duties as a salesperson] and his final

illness." Dr. From's evaluation of the total situation can be seen in the following testimony:

> The fact that this man went back to work about the middle of November, 1974, which was approximately one week after a hospitalization for a mild upper GI bleeding -- that is, at the time he left the hospital, his hemoglobin was 10.5 grams percent, and at admission to the hospital, it was 13. He had no brain symptoms of poor profusion of his brain. He did have a week's convalencence (sic) at home. He then went back to work for approximately two and half months before he had another rebleed. He was doing work to which he was accustomed, and there was nothing unusual about that work different in any way from anything in the past, and I would therefore conclude that there is no causal relationship between his work and his recurrent tendency to bleed. I mean, he would have had the same tendency to bleed if he had been at home, I think, than just as well at work.

Dr. Ravreby, internist, was called by the claimant to testify on the basis of medical records. Dr. Ravreby, disagreeing with Dr. From's analysis of the convalescence period, stated "that the convalescence following this hospitalization was insufficent and directly led to further medical problems." His additional testimony was:

> Yes, I feel that the continued evidence of hepatic disease and gastrointestinal bleeding was a manifestation of insufficient treatment and the treatment should have included a longer period of rest and evaluation as to recovery and potential for bleeding and the assurance, both from the patient's and the physician's side, that the bleeding tendency was at a minimum and hepatitis and cirrhosis had been treated as optimally as possible and, therefore, the lack of sufficient rest as a part of the treatment routine and further medical evaluation directly contributed to the bleeding episode on 1-30-75 and, therefore, directly attributed to the death.

Dr. Ravreby also commented upon the possibility of chemical exposure stating that one instance or chronic exposure could result in hepatitis. Other possibilities were dietary habits and alcohol consumption after Lalor's November hospitalization. The doctor did not think his information was adequate to form an opinion as to these factors. Dr. Ravreby thought the most significant but somewhat speculative factor in Lalor's death was his lack of emergency care at the onset of bleeding.

Robert Victor Levetan presented expert testimony of a different nature. It is his job as research director "[t]o devise chemical compounds, establish production procedures, and in essence to develop the products which the company sells." Part of his responsibility was to be sure products were safe for customers. He claimed that there were no known liver irritants in Kem products.

It should be noted that the deputy industrial commissioner misinterpreted a portion of the expert testimony on which he relied. At page 5 of his opinion he writes, "In reply to a hypothetical question, the doctor expressed the medical opinion that Mr. Lalor should have refrained from work a minimum of three to four weeks after his November, 1974 illness (page 13, lines 15-18, Deans' deposition)". The hypothetical referred to the January episode from which Lalor died and not to his November illness.

While the issue of whether or not an injury "arose out of" employment is essentially determined by expert testimony, *Musselman v. Central Telephone Co.,* supra, this testimony in its entirety must be considered along with other testimony bearing on a causal relation. *Burt v. John Deere Waterloo Tractor Works,* supra.

The stipulated testimony of the motel manager, Bob Alexander, was that on Wednesday, January 29, 1975 decedent called the motel office and told them he was not feeling well and did not want maid service on that day. He was observed leaving and returning to the motel on one occasion that day. On Thursday morning he called the motel office and asked for some milk. Alexander brought decedent some milk and observed a wastepaper basket half full of bloody fluid. Decedent asked Alexander to call his wife which he did. This was all approximately 10:00 a.m. Decedent's wife arrived approximately 2 or 2:30 p.m. at which time decedent was taken to the hospital.

Thomas Kusterman, regional sales manager for Kem Mfg. Corp., discussed his company's policy regarding continuing payments during illness. He stated that a productive salesman such as Lalor would be paid during an illness and that payments to Lalor were continued at Kusterman's request. Recounting the company's treatment of another salesman who had suffered a heart attack after being with the company for a shorter period than Lalor, Kusterman said the man had been paid several weeks in advance and not charged. Although the contract of employment read that sums drawn by the salesperson against unearned commissions would be repaid, Kusterman testified, "If we paid his money while he was ill, we don't expect him -- a fellow who was with us and productive -- to make it up. It's an inducement to bring him back in a proper frame of mind." Kusterman had not requested Lalor to return to work. It was Lalor himself who determined the return date.

Leo Gene Schwarz, a friend of the Lalors, declared that Lalor did not abuse alcohol and that Lalor's physical condition appeared to deteriorate. Similar testimony came from Lalor's daughter, Barbara Willison, and his wife, Betty. Another family friend, John Ault, also stated Lalor did not abuse alcohol.

The deputy commissioner held that "the decedent's work activities between November 18, 1974 and January 29, 1975 were of such a nature so as to aggravate the preexisting conditions." No specific work activity is noted as the aggravating factor -- only work itself as opposed to rest. This conclusion finds support from the opinion of Dr. Ravreby only. As noted the opinion of Dr. Dean does not bolster that of Dr. Ravreby as they are considering two different episodes of bleeding.

The deputy further found that the decedent did not have the onset of bleeding until January 30. Although this commissioner would not necessarily find similarly, assuming that to be the fact it would appear nothing connected with decedent's employment on January 29 contributed to the onset of the symptoms as it would appear little or no exertion was performed for the employer on January 29.

This commissioner, upon examination of the record as a whole, can find no reason why, as indicated by the deputy, the opinion of Dr. Ravreby is entitled to greater weight than that of the other doctors.

Dr. Robb indicated that the bleeding problem of decedent in November was minor as compared to that in January. Drs. Robb and From indicate that rest of the affected organs through abstinence from irritating chemicals, proper diet and medication and not physical rest would be proper.

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, 288 N.W. 402 (1939). The medical evidence taken in its entirety coupled with the other testimony relating to a causal connection fails to establish by a preponderance that Lalor's death arose out of his employment.

* * *

Signed and filed this 26 day of July, 1977.

ROBERT C. LANDESS
Industrial Commissioner

Appealed to District Court; Remanded.

BETTY LALOR,

Claimant,

vs.

KEM MANUFACTURING COMPANY,

Employer,

and

BITUMINOUS CASUALTY COMPANY,

Insurance Carrier,
Defendants.

Review Decision on Remand

This is a supplemental decision pursuant to a district court decision remanding this matter to the industrial commissioner with instructions to determine whether claimant established that the failure of claimant's deceased husband to seek treatment following the onset of gastro-intestinal bleeding was caused by the requirements of decedent's employment. It is not disputed that there was uncontroverted medical testimony that the failure of her spouse to seek treatment when the symptoms began helped to cause his death.

The court has indicated that this issue was not resolved by the review decision previously rendered by this commissioner. As stated in that decision:

> The deputy commissioner held that "the decedent's work activities between Nov. 18, 1974 and Jan. 29, 1975 were of such a nature so as to aggravate the preexisting conditions." No specific work activity is noted as the aggravating factor -- only work as opposed to rest. This conclusion finds support from the opinion of Dr. Ravreby only. As noted, the opinion of Dr. Dean does not bolster that of Dr. Ravreby as they are considering two different episodes of bleeding.
>
> The deputy further found that the decedent did not have the onset of bleeding until Jan. 30. Although this commissioner would not necessarily find similarly, assuming that to be the fact it would appear nothing connected with decedent's employment on Jan. 29 contributed to the onset of the symptoms as it would appear little or no exertion was performed for the employer on January 29.

It was felt that this language sufficiently dealt with the issue and established that the requirements of decedent's employment were not a factor in his failure to seek prompt medical care.

While the record is unclear as to the exact time of the last onset of bleeding, it is apparent that decedent was ill and knew he was ill commencing on January 29. This is supported by the testimony of the motel manager, Bob Alexander, who stated that on the 29th, decedent called the motel office and told them he was not feeling well and did not want any maid service that day. Moreover, claimant testified that decedent called her on the 29th and also stated that he did not feel well.

On the morning of January 30, decedent called the motel office and asked for some milk. Alexander delivered the milk to decedent's room and noticed blood in the wastepaper basket. Alexander again rechecked the room about 10:00 a.m., and decedent then asked Alexander to call the claimant, which he did. Claimant got a family friend to accompany her and arrived at approximately 2:00 or 2:30 p.m., at which time decedent was taken to the hospital.

There is little or no evidence in the record as to what decedent's work activities were, if any, on either the 29th or 30th of January, 1975. Alexander testified that the decedent left and returned to his room on one occasion on the 29th. However, decedent's work record and daily log does not indicate his making any sales calls on either the 29th or 30th, and no evidence was presented of any such calls in fact being made.

The evidence shows that decedent went out on the 29th and used the telephone on both the 29th and 30th. Nevertheless, there is no indication of any doctor or other source of medical care ever having been contacted prior to the time decedent was taken to Sartori Hospital by the claimant. Decedent's employment had not taken him to a remote area where prompt medical attention was not available. On the contrary, claimant was in an urban area with many doctors and several hospitals. Yet, when decedent finally did ask for assistance on the 30th it was to have Mr. Alexander call claimant to come and get him, and not to seek or summon medical attention.

There is nothing in the record to indicate that anything other than decedent's unexplained, personal reluctance prevented him from seeking medical treatment after the onset of his illness, and clearly no evidence such as would sustain claimant's burden to establish that decedent's failure in this regard was caused by the requirements of his

employment.

* * *

Signed and filed this 16 day of February, 1978.

ROBERT C. LANDESS
Industrial Commissioner

No appeal.

ARISING OUT OF GUILLAIN-BARRE' SYNDROME

JON W. BARGMANN,

Claimant,

vs.

BRAMMER MANUFACTURING COMPANY,

Employer,

and

EMPLOYERS INSURANCE OF WAUSAU,

Insurance Carrier,
Defendants.

Appeal Decision

This is an appeal pursuant to Rule 500-4.26, Iowa Administrative Code, and §86.24, Code of Iowa, of an arbitration decision wherein the claimant, Jon Bargmann, was awarded temporary total disability benefits and related medical expenses for employment related disability which commenced August 21, 1973. Defendants, Brammer Manufacturing Company, employer, and Employers Insurance of Wausau, insurance carrier, filed a petition for review which shall be considered an appeal. The only issue on appeal is whether or not there is a causal relationship between the claimant's employment and his disabling condition.

Claimant was twenty-two years of age and single in the summer of 1973. He was employed by defendant employer on May 5, 1972. His employment as a spray painter commenced February 12, 1973. Prior to employment with defendant employer, claimant had taken two years of college and worked for his uncle in a hardware store.

On July 20, 1973 the claimant was examined by David C. Van Hecke, M.D. Claimant had lost 50 pounds by self-dieting over the previous year and there was some concern about diabetes. The results of the physical examination were normal.

Following the examination, claimant went on vacation camping along the Wapsi River. After this, claimant returned to his regular employment .

Claimant's work station at defendant employer's was a booth about 12 feet wide and 10 feet deep. It had sides, a back and a top. The sides were open enough to allow the articles the claimant was to spray with lacquer to arrive and depart on pallets placed on a conveyer belt. The lacquer claimant used from February, 1973 through his last employment with defendant employer contained 25% methyl butyl ketone (MBK).

There were other stations and persons in the defendant employer's plant that were involved in handling solutions containing MBK. Eight of these co-employees all of whom had been exposed to MBK for a greater period of time than claimant were examined after claimant's condition developed. None of these individuals showed any symptoms similar to those displayed by the claimant.

Claimant was next seen by Dr. Van Hecke briefly on August 22, 1973. Claimant related that he had gone on vacation and then returned to work. In the two or three week period since he had returned, he developed a weakness in his legs to the point where he could hardly walk. "He had no particular pain but his ankles were numb and felt funny. It had started in the feet and was progressing up into his lower legs, and it was worse on the right side, and he looked so awful that I immediately called . . . a local orthopedic surgeon (who) saw him immediately that day."

Dr. Van Hecke saw claimant again on August 27 and tests were run which were normal except for an elevated creative phosphokinase (CPK) and elevated total bilirubin.

Arrangements were made to refer claimant to University Hospitals, Department of Neurology, where claimant came under the care of Lynn Lyon, M.D., a neurologist.

Dr. Lyon first saw claimant August 29, 1973. The history elicited was as follows:

> Jon presented to me on the 29th of August, 1973, as a 22-year-old man who had essentially been healthy in the past. Approximately the 1st of August, of 1973, he noted the gradual onset of a feeling of weakness and "a funny feeling" in his ankles and feet. He had no pain or cramps associated with this. His problem gradually progressed over the next three weeks to involve his entire legs. He began to have trouble walking, particularly walking up and down stairs. He still complained of no other neurological deficits. Specifically, there was no back pain. His sexual function and sphincter function remained intact. In the last week prior to his admission, to his first being seen by myself, the patient felt that perhaps his arms were becoming mildly but similarly involved. There were no symptoms above the neck.
>
> The remainder of his medical history was essentially noncontributory.
>
> * * *
>
> At the time of his initial evaluation he did relate to me that he had been working as a spray painter for approximately the last six months. I inquired of him and he informed me that similar workers doing similar jobs at the plant had not had similar symptoms, and that's as far as that particular item was pursued at the time of the initial evaluation.

After a general physical and neurological examination, Dr. Lyon came up with a working diagnosis of polyneuropathy, probable Guillain-Barré syndrome. Dr. Lyon indicated the exact etiology of Guillain-Barré is unknown but that it is generally thought to be a form of auto-immune or allergic neuropathy that probably is preceded in about two-thirds of the cases by some kind of an infectious illness; most commonly, an upper respiratory infection, less commonly gastrointestinal illness, but some kind of viral or other infectious illness.

Dr. Lyon further testified that the majority concept is that this antecedent illness, which is present in perhaps two-thirds of the cases, somehow sends out an allergic or auto-immune response whereby the patient produces antibodies to the myelin in his own peripheral nerves.

Claimant was admitted to University Hospitals for a more complete clinical and laboratory examination to rule out other disease processes that are also capable of causing neuropathy.

In general, Dr. Lyon felt the laboratory confirmed his working diagnosis of Guillain-Barré syndrome. Dr. Lyon testified:

> There is no one specific laboratory test for Guillain-Barré syndrome. The things that we look for are: 1. Slowing of nerve conduction velocities, which in Mr. Bargmann had. Such slowing is not specific for Guillain-Barré. The nerve conduction velocities would be slowed in polyneuropathy of any cause. Secondly, we usually see, although not in all cases, but in perhaps seventy-five percent of the cases with Guillain-Barre, we see an elevated spinal fluid protein without an associated abnormal cell count in the cerebral spinal fluid. Jon's CSF protein was mildly elevated with a value of 55. Upper limits of normal are 45. And he did not have an abnormal cell count and, thus, his spinal fluid was compatible with Guillain-Barré.
>
> So to my way of thinking his laboratory confirmed my working diagnosis and I discharged him on August 31, still with a diagnosis of Guillain-Barré syndrome.

Dr. Lyon next saw claimant on September 5 at which time his condition was clinically unchanged. Nerve conduction values were slowed somewhat and there were some minor variances in laboratory findings.

Claimant was again seen by Dr. Lyon on September 19, October 8, October 26, November 7 and November 28, 1973; January 24, May 2 and September 4, 1974; and March 14, 1975. Dr. Lyon considered claimant's condition stable until the October 8 visit. At that time claimant related slow improvement until one week prior when he felt his legs had worsened and balance become less stable. Dr. Lyon confirmed that his condition at this time was somewhat exacerbated. Dr. Lyon noted that the majority of cases of Guillain-Barré would steadily improve but that some cases do show exacerbation or slight progression of the syndrome. Laboratory examination showed normal. Because of claimant's slight worsening, he was started on steroid therapy in the form of Prednisone, 60 milligrams per day commencing October 17, 1973. The October 26 examination noted some minimal improvement. Steroid treatment was continued on decreasing dosages for an overall total of six weeks after which examination on November 28 showed continued improvement. Claimant was at that time wearing short-leg braces to compensate for bilateral foot drop.

Throughtout the visits in 1974 and 1975 Dr. Lyon thought claimant showed progressive improvement and by March of 1975, claimant had experienced a complete clinical and electrical diagnostic recovery and that claimant would be able to return to his initial employment on a full-time basis.

Dr. Lyon's initial information received from the claimant revealed no other similar symptoms by co-employees. The thought of possible toxic neuropathy did not come up until Dr. Lyon received a letter from a relative of claimant with reference to a newspaper article relating to an outbreak of MBK neuropathy in a plant in Ohio. Reference was also made to the fact that claimant at least in some degree was exposed to MBK at his place of employment.

As a result of this information, Dr. Lyon went to defendant employer's and examined eight co-workers including ones who spray painted in the same manner as claimant. Five of these co-workers were also given further examination at University Hospitals. None of those examined showed any clinical or electrical evidence of polyneuropathy. Some of those examined had been spraying lacquer under conditions similar to claimant for seven to ten years.

Dr. Lyon indicated there was very little to research in medical literature on polyneuropathy due to MBK. Dr. Lyon obtained from a Dr. Allen in the Neurology Department at the Ohio State University Hospitals an account involving the medical details of the patients involved in the MBK incident in Ohio. The polyneuropathy described by the people in Ohio, now felt to almost certainly be due to MBK, presented itself in a manner quite similar to Guillain-Barré with a couple of minor differences. Dr. Lyon Stated:

> Guillain-Barré in general produces proximal weakness greater than distal weakness. The Methyl Butyl Ketone neuropathy produced primarily distal weakness. Jon's weakness was more severe distally than proximally.
>
> Guillain-Barré almost uniformly causes reduction or diminution in the tendon reflexes: The reflexes in the Methyl Butyl Ketone neuropathy were found to be normal. Jon's reflexes were definitely diminished.
>
> And thus Jon's neuropathy was slightly atypical for Guillain-Barre in that it was more severe distally than proximally, although I have seen this form of involvement in other cases of Guillain-Barré; and he was atypical for the Methyl Butyl Ketone neuropathy in that his reflexes were definitely diminshed.
>
> To summarize, in all other aspects the polyneuropathy caused by Methyl Butyl Ketone is clinically very similar to, almost identical to, the type of neuropathy that we would see in Guillain-Barré. And thus Jon's clinical picture was compatible with Guillain-Barré, and his clinical picture was also compatible with the neuropathy caused by Methyl Butyl Ketone as found in the workers in Columbus, Ohio.
>
> It was my opinion at that time that his illness was that of Guillain-Barré and not Methyl Butyl Ketone neuropathy because of the lack of involvement of any of his co-workers who we had investigated clinically and electrically.

* * *

My feeling is, that Mr. Bargmann's illness is that of

Guillain-Barré, and while his illness is clinically similar to the polyneuropathy seen with Methyl Butyl Ketone, in view of the lack of involvement of fellow employees, some of whom were exposed to the same working conditions for periods even longer than Mr. Bargmann worked there, that I do not feel his neuropathy is due to Methyl Butyl Ketone but rather is due to Guillain-Barré syndrome.

On cross-examination, Dr. Lyon testified:

> The only real data that we have on MBK and neuropathy is the group of patients in Ohio, and let me just -- they had a series of 86 cases from the plant in Ohio, and I think that the clinical picture is fairly well delineated from these 86 cases, at least as it applies to the method of exposure to MBK that these employees had. No specific tools of diagnosis specific for MBK polyneuropathy were delineated that would differentiate it with certainty from other forms of polyneuropathy.

In response to a question regarding whether a reasonable medical opinion in support of a diagnosis of MBK polyneuropathy could be made, Dr. Lyon testified:

> I think any other neurologist who saw Mr. Bargmann would arrive at a diagnosis of polyneuropathy. Upon reviewing the literature on MBK neuropathy, I think that any neurologist--granted, I can't speak for them, but I would conjecture that any neurologist would feel that Mr. Bargmann's clinical picture was compatible with MBK neuropathy. I forwarded the clinical findings in Mr. Bargmann's case to Doctor Allen, who was investigating the cases at Ohio State, and it was his feeling that Mr. Bargmann's symptoms and signs were compatible with MBK neuropathy.
>
> I think any neurologist would, however, also feel that his symptoms were quite compatible with Guillain-Barré syndrome, the difference between the two forms of neuropathy, as I mentioned, being quite slight.
>
> So I think anyone would agree that his clinical picture was compatible with MBK neuropathy. What another physician or another neurologist would feel about the lack of involvement of co-workers, I don't feel that I can answer.

As to variations in individual susceptibility, Dr. Lyon responded:

> Individual variation in susceptibility to any factor is always a possibility and would have to be considered a possibility with exposure to MBK. In the group of employees in Columbus, Ohio, that were involved, epidemiologic and toxicologic studies were performed and showed a nice relationship with the attack rate of polyneuropathy and the severity of the polyneuropathy with the amount of exposure to MBK in the Columbus plant. In that particular plant, we don't see anything that would support the suggestion that there was undue individual variation in their susceptibility to MBK. It appeared to be more a matter of length and degree of exposure to the chemical. I guess I have answered it.

During the course of treatment at University Hospitals, claimant was continuing to be seen by Dr. Van Hecke. After Dr. Lyon's initial examination, Dr. Van Hecke received a lengthy letter indicating the diagnosis of Guillain-Barré syndrome. Dr. Van Hecke did not consider this a very satisfactory diagnosis because it is a disease with an unknown cause. Dr. Lyon's letters and conversations kept Dr. Van Hecke current with claimant's condition until December 4, 1973 when Dr. Van Hecke again saw the claimant. At this time claimant was off steroids and wearing leg braces. A rash that had apparently developed in conjunction with the steroids had partially cleared and headaches that had developed while on steroids had diminished. No medication was prescribed.

Dr. Van Hecke then saw claimant monthly during 1974. In January claimant called Dr. Van Hecke and reported a swelling in his ankles which Dr. Van Hecke thought might be a urinary tract infection. When he checked claimant on February 5, 1974 a few white cells were found in the urine but the swelling was no longer present.

In March, Dr. Van Hecke gave claimant an injection of ACTH which is a pituitary stimulating hormone normally given to people who have had a course of cortisone. Prednisone is a form of cortisone.

Dr. Van Hecke testified that claimant's weight was 193 in December, 205 1/2 in April. Dr. Van Hecke indicated his main concern was about claimant's weight increase and the side effects of the cortisone and a cough that developed in April which did not appear serious. Although Dr. Van Hecke did not conduct a neurological examination, he did note an improvement in claimant's neuropathy.

Dr. Van Hecke disagreed with the diagnosis of Guillain-Barré and believed claimant's condition to be caused by the MBK. He related:

> Well, not everyone at the company in Ohio certainly developed a toxic neuropathy who worked with Methyl Butyl Ketone. I feel that certain people react to certain foreign substances in a detrimental way, the same as you would react, an asthmatic would react to certain allergic conditions. It was my feeling that Jon, perhaps in the two weeks that he was away from his work, developed some allergy to Methyl Butyl Ketone; and when he went back to work after being off work for two weeks, this idiosyncrasy, idosyncratic or toxic reaction took place. Dr. Lyon never disagreed with me, but he would not agree.

* * *

Q. Would the amount of Methyl Butyl Ketone affect your opinion, in other words, the amount of exposure that he had?

A. No, not necessarily, because I have seen people develop reactions to paint spray from such as a -- well, for one thing, hypotensive reaction, which so-called postural hypotension, I have seen in patients who use paint spray, one small can, in a closed area, and have used it periodically. I am recalling a neighbor of mine who was spraying some furniture. He had sprayed it outside several times. Then in the wintertime, he was doing it in the basement, and developed a -- he fainted. After we checked him out,

couldn't find anything wrong, he wondered whether it was the paint. So, as a challenge, he did it again, and he got very faint from it. There are certain people who react to chemical toxins, and it does affect their nervous system. I feel that Dr. Lyon is being a purist about this. He is a typical scientist: If you can't demonstrate something in the laboratory, it isn't so. Well, I don't agree, because I knew Jon, and I wasn't only concerned with his nervous system, I was concerned with his general health, and I felt that there had to be some connection here.

On cross-examination, Dr. Van Hecke conceded that he had no special training nor had done any independent research on polyneuropathy caused by MBK. Dr. Van Hecke pointed the finger at MBK based only "upon the information that came out of Ohio". He did not obtain a history of claimant's activities while on vacation.

Dr. Van Hecke further testified:

> Q. Now, it is my understanding that you feel that Jon has a particular susceptibility to MBK.
>
> A. Yes.
>
> Q. I didn't mean to phrase that poorly, but, as differed from perhaps the other people who are working at Brammer.
>
> A. Yes. The reason I hesitated is because it might not be MBK. You see, it could be some other chemical in the spray; but, because of the occurrence in Ohio, we would have to point to MBK.
>
> Q. Do you agree or disagree with this statement which was made by Dr. Lyon in his deposition, reading from page 33 of it? "In the group of employees at Columbus, Ohio, that were involved, epidemiologic and toxicologic studies were performed and showed a nice relation with the attack rate of polyneuropathy and severity of polyneuropathy with the amount of exposure to MBK in the Columbus plant. In that particular plant, we don't see anything that would support the suggestion that there was undue individual variation in their susceptibility to MBK." Do you agree or disagree with that statement? Would you rather read it than have me read it to you?
>
> A. It is difficult for me to answer that question, because I am really not an expert on it. But I would disagree with it. The basis of my experience with many, many patients who react to various things in various odd ways that there could be an individual reaction. But that is why I say I am not sure it is MBK. It might be something else.

and further:

> Well, as I say, I am not a neurologist, and I am not an expert in toxic neuropathy, nor do I know a great deal about MBK. That is why I have been careful, in order to give an honest opinion, to state that I do not necessarily agree that it was MBK, but I believe that it was something in the spray that he was using.

and in conclusion:

> THE WITNESS: I might add something to this, that you asked me whether I had read anything. About this time -- I take the New Yorker Magazine. Every once in a while, the New Yorker Magazine goes into something in great depth. There was a lengthy article in the New Yorker Magazine about a woman who defied diagnosis from everyplace in the country. She was apparently a wealthy woman, had gone from Massachusetts General Hospital to Mayo Clinic, to here, to there; and they discovered -- someone discovered along the way that she had a toxic reaction to some type of plant fertilizer that she was using to spray her house plants, and that this was causing her illness, which was very similar to Jon's. Now, you know, you can learn things in a lot of different ways; but there was a definite similarity there. It is my feeling that Jon would not have had this illness if he had not worked as a spray painter at Brammer, and I can't give you any facts why I think so. It is just my opinion of the way -- of knowing Jon, knowing the type of boy that he is. He is very clean-cut, careful type of a kid. He doesn't mess with things that he shouldn't. This is strictly my gut reaction to the situation.

Claimant testified that the work he performed both before and after his vacation from February, 1973 while at defendant employer was for the same number of hours and involving the same activities.

The only information known about claimant's activities while on vacation are that he went camping somewhere along the Wapsi River and that in response to a leading question, he apparently did not work with any pesticides or insecticides or any vaporized chemicals of any kind he had not used in the past.

For an injury or occupational disease to be compensable, it must arise out of and in the course of employment. *Lindahl v. L. O. Boggs Co.,* 236 Iowa 296, 18 N.W.2d 607. The burden of proof is upon the claimant to establish his claim by a preponderance of the evidence. *Almquist v. Shenandoah Nurseries, Inc.,* 218 Iowa 724, 254 N.W. 35. 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. The evidence must be based on more than mere speculation, conjecture and surmise. *Burt v. John Deere Waterloo Tractor Works,* 247 Iowa 691, 73 N.W.2d 732. A fact is not proved by circumstantial evidence unless the conclusion sought to be drawn is more probable than any other theory. *Haverly v. Union Construction Co.,* 236 Iowa 278, 18 N.W.2d 629.

In this matter there is no conflict in the evidence as to the work history of the claimant as it affects his contact with MBK. From February, 1973 through late July, 1973 claimant was exposed to MBK in the same manner as he was in August of 1973. In late July, 1973 claimant was examined by Dr. Van Hecke and given a clean bill of health.

The two periods of employment were separated by a vacation period. Around the time of claimant's return to work in August his symptoms began to manifest. The symptoms progressed until the time when claimant went to Dr. Van Hecke on August 22, 1973. After that time claimant was removed from exposure to MBK. Dr. Van

Hecke initially found no causal relation between claimant's condition and his employment. Later, Dr. Van Hecke was made aware of claimant's exposure to MBK and a newspaper article relating incidents of exposure to MBK and a toxic reaction thereto by several employees of a plant in Ohio. Based upon this information, Dr. Van Hecke changed his opinion and informed claimant's employer that he considered claimant's condition to be work-related. In the meantime claimant had been referred to Dr. Lyon as claimant's condition was known to be neurological in origin. Dr. Lyon made an initial diagnosis of Guillain-Barré. Dr. Lyon was supplied with the same information as Dr. Van Hecke regarding the possibility of MBK being the cause of claimant's neuropathy. After being so advised, Dr. Lyon examined employees similarly exposed to MBK and reviewed an account of the medical details concerning the patients in Ohio. Armed with this information, Dr. Lyon did not recede from his diagnosis of Guillain-Barré syndrome. This was so despite the noted similarities and dissimilarities between claimant's symptoms and the classic Guillain-Barré syndrome as well as the classic MBK neuropathy.

Claimant's condition remained relatively stable after the time he was first seen by Dr. Lyon until around the first part of October, 1973 when a period of exacerbation was noted by both the claimant and Dr. Lyon. This occurred without any further exposure to MBK.

This is not a case in which the medical testimony is uncontroverted. See *Langford v. Kellar Excavating & Grading, Inc.,* 191 N.W.2d 667 (Iowa, 1971). Both medical opinions are based, however, basically upon the results of the examination by Dr. Lyon. Dr. Van Hecke's knowledge of the examination by Dr. Lyon was limited to the reports sent to him by Dr. Lyon.

Expert opinion testimony, even if uncontroverted, may be accepted or rejected, in whole or in part by the trier of fact. *Sondag v. Ferris Hardware,* 220 N.W.2d 903 (Iowa, 1974). Greater deference is ordinarily given opinions involving medical expertise. *Merchant v. SMB Stage Lines,* 172 N.W.2d 804 (Iowa, 1969). The weight to be given such an opinion is for the finder of fact, and that may be affected by the completeness of the premise given the expert and other surrounding circumstances. *Bodish v. Fisher, Inc.,* 257 Iowa 516, 133 N.W.2d 867 (1965).

Dr. Van Hecke's explanation as to why the claimant developed his neuropathy in the first part of August, 1973 as opposed to the five month period from February through July, 1973 was: "It was my feeling that Jon, perhaps in the two weeks that he was away from his work developed some allergy to Methyl Butyl Ketone; and when he went back to work after being off work for two weeks, this idiosyncrasy, idosyncratic or toxic reaction took place." No explanation was given as to how this allergy was supposed to have developed. Is it not easily as possible that the claimant contacted some agent while on vacation which was the sole cause of his neuropathy? This theory of Dr. Van Hecke is at best conjectural and not based upon any direct evidence. A fact is not proved by circumstantial evidence unless the conclusion sought to be drawn is more probable than any other theory. *Haverly v. Union Construction Co.,* supra.

Viewing the testimony of Dr. Van Hecke as a whole, it is clear that he is searching for some causative agent to pin claimant's symptoms on. The search ended when he was provided a letter and a newspaper article.

Dr. Lyon investigated the possibility of the lacquer being the causative agent and while conceding the symptoms were compatible with MBK neuropathy did not concede this diagnosis.

Based upon Dr. Lyon's more complete examination, investigation and specialty, greater weight will be given to his diagnosis.

* * *

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

* * *

Signed and filed this 17 day of January, 1977.

ROBERT C. LANDESS
Industrial Commissioner

No appeal.

ARISING OUT OF – HEART ATTACK

ELMO L. COLEMAN,

Claimant,

vs.

MILFORD COMMUNITY SCHOOL DISTRICT,

Employer,

and

A.I.D. INSURANCE COMPANY,

Insurance Carrier,
Defendants.

Arbitration Decision

INTRODUCTION

This is a proceeding in arbitration brought by Elmo L. Coleman, claimant, against Milford Community School District, employer, and A.I.D. Insurance Company, insurance carrier, for the recovery of benefits on account of an injury on June 27, 1976.

* * *

ISSUE

The issue to be determined is whether claimant sustained an injury arising out of and in the course of his employment on June 27, 1976.

STATEMENT OF FACTS

Since 1956, claimant has worked as a custodian for defendant employer. On approximately June 1, 1976 claimant and four other men were assigned the task of moving the furnishings of a three-story school building to various places in Milford. The moving of the furnishings was necessary because of the pending destruction of the building and the construction of a new building. The furnishings primarily consisted of desks and boxes of

materials. The desks weighed approximately 50-60 pounds. This work was physically more demanding than the normal work performed by claimant.

On June 24, 1976 claimant and the four other men were moving boxes of materials from the school to a building in downtown Milford. The men were required to carry the boxes up 30 steep steps at the downtown building. After unloading an 8' by 14' farm trailer at the building, the men decided to seek a different building to store the materials. Claimant contacted Marvin Anderson, superintendent for defendant employer, concerning a different building to store the materials. A different building was found by Anderson.

Claimant moved furnishings from the school building on June 24 and 25, 1976. At approximately 3:30 p.m. on June 25, 1976 claimant stopped moving furnishings and went to the high school. He left for home at 4:30 p.m. Claimant did not remember anything unusual occurring to him during the evening of June 25, 1976.

On the morning of June 26, 1976 claimant went to the high school and performed light janitorial work. At approximately 8:30 a.m. the fire whistle of the Milford volunteer fire department sounded. Claimant went to the fire station and drove a fire department van to the fire at Spirit Lake. At the fire, claimant operated the pumper truck. Nothing unusual was noted by claimant about his physical condition following the fire or during the evening of this day.

At approximately 3:00 a.m. on June 27, 1976 claimant went to the bathroom at his house and experienced a "funny feeling". At 7:30 a.m. on this day, claimant requested his wife to call the hospital.

Claimant was admitted to the coronary unit of the Dickinson County Memorial Hospital and was treated by Maurice W. Kirlin, M.D. An electrocardiogram taken at this time revealed that claimant was experiencing an acute heart attack.

MEDICAL TESTIMONY

Claimant offered the testimony of Dr. Kirlin and Bruce B. Gambach, D.O. Defendants submitted the testimony of Mark D. Ravreby, M.D.

During October, 1975 claimant was hospitalized by Dr. Gambach for repair of a bilateral inguinal hernia. Prior to the surgery, Dr. Gambach performed a physical examination of claimant. His examination revealed a normal electrocardiogram, a normal heart rate and rhythm of 72 per minute, no thrills or friction rubs, no murmurs, and slightly elevated cholesterol level. Dr. Gambach released claimant to return to normal activities after three months.

In response to a hypothetical question by claimant, Dr. Gambach stated:

> I would have an opinion on that, that if the patient did have arteriosclerotic heart disease, which obviously he did have, if he sustained an acute myocardial infarction, I feel as if the heavy work and sudden bursts of energy could have produced the infarction.

On cross-examination, Dr. Gambach testified:

> Q. Do you know the time span, if any, between the heavy work that Mr. Hemphill has referred to and the onset of the heart attack?
>
> A. No, I don't.
>
> Q. If I tell you that there was at least a one-day or possibly a day and a half interval between the end of the work week and the heart attack, would those facts alter your opinion any?
>
> A. One day or one and a half days, did you say?
>
> Q. If I told you that the claimant, Mr. Coleman, was a janitor at the school, which I believe you understand?
>
> A. Yes.
>
> Q. And his work week ended on a Friday at about 5:00 o'clock in the afternoon and he had the heart attack at around 7:00 o'clock in the morning on Sunday, would that fact alter your opinion?
>
> A. I don't care to comment on that and I don't have an opinion on that.
>
> Q. Well, do you mean that the interval of time wouldn't make any difference in your answer?
>
> A. I'm not-- I'm not his physician and I don't have an opinion on that.

A causal connection was made by Dr. Kirlin between claimant's work for defendant employer and the heart attack suffered by him on June 27, 1976. Dr. Kirlin testified on cross-examination about the time period from June 25, 1976 when claimant stopped work and the onset of his coronary on June 27, 1976 as follows:

> Q. In your practice here in Spirit Lake when you have had occasion to treat a coronary such as Mr. Coleman had on June 27th, have you found frequently that it immediately followed heavy lifting or heavy exertion?
>
> A. Often it can follow heavy exertion I would say, yes. In other words, the person would exceed -- the amount of work that person did would have exceeded the capacity of his coronary arteries to deliver the necessary amount of blood to his heart.
>
> Q. In those situations, doctor, what is the length of time between the termination of the physical exertion and the beginning of the coronary in the usual situation?
>
> A. Well, some times we see it -- just talking off the top of my head, some times we can see immediate pain occurring right during the exertion, and some times it doesn't occur for a matter of hours, you know. It can be several hours before it would become obvious so there is a zone here, a gray zone.
>
> Q. When you use the phrase several hours are you talking up to in terms of perhaps as long as 24 hours?
>
> A. Could be.
>
> * * *
>
> Q. I guess my question I get back to is whether or not the heavy exertion over this two or three week period or whatever it was that Mr. Coleman told you about and whatever he testified to at the actual trial, my question comes back again to whether you have seen other cases where you have concluded that

physical exertion 48 hours before the beginning of the coronary was the direct producing cause?

A. I think I probably seen [sic] some cases where the exertion occurred a day or two ahead of time. Although, it is not uncommon to find it, as I mentioned before, where the symptoms would occur right during the exertion or immediately after, see, but it would't [sic] be unheard of the other way either.

Dr. Ravreby found no relationship between the work activity of claimant and the heart attack suffered by him. He explained the basis for his opinion as follows:

. . . . First of all, Mr. Coleman was used to working, and, therefore, the increased physical activity was not an unusual situation for him, as it would be for a desk worker who was suddenly forced to change a tire.

Second of all, he was 58 or '9 years old at the time of this episode. He had a known blood pressure elevation in the past. He had known elevations of cholesterol and Triglycerides.

His family history revealed the presence of coronary disease, and he had been a cigarette smoker.

These are all known risk factors in the production of acceleration of coronary disease.

In addition, the acute episode was not in association with any--was not in realistic association with any heavy work load; that is, it was not at the time of lifting or physical activity, but rather was on the morning of a Sunday, and followed a night of--and a full day of no real physical activity; and thus I could not, in all conscience, equate it with the genesis of the attack.

I felt that the attack, as it developed, was the result of pre-existing factors that had culminated in obstruction of a coronary artery and obstruction of blood flow to a certain segment of the heart, and thus, on that basis, other than work-related.

Dr. Ravreby also elaborated on the time lapse between claimant's work activity and the onset of his heart attack. He testified:

I think the time lapse is significant. We certainly do consider some stresses to accentuate a pre-existing condition, and I feel that working definitely is a physical episode that, in some cases, causes latent disease to become overt.

If he was involved in a heavy physical activity and had known coronary disease, which was asymptomatic, and then during the working episode developed symptoms, I would say it was work-related. I'd even give a lapse of time, such as an hour or two, but I've known people in work and social activities to play golf or tennis or handball or squash, and then to rest, take a shower, and then develop their coronary in the shower, for example. That's not an unusual episode; but then if there is a period of rest, then generally it becomes more and more difficult to relate it to a work activity, and in this particular case there was a considerable lapse of time where no physical work was involved, and that it becomes increasingly difficult, and then impossible to state that it was work-related.

He further testified on cross-examination:

Q. So, in essence, you are saying that although physical activity is a risk factor, and he certainly was having heavy physical activity, that no way at all could that be at all connected with the attack he suffered?

A. Only if it were in close approximation with the actual heart attack.

Q. Okay. What would be close enough?

A. I would say within a matter of hours. It has to be within hours. After six to eight hours it hurriedly drops off; by 12 hours it's absent.

APPLICABLE LAW

The 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. 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 supreme court of Iowa 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 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. * * * 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. * * * *

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 that 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 medical testimony. *Bradshaw v. Iowa Methodist Hospital,* 251 Iowa 375, 101 N.W.2d 167.

ANALYSIS

Claimant failed to sustain his burden of proof of a causal connection between his work activity for defendant employer and the heart attack suffered by him on June 27, 1976. Greater weight was given to the opinion of Dr. Ravreby than to the opinion of Dr. Kirlin concerning the ramifications of the time lapse between claimant's work activity and the onset of his heart attack.

Dr. Gambach was reluctant to address this issue. When he did address this issue, his testimony was equivocal. Consequently little weight was given to the opinion of Dr. Gambach.

FINDINGS

WHEREFORE, it is found that claimant failed to sustain his burden of proof of a causal connection between his work activity for defendant employer and the heart attack sustained by him on June 27, 1976

* * *

Signed and filed this 19th of August, 1977.

DENNIS L. HANSSEN
Deputy Industrial Commissioner

Appealed to Commissioner; Affirmed.

ARISING OUT OF – HEAT EXHAUSTION

GEORGE McCONEGHY,

Claimant,

vs.

WITT MECHANICAL CONTRACTORS,

Employer,

and

BITUMINOUS INSURANCE COMPANY,

Insurance Carrier,
Defendants.

Review Decision

This is a proceeding brought by Witt Mechanical Contractors, defendant employer, and Bituminous Insurance Company, its insurance carrier, pursuant to §86.24, Code of Iowa, for review of an arbitration decision wherein George McConeghy, claimant, was found to have suffered an injury arising out of and in the course of his employment for which he was awarded compensation.

* * *

Claimant testified that he began his employment with defendant employer in December, 1973 and in June, 1974 he was working with a construction crew at the site of the Adel water works. At that time, he usually worked five or six days a week, as weather allowed, and the work day was usually nine hours in length with a daily lunch break of some forty-five minutes to one hour duration. Claimant testified that the weather had been hot for several days prior to the injury involved herein and that he had been working outdoors in the sun doing cement work. On one occasion, a few days before the accident, a co-worker had advised him to sit down out of the sun and had brought him salt tablets and water. On the day before the injury, claimant was assigned to drive a truck to Des Moines, pick up a load of chemicals and drive the truck to another job site of defendant employer in Fulton, Illinois. Claimant testified that the truck was an old model dump truck and that the weather was hot with the temperature around 85°. Although the window on the driver's side of the cab was open, claimant said, "In the truck I was getting fumes and heat from the truck engine coming up into the cab. Very miserable." Shortly after leaving Des Moines with a lowboy trailer attached to the truck both of which were loaded with chemicals, claimant noticed pieces of rubber flying from a tire on the trailer. He stopped and called his foreman who advised him to keep on driving. He started out again, but soon another tire went flat and he was forced to park the truck and trailer along the side of the road. Claimant walked about one mile to a telephone and reported his predicament to his foreman. He then walked back to the truck and drove slowly down the median strip to the exit to facilitate the changing of the tires. Claimant's foreman and two other individuals later arrived and all four assisted in changing the tires on the trailer. Shortly after, starting out again claimant came to a weigh station where a request for the registration certificates for the truck and the trailer precipitated a thirty minute search of the truck which resulted in finding scraps of paper which were outdated. After some delay and receiving a ticket for being overweight, claimant resumed his journey. He stopped along the route for a hamburger and, although there was some difficulty with the starter when he finished his meal stop, the trip remained uneventful until claimant had passed Davenport. Somewhere between Davenport and Clinton, he ran out of gas. By this time he had opened the window on the passenger side of the cab, but the truck was still hot. After refueling the truck, claimant continued on toward Clinton. Shortly after dusk, he stopped again for a hamburger and called Robert Witt, the owner of defendant employer, who advised him to stop at Clinton and spend the night at the Holiday Inn before proceeding on to Fulton the next morning. Claimant testified that he arrived at the Holiday Inn in Clinton about 11:00 p.m. The restaurant was closed so he made a few purchases at a nearby store, had three mixed drinks at the Holiday Inn, went swimming and went to bed sometime before 2:00 a.m. The next morning claimant arose about 5:30 or 6:00 a.m., met Mr. Witt at the Holiday Inn and, after the restaurant opened, he had breakfast with Witt. Claimant then drove the truck and trailer to the job site in Fulton, Illinois where he assisted in unloading the trailer. He then unhitched the trailer from the truck and hitched it to a late model pickup for the return trip to Des Moines. Claimant testified that prior to beginning the return trip, he was hot and sweating and feeling dizzy or nauseous. He turned on the air conditioner in the truck in an attempt to cool down. As he was driving along an access road between the work site and the toll bridge between Clinton and Fulton, claimant caught himself driving at a high rate of speed. He felt dizzy and he was sweating. When he got to the toll booth at the foot of the bridge in Clinton, he stopped and

got out of the truck to cool off. Claimant testified that he was panting, felt light-headed and was completely soaked with sweat. At this point, his recollection was somewhat confused. "I recall -- I remember stopping the truck and I remember -- I vaguely remember the driver or not the driver, but the pay station attendant saying something about going into the rest room. I remember a commotion outside the rest room or what I assume was the rest room. I remember being assisted at that time." From the toll booth, claimant was taken by ambulance to Saint Joseph Mercy Hospital in Clinton where examination and X-rays revealed an anterior dislocation of the right shoulder. Claimant was hospitalized for three days and was unable to work from June 21, 1974 through August 1, 1974.

William Spence was a co-employee of claimant at the Adel water works job site. Spence testified that claimant had become overheated on the job on the two days immediately prior to the trip from Des Moines to Clinton. On each of those days, Spence noticed that claimant appeared flushed and unsteady on his feet. On both occasions he took claimant aside, had him sit down out of the sun and lower his head and brought him salt tablets and water.

Robert Witt, the owner of defendant employer, testified that he met claimant at the Holiday Inn in Clinton early on the morning of the accident. He waited with claimant in the truck until the restaurant opened, had breakfast with claimant and drove to the job site in Fulton. He testified that he was with claimant the bulk of the morning and that at no time that morning had claimant given any indication of illness or any sort of problem. He testified that claimant did not appear to be feeling ill and that claimant had eaten his breakfast.

[Ronald K. Bunten, M.D., an orthopedic surgeon, rated claimant's disability because of the shoulder injury at five to ten percent of the body as a whole.]

* * *

[Donald W. Blair, M.D., an orthopedic surgeon, gave a five percent of the right upper extremity as his rating.] * * * In response to a hypothetical question concerning the cause of claimant's fainting spell at the toll booth, Dr. Blair testified, "From the information which was given to me, I would not feel that there was definite evidence that would substantiate the diagnosis of heat exhaustion."

William Albert Castles, M.D., practices medicine as a family physician in Dallas Center, Iowa and has had a great deal of experience in treating patients for heat exhaustion and sunstroke. Dr. Castles testified that claimant had been a patient of his for ten or fifteen years. He first treated claimant for a shoulder ailment on June 25, 1974 at which time Dr. Castles prescribed a restraint on the right arm, a sling to hold the right hand and a restriction on activities including six weeks off work. In response to a hypothetical question, Dr. Castles testified that claimant's fainting spell or blackout and his fall and injury at the toll booth were probably related to his work. It was Dr. Castle's opinion that claimant's symptoms prior to the blackout were consistent with the suffering of heat exhaustion and that exposure to exhaust fumes would heighten the effects of heat exhaustion. Dr. Castles indicated that in forming his opinion, "I am relying on the fact that the man had suffered from heat the day before apparently, that he had not -- it would be very difficult to consume chloride in that period of time that we are given here to bring his blood chlorides up so he would be in the best of health."

In any workers' compensation case, the claimant has a burden of proving by a preponderance of the evidence that his claim arose out of and in the course of his employment. *Lindahl v. L. O. Boggs,* 236 Iowa 296, 18 N.W.2d 607 (1945). Additionally, in order to recover for injuries from heat exhaustion, it must be shown that natural heat was intensified by artificial heat. *West v. Phillips,* 227 Iowa 612, 288 N.W. 625 (1940). That is, claimant must have been subjected to a greater hazard from the heat than that to which the public generally in that locality is subjected. *Wax v. Des Moines Asphalt Paving Corp.,* 220 Iowa 864, 263 N.W. 333 (1935). In the case sub judice, the uncontroverted testimony of claimant shows he was subjected to heat and exhaust fumes from the engine of the truck, in addition to natural heat throughout his trip from Des Moines to Clinton.

The issue in this appeal is the question of whether claimant's injury arose out of his employment with defendant employer. For an accident to arise out of and in the course of the employment, it must result from a risk reasonably incidental to the employment. *Reid v. Automatic Electric Washer Co.,* 189 Iowa 964, 179 N.W. 323 (1920). *Pace v. Appanoose County,* 184 Iowa 498, 168 N.W. 916 (1918). The Iowa Supreme Court, in *Pace v. Appanoose County,* supra, quoted with approval the following language from *McNicol v. Patterson Wild and Col.,* 215 Mass. 497, 102 N.E. 697:

> An injury 'arises out of' the employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Under this test, if the injury can be seen to have followed as a natural incident of the work, and to have been contemplated by a reasonable person familiar with the whole situation, as a result of the exposure occasioned by the nature of the employment, then it arises 'out of' the employment.

More recently, in *Musselman v. Central Telephone Company,* 154 N.W.2d 128 (Iowa 1967), the court indicated that the test of whether the injury arose out of the employment is whether there was a causal connection between the conditions under which the work was performed and the resulting injury, i.e., whether the injury followed as a natural incident of the work. The *Musselman* court also noted that whether the injury or disease had a direct causal connection with the employment or arose independently thereof is essentially within the domain of expert testimony. See also *Bradshaw v. Iowa Methodist Hospital,* 251 Iowa 375, 101 N.W.2d 167 (1960). But 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 (1956). In considering the evidence, it must be noted that claimant is not required to "prove his theory of causation

by evidence so clear as to exclude every other possible theory. The evidence must be such as to make that theory reasonably probable, not merely possible, and more probable than any other hypothesis based on such evidence." *Latham v. Des Moines Electric Light Co., 229 Iowa 1199, 1207; 296 N.W. 372, 375 (1941).*

Dr. Castles alone, among the three doctors who testified in this case, established his expertise in the area of heat exhaustion. The facts upon which he relied in formulating his opinion were supported by the evidence. Therefore, his opinion as to the causal connection between claimant's employment and the injury is accepted. Dr. Blair and Dr. Bunten, while in agreement as to the bulk of the findings concerning claimant's dislocation of the shoulder, disagreed somewhat as to the extent of disability. The difference, however, is slight and it is unnecessary to choose between their assessments as the disability must be evaluated from an industrial and not an exclusively functional standpoint. *Martin v. Skelly Oil Co.,* 252 Iowa 128, 106 N.W.2d 95 (1960). 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. *Olson v. Goodyear Service Stores,* 255 Iowa 1112, 125 N.W.2d 251 (1963). The record indicates claimant is of a young age and has been able to resume work in areas substantially similar to the work he performed prior to his injury.

The arbitration decision awarded a five percent disability to the body as a whole, together with five and six-sevenths weeks of healting period, together with related medical expenses. The record including the additional evidence supports this finding.

* * *

Signed and filed this 22nd day of April, 1977.

ROBERT C. LANDESS
Industrial Commissioner

No appeal.

ARISING OUT OF – SALMONELLA INFECTION

WILLIAM E. ZWACK,

Claimant,

vs.

THE FINLEY HOSPITAL,

Employer,

and

UNITED STATES FIDELITY
& GUARANTY COMPANY,

Insurance Carrier,
Defendants.

Review Decision

This is a proceeding brought by The Finley Hospital, defendant employer, and United States Fidelity and Guaranty Company, its insurance carrier, pursuant to §86.24, Code of Iowa, for review of an arbitration decision wherein it was found that William E. Zwack, claimant, sustained an injury arising out of and in the course of his employment.

* * *

Claimant testified that he began his employment with defendant employer on October 16, 1972 and that in January, 1975 he was employed as the chief x-ray technologist for defendant employer. His duties there included coordinating the activities of the x-ray department, scheduling technologists and students, instructing students, ordering supplies and materials for the department, performing x-ray procedures and overseeing the maintenance of equipment in the x-ray department. Claimant estimated that 90% of his time at work was spent in a supervisory capacity and 10% was spent with direct patient contact. From January 9, 1975 through January 23, 1975 claimant assisted at times in preparing patients for, and taking, x-rays or radiographs of various portions of the body. Though claimant did not participate in all of the takings of x-rays, hospital records indicated that during the period from January 9 through January 23 some 41 stomach x-rays and 27 x-rays of the colon area were taken in the x-ray department at defendant employer. Claimant testified he did participate in some of these and other x-rays. During this process claimant wore no protective mask or gloves though he followed standard hospital procedures of washing the hands each time a different patient was seen. The areas of the room with which patients came in contact were scrubbed after each patient was x-rayed. During the period from January 9 through January 23, claimant occasionally participated in the taking of routine radiographs, prepping patients, taking of x-rays during surgery and transporting of patients to and from the x-ray department. Additionally, claimant was the only one in the x-ray department at that time who performed the injection of patients with contrast material for certain x-ray studies.

Claimant testified that during the entire month of January, 1975, he at no time left Dubuque County, Iowa. His activities were largely limited to going to work and going home. He may on some occasion have gone shopping but he did not engage in any social activities outside the home other than church attendance and did not entertain friends in his home. Claimant also testified that the only meal he took outside the hospital and outside his home for the thirty-day period preceding January 24, 1975 was Christmas dinner at the home of his mother-in-law with his family. Claimant usually ate his lunch at home though on occasion he would take his lunch to work. Whenever he carried his lunch to work, it was stored under refrigeration until it was consumed.

For a period of six months prior to January 24, 1975, claimant had been under some emotional stress. He testified that he was experiencing some pressure from one of the doctors at defendant hospital relating to the performance of his duties. Additionally, he and his wife had been consulting a marriage counselor. By January 24, the employment pressures had abated and his marital status was stable.

On January 24, 1975 claimant went to work at 7:00

a.m. At approximately 7:30, he began having cramps and feeling the need for readily available bathroom facilities. As the department was undergoing construction at that time and facilities were not readily available, claimant decided to go home. After arriving at home, he took his temperature and, finding a fever, decided to remain home that day. The next day, his conditions had worsened slightly and he consulted John G. Brehm, M.D. After examination by Dr. Brehm on January 25, claimant returned home and remained there until February 7, 1975. Throughout this period he suffered from high fever, diarrhea and lower-abdominal pain. On February 7, he was admitted to Finley Hospital in Dubuque as a patient where he remained until February 19 when he was transferred to University Hospitals in Iowa City, Iowa. Claimant was still suffering from fever, cramps and severe diarrhea. Late on February 19 or early on the 20th, claimant underwent surgery in Iowa City during which the large intestine was removed and ileostomy was connected. On April 22, 1975 claimant was discharged from the University Hospitals, but he was readmitted on May 19, 1975 for further surgery which was performed on May 30, 1975. Claimant was able to return to work on August 4, 1975, though his position upon return was Educational Director, not chief x-ray technician and his salary was lowered from $6.03 per hour to $5.05 per hour.

Barbara Ann Zwack, claimant's wife, was employed by defendant employer as a nurse. She testified that during the period from January 1, 1975 through January 24, of that year the only visitors to their home were the babysitter and Mrs. Zwack's sister-in-law and that to the best of Mrs. Zwack's knowledge, neither of those individuals had had any bout with any dysentery-type affliction during that period of time. She also testified that no one in their household had suffered from any Salmonella or other lower-intestinal involvements of a serious nature prior to the onset of claimant's illness. There was, to the best of her knowledge, no Salmonella infection reported in the schools which the children attended. No one in the household had been ill from anything eaten in the home for some forty-eight hours or more prior to January 24. There was no aged meat or mayonnaise, dairy products or eggs in the house. All of the members of the family ate the same food when they were home.

Mrs. Zwack testified that when claimant returned home on January 24, he was suffering severe cramping of the lower abdomen, diarrhea, a fever of 103° and complained of some nausea. He was given Lomotil for the diarrhea but it persisted along with the fever. No attempt was made to isolate claimant from the other members of the family.

On or about January 30, a stool culture was taken of claimant which Mrs. Zwack took to the hospital for examination. Dr. Brehm advised the family that the culture revealed the presence of a Salmonella infection. During the time claimant was confined at home prior to admittance as a patient at defendant employers, Mrs. Zwack frequently examined his stools and found no gross blood, no visible blood or any mucus discharge.

Approximately five days after the apparent onset of claimant's illness, seven-year-old Steven Zwack, claimant's son became ill. In February, 1975 a stool culture was taken of Steven and the same type Salmonella as was found in the culture taken from claimant was indicated. Steven was given no medication but the illness cleared up in about five days. Sometime later in February, two-year-old Matthew Zwack became ill and a stool culture again indicated the same type Salmonella. No other members of the household became ill nor was there any indication of the presence of Salmonella in the stool cultures taken from the other family members.

John G. Brehm, M.D., practices general internal medicine in Dubuque. He testified that he first saw claimant on January 25, 1975 in his office and found evidence of a fever and gastroenteritis at that time. There was nothing in claimant's history at that time that indicated ulcerative colitis or Salmonella. In fact, there was, in Dr. Brehm's words, "nothing about the history that would have differentiated this illness from any of the myriad of gastrointestinal flu bugs that we see during the winter." Lomotil was prescribed at that time for treatment of diarrhea. As to the decision to hospitalize claimant, Dr. Brehm testified:

> A. The admission was occasioned by his general downhill course. He was not improving, and he was continuing to have fever. And the diarrhea had been quite severe.
>
> And when these circumstances come about, the next general measure that we take with these diseases is hospitalization of the patient and taking them off of a diet and putting them on intravenous feedings to replace the lost fluids and electrolytes in the system.
>
> Q. What occasions the loss of fluids?
>
> A. In this case, it was diarrhea entirely was the cause.
>
> Q. Does the colon cause this problem; is it a malfunction of it?
>
> A. Yes, it was a malfunction of the colon in his case. The colon is primarily responsible in the human organism for the absorption of water and a considerable portion of the electrolytes, which has sodium, potassium, and other mineral substances which have to be resorbed from the gastrointestinal tract. And a diseased colon does not resorb these, resulting in the expulsion of fluid feces.
>
> Q. Would this type of problem or condition in the colon be consistent with an infection caused by Salmonella?
>
> A. Yes, it certainly is.

Dr. Brehm also testified that a stool culture taken from claimant on January 29, 1975 had revealed the presence of Group B Salmonella and that the organism was found to be sensitive to certain drugs, among them gentamicin and chloramphenicol. Initially, claimant was treated with gentamicin, but was later treated with chloramphenicol when the final sensitivity reports were completed. Another stool culture taken on February 7 proved positive for the Salmonella infection but all subsequent cultures were negative. Dr. Brehm discounted the significance of the later, negative cultures.

> A. We had not had another positive culture report, but this is not reason to disregard the diagnosis, because once you're treating a patient with anti-

biotics, cultures frequently will not show positive even though the organism is still present in the patient and still the cause of the infection.

Q. So it's possible then, if a patient is being treated with antibiotics, to have Salmonella and not test for it.

A. Yes.

* * *

Q. If the disease were progressing the way that Mr. Zwack's illness did here, wouldn't you ordinarily expect to see some positive signs in blood cultures, urine cultures and stool cultures?

A. Not with the level of antibiotic therapy he had. When patients are on antibiotics, usually all the cultures will become negative, even if they're grossly, obviously infected beyond that point, because it is harder for these organisms to grow in the laboratory than it is for them to grow in the human. When you take them out of the human, that little difference between being inside somebody's body and being inside a test tube is enough to stop their growth.

Q. Doctor, was he on heavy doses of antibiotics?

A. He was, indeed.

Q. Could you give us some idea --

A. He was on the maximal dose of Gentamicin that we dare use at the initiation of his therapy. This is a toxin antibiotic and one that causes renal damage in doses much higher than this, kidney damage. So this is as much as we dared use in this case.

And then with the other antibiotic, he was on large doses of this as well. That antibiotic has no very specific limit on its upward dose, although it has very serious toxicities in rare cases.

During the period of claimant's hospitalization in Dubuque, the diarrhea continued and, shortly before his transfer to University Hospitals in Iowa City, some blood began to appear.

Q. Is there any indication, doctor, in the record at any time, in the Finley record, that there was blood in Mr. Zwack's stool?

A. Before I answer the question, I will mention -- Now, I have not reviewed the nurses' notes. But once, approximately four or five days prior to his transferral to the University Hospitals, one of the nurses reported to me that the stools looked bloody. And I knew that she had written something to that effect in the chart.

So we tested at bedside rounds in the morning a sample of the stool with a pill that detects the presence of blood, and it was negative at that time.

Q. All right.

A. The stool did have a reddish-brown color, but there was no trace of blood at that time.

Q. Ultimately, was there some blood found?

A. There was blood. I think it began about 36 to 48 hours prior to his transferral to the University Hospitals. That would have been the 17th. Blood began to be noticed.

Q. All right. Would the blood passing the stool have any relationship to the Salmonella infection?

A. Yes, a severe enteritis, such as this unquestionably was, can lead in its end stages to bloody diarrhea. This is the end stage of any severe inflammatory condition of the bowel, will lead to the passage of blood.

It was Dr. Brehm's opinion that at the time of claimant's transfer to Iowa City, he was still suffering a severe Salmonella enteritis.

Dr. Brehm testified at length concerning the sources and nature of Salmonella infection.

Q. What is the source; how does one get an infection of this kind?

A. There are many sources.

Q. What could some be?

A. Human contamination from fomites is a common source. Fomites include saliva, sputum, feces, urine, any of the materials that can be passed off the human body.

Q. All right.

A. Now, other sources include contaminated foods. Eggs and dairy products are fairly common sources. It can also be transmitted by milk and water.

This organism survives relatively well in soil, and it grows well in a number of foods. And any way that it is ingested, it is a highly infectious organism in the host that is predisposed to get it; that is one that is not previously immunized. And it is an organism which once acquired, even in small numbers, is likely to cause infection.

Q. So it has to be ingested or taken into the system in some fashion.

A. Yes, that's correct. I know of no other way that you could get it.

Dr. Brehm said that, in his opinion, "the most probable source (of claimant's infection) was contamination from a patient at Finley" and went on to state his reasons for that opinion.

Simply that from what I know, there is no other probable source. And usually when a household item, a food item, is a contaminant, the source of such a problem, there is an epidemic in the household. And it's hardly likely that he ate something which no one else in the family touched.

And, also, the pattern in which it was acquired would indicate to me that he incubated the organism first, and then the children acquired it from him and went through an incubation period. Now, I think if it would have been acquired at home, that the incubation of all of them would have been perhaps a little closer.

Dr. Brehm admitted under cross-examination that his opinion as to the source of claimant's infection was based

in part on the assumption that some patient in the x-ray department of defendant employer was an undiagnosed carrier of Salmonella or that claimant came in contact in the x-ray department with a person who was actually symptomatic of the illness but of whom a diagnosis was not made due to antibiotics having been administered which prevented a confirmatory culture. He further admitted that he had no knowledge of such a person having been at defendant employer during January, 1975.

Dr. Brehm also testified to the nature of the relationship between a severe Salmonella infection and the condition known as ulcerative colitis.

> A. Okay. This much we know about severe internal infections, of which Salmonella enteritis is one: There is well-documented evidence, and many times this has been reported, that severe infections of a number of types will progress to a point which is indistinguishable from ulcerative colitis. There has never been settling of the question, is it the end stage of this bad infection, ulcerative colitis? And that's a tough question to answer, because as far as the patient is concerned, it's the same disease at that point.
>
> As a matter of fact, we don't know what causes ulcerative colitis. It may be a disease that's caused by any number of things which happen which grossly derange the architecture of the bowel and the individual's immunological capabilities to respond. And certainly he had a disease which deranged his bowel, as manifested by the severity of the illness.
>
> And certainly his immunologic ability was deranged, because toward the end of his time at Finley Hospital he was no longer even able to mount a white cell response. His white cells, instead of rising as you expect to see in an infection with an organism of this source, were falling.
>
> Now, an infection of this sort can certainly lead to a picture in the bowel which looks like ulcerative colitis and possible or probably is ulcerative colitis, but we don't have final definitive information. Unfortunately, this doesn't happen enough that you can take 25 or 30 of these cases and study them. They only happen once in a great while. And even in major centers, they can only cite a few cases that have ever gone on like this. But, it happens.
>
> Q. Then in your opinion, was there a causal relationship between the Salmonella and the problem with the bowel?
>
> A. I think they're related.
>
> Q. And in what fashion, or how did it cause it; where are we there?
>
> A. If the bowel disease was due to Salmonella alone, then certainly that is the cause. If ulcerative colitis is the disease he had, I believe that it was precipitated by the Salmonella infection.
>
> Q. Either it caused the thing or it incited the colitis.
>
> A. Right.

* * *

Dr. Brehm admitted that the exact etiology of ulcerative colitis is unknown.

Ross A. Madden, M.D., an associate of Dr. Brehm, completed his residency in internal medicine in California in 1972 and had practiced medicine since that time in Dubuque, Iowa. He had been claimant's family physician for the past two or three years. At the time of the onset of claimant's illness, Dr. Madden was out of town but he returned to Dubuque on February 12, 1975 and followed claimant's case with Dr. Brehm after that date. After discussing the manner in which Salmonella infections can be passed from one person to another and possible sources of infection, Dr. Madden testified that an x-ray room would be a place that such an infection might be acquired. In discussing the source of claimant's infection, Dr. Madden said:

> A. It's my opinion that the most likely source of infection would be contact with a patient who was indeed infected with Salmonella but was probably an unknown carrier.
>
> Q. And that would take place where, in this situation?
>
> A. In the x-ray department at Finley.
>
> Q. And that's your best judgment of it?
>
> A. That's correct.

Dr. Madden testified that this particular bacteria might attack and inflame either the small or large intestine and that it could, in the severe degree to which claimant was stricken at the time of transfer to Iowa City, produce a perforation of the large intestine. He also testified that "severe bacterial infections can produce ulcerations, erosions, changes in the bowel that microscopically may not be differentiated from ulcerative colitis."

Dr. Madden indicated the nature of the symptoms of ulcerative colitis.

> Q. Tell us what are the classical symptoms for ulcerative colitis, if you would, please.
>
> A. Usually it begins with bloody stools, painful bowel movements, frequent bowel movements.
>
> Q. Is there a mucusy discharge from the --
>
> A. There may be mucus, yes.
>
> Q. Is there any particular part of the gut that is wrenched by the pain?
>
> A. Usually ulcerative colitis begins in the rectum, as with most of the inflammatory diseases. However, this can range from only rectal involvement to total colon involvement.
>
> Q. If you don't see blood in the stool, do you think you have ulcerative colitis?
>
> A. No, not generally.

Dr. Madden further testified that although blood began to appear in the stools of claimant some thirty-six to forty-eight hours before the transfer to Iowa city, he did not feel there was anything to indicate the presence of ulcerative colitis when the transfer was made on February 19, 1975. Dr. Madden further testified to the possible relationship between the ulcerative colitis and Salmonella.

As has been stated, ulcerative colitis does not have any known etiology that can be specified. Infections are one of the things and one of the potential etiologies that has been discussed. Therefore, it would be possible for a Salmonella infection to aggravate the bowel and produce an ulcerative colitis-like disease.

On cross-examination, Dr. Madden admitted making the same assumption as Dr. Brehm concerning the presence of a "carrier" of Salmonella at defendant hospital.

Q. Doctor, again, the ultimate opinion that you expressed to the Industrial Commissioner here that there was some relationship between his work at Finley Hospital and Salmonella forces you to assume that there was somebody in Finley Hospital that was a dormant carrier of Salmonella; is that correct?

A. That's correct.

Q. And if that assumption were not correct, then he'd have had to get the Salmonella some place else; that's true, isn't it?

A. Yes.

Robert G. Vernon, M.D., a physician specializing in pathology and clinical pathology with over twenty year's experience as a pathologist, testified that the etiology of ulcerative colitis is not known. As to a causal relationship between Salmonella and ulcerative colitis, he said:

Well, I think Salmonella can cause ulcerative colitis, as can a number of other organisms. So, you know, it's one where the ulcerative colitis is a disease complex which may have many causes, of which Salmonella could be one of the causes, at least in theory.

Dr. Vernon also testified as to possible effects of Salmonella infection.

Q. Let me ask you this: You take a colon that's severely infected with Salmonella; can that produce a perforation?

A. Yes, sir.

Q. And if you took a colon that was severely infected with Salmonella and compared it to a colon that had ulcerative colitis, would it be possible to differentiate between them, from a pathological standpoint?

A. It's my opinion that Salmonella could produce a process in the colon which would be almost identical to ulcerative colitis.

Dr. Vernon said that this case was one of the problem cases where "it's almost impossible to make a distinction, even on the basis of microscopic examination" between particular diseases.

Luke C. Faber, M.D., a general surgeon in private practice in Dubuque, Iowa testified that ulcerative colitis is a disease from an unknown cause and that it is possible to have a bacteria infection like Salmonella and ulcerative colitis simultaneously. He also testified:

. . .it is my opinion that from looking at the record and evaluating and reading the testimony and the path reports and operative reports, it is my opinion that Mr. Zwack had a rather typical case of toxic megacolon; that it was not caused by, nor was it aggravated, nor was it altered by, the presence of Salmonella organisms in his stool.

His course was as one would predict. I don't think the Salmonella influenced it one bit.

L. DenBesten, M.D., is a professor of surgery and vice-chairman of the Department of Surgery at the University of Iowa as well as chief of the Surgical Service at the Veteran's Administration Hospital in Iowa City, and has some five years of experience as a surgeon in Nigeria, West Africa including two years as Chief of Surgery at the Mkar Hospital in Nigeria. Dr. DenBesten first came in contact with claimant shortly before claimant's discharge from University Hospitals in Iowa City in February, 1975. He performed surgery on claimant on May 30, 1975 when he carried out an abdominal perineal resection of claimant's remaining colon and rectum and established an interabdominal reservoir for a Koch pouch. Dr. DenBesten was of the opinion that claimant's condition was not similar to cases of Salmonella infection previously encountered by the doctor.

Q. Doctor, what, basically, is Salmonella infection or Salmonella enteritis?

A. Classically, Salmonella infection has its major impact on the intestinal tract in the small bowel near its junction with the cecum, or the beginning of the large intestine. During my years in Africa, we cared for an average of 40 patients at any one time with typhoid fever, or Salmonella infection, and I had occasion to see many of the Salmonella typhosa or paratyphi infections which had gone on to cause perforations and acute peritonitis, and in that circumstance, they invariably involve the lymph patches or lymph nodes on the small intestine near its end in the part called the ileum.

* * *

Q. Were the findings in the first surgical procedure (performed on claimant, February 20, 1975) consistent with a Salmonella infection?

A. My best answer would be that I have not seen Salmonella manifesting itself in human disease in this manner.

Dr. DenBesten testified that the exact etiology of ulcerative colitis is unknown and that, in his opinion, no relationship between Salmonella and ulcerative colitis has been medically and scientifically established.

Q. Now Doctor, what is the relationship, if any, of this patient between any Salmonella infection as treated in Dubuque and the ulcerative colitis, the toxic megacolon excised by surgery here in Iowa City?

A. None that I know. That is to say clinical situations similar to toxic megacolon most often found with ulcerative colitis have also been reported after certain drugs such as Lincomycin and Clindamycin, but I am unaware of a similar condition occurring after other enteric infections.

Q. Is that in layman's terms that there just is no

connection between the Salmonella and the ulcerative colitis?

A. No. It means that there is no medical precedent, to my knowledge, in which ulcerative colitis has been associated with Salmonella infections.

* * *

Q. I understand you have no knowledge of any Salmonella leading to the ulcerative colitis, is that correct?

A. That's correct.

* * *

Q. Have you seen, Doctor, Salmonella infection leading to or contributing to ulcerative colitis in this manner?

A. Not in my clinical experience.

* * *

Q. So both as to ulcerative colitis and Crohn's disease, the causes of these diseases are very limited?

A. Has not been scientifically established.

Dr. DenBesten was of the opinion that the significant dates in the development and progression of claimant's condition were consistent with a diagnosis of ulcerative colitis.

Q. Doctor, Mr. Zwack was hospitalized at the Finley Hospital on February 7 of this year and was first operated upon here February 20th. Are those dates consistent with what you were explaining to me?

A. Yes. Those dates would be consistent with ulcerative colitis developing and leading to an acute emergency.

Q. I believe Mr. Zwack has told us that he was first exhibiting symptoms approximately January 19th.

MR. ERNST: January 24th.

Q. January 24th, and that would be diarrhea. Would that be consistent with the later surgery on February 20 and the ulcerative colitis?

A. Yes, it would.

Dr. DenBesten was unable to state with certainty the precise nature of claimant's condition as to whether it was in fact ulcerative colitis or Salmonella.

Q. Doctor, what is likely, in this case, based on your knowledge of the patient, was there in fact a Salmonella infection involved along with the ulcerative colitis, or did they occur independently? What is the state?

A. I simply do not know.

* * *

Q. Doctor, tell us whether or not here the ulcerative colitis was the underlying condition rather than the Salmonella infection?

MR. ERNST: Object to the form of the question as vague and indefinite. Go ahead.

Q. You are not able to answer that, I take it?

A. That's correct.

Wilbur L. Zike, M.D., is a faculty member of the University of Iowa College of Medicine and practices medicine as a general surgeon. His first contact with claimant was on February 20, 1975. Claimant had been admitted on February 19 and x-rays of the abdomen indicated free air in the abdomen, signifying a perforated bowel viscus. Claimant was operated on at once by Dr. Zike. At the time of surgery, claimant had been a patient at the University Hospitals less than twenty-four hours and, in Dr. Zike's words, "he just had time for a minimal work up here." Surgery revealed an unusual situation.

Q. Is there any relevance or significance here, Doctor, of the necrotic condition of the colon that you found?

A. Could you amplify a bit more?

Q. Is the necrotic colon found in all cases of the perforated bowel, or is this something --

A. No. I wouldn't say that necrotic bowel of the extent that we found today would be typical. I would interpret this to signify a very serious and significant inflammation, and I would also think that it would indicate a quite long standing inflammation.

Q. In terms of hours or days, what would a long standing inflammation --

A. I would say days.

Dr. Zike felt that claimant's condition was not typical of Salmonella infection and that the infection may have been unrelated.

* * *

In other words, the distribution of the disease as we saw it was certainly not typical of a Salmonella infection, at least one that had perforated.

Q. Is there any question, Doctor, that in fact Mr. Zwack did suffer from a Salmonella infection?

A. According to my knowledge, the Salmonella was grown from stool cultures from Mr. Zwack.

Q. But he exhibited manifestations that were not in keeping, or not normally found in the Salmonella infectious patient, is that correct?

A. As far as the pathological diagnosis of the removed specimen, yes, and plus what we saw at the operation. His other symptoms such as fever, diarrhea, those could have been manifestations of a Salmonella infection.

Q. Might Mr. Zwack have incurred this same episode of ulcerative colitis and perforation of the colon without ever having the Salmonella infection?

A. Yes.

Q. But, I take it, he could not have had the perforation of the bowel solely from the Salmonella infection?

A. Well, we don't feel that the area of disease and the area of perforation is in the typical place for a Salmonella infection, plus the pathological diagnosis of the removed specimen is that of ulcerative colitis, plus we were never able to culture any Salmonella

organisms here from either his bowel or from the fluid in his abdomen after the bowel had perforated.

Dr. Zike admitted that the failure to culture Salmonella might have been due to the antibiotics administered to claimant. Dr. Zike testified that the etiology of ulcerative colitis is unknown.

Dr. Zike also testified as to the relationship between the Salmonella infection and ulcerative colitis in this case.

Q. I am still trying to understand the relationship, if any, between the Salmonella which I understand was cultured and identified in Mr. Zwack, and then the subsequent perforated bowel and ulcerative colitis. Did the Salmonella infection cause the ulcerative colitis?

A. I can't say that.

Q. Your feeling is that it did not cause --

A. My feeling would be that it's probably not related to the development of the ulcerative colitis.

Q. Is that to say that the Salmonella infection is a fortuitous event of the ulcerative colitis?

A. It could well be.

* * *

Q. Is it then possible, Doctor, the entire process here from the beginning was that of ulcerative colitis, and the Salmonella demonstration may have been fortuitous?

A. Could be.

* * *

Q. Is it likely, Doctor, that the Salmonella infection caused the ulcerative colitis that you found?

A. In my opinion, no.

* * *

Q. Something related to the ulcerative colitis may have been happening on the 12th day of February?

A. I would think that if you had a patient that had a sudden onset of a diarrhea disorder, a bloody diarrhea at that, and I'm sure that this Doctor -- I know him -- I'm sure that if that organism would not have been isolated, that he would have thought of ulcerative colitis probably very seriously, and my own opinion is that it probably was a red herring to sort of steer him away from what I know that he knows is the proper treatment of this disorder. I'm not saying that to say that with proper treatment one wouldn't get a toxic megacolon with perforation because you can have the best of everything that you can think of, and people just go right ahead and do this.

Q. Is that to say you feel at Finley there that the treatment was going after the red herring, the Salmonella bacteria, rather than after the ulcerative colitis?

A. I would think so.

Q. Not that it made any difference in the end. Ultimately they got to the correct end, but they got there in a roundabout way.

A. The only thing we would be apprehensive about is the use of Lomotil and some of the narcotics. We feel that this may precipitate a toxic megacolon in somebody who has severe ulcerative colitis.

James Robert Custer, M.D., a radiologist with defendant employer, testified as to procedures used in the x-ray department. Dr. Custer also testified that in his seven and one-half years experience in the field of radiology, he had neither witnessed nor heard of a case where an x-ray technician had been known to contract Salmonella bacteria in connection directly related to his work in an x-ray unit.

Ann Burds, nurse-epidemiologist, is a registered nurse engaged in infection control-surveillance and is employed by Mercy Medical Center, Xavier Hospital, and defendant employer, all of Dubuque, Iowa. She began her present employment in September, 1974 and her primary responsibility is the surveillance, record-keeping and follow-up on nosocomial, or hospital-acquired, infections. Mrs. Burds testified that she had interviewed both claimant and his wife relative to common routes of transmission of Salmonella in January, 1975, but the interviews did not yield any definite conclusions as to the source of the infection. She also testified that records of defendant employer showed no Salmonella Group B typhimurium infections, such as claimant had, in 1974 or in the weeks preceding the isolation of the infection in the culture taken from claimant. Further, the records indicated no infection other than claimant's infection in the year 1975 until the month of August. Mrs. Burds testified that the records included all cultures taken of either in-patients or out-patients at defendant hospital as well as routine cultures taken of dietary personnel at defendant employer. Two fellow employees of claimant who also worked in the x-ray department of defendant employer were cultured in connection with claimant's illness and those tests proved negative. Mrs. Burds admitted that those two employees were the only employees of defendant employer who were cultured in connection with claimant's illness and she admitted that the records were complete only as to cultures taken. That is, there were many in-patients and out-patients of defendant employer, as well as many employees, who were not cultured and who were possible sources of infection.

Ronald Jaeger, Assistant Director at defendant employer, testified that a review of records kept at the hospital revealed only one diagnosed case of Salmonella infection of in-patients at defendant employer in a period from June 28, 1974 until the admission of claimant as an in-patient on February 7, 1975. The records apparently did not cover out-patients coming to the hospital during that time.

In addition to the testimonial evidence, the record contains a great deal of documentary evidence including hospital records and the University Hospital pathology report signed by John Dawel, M.D.

Analysis of the case sub judice is facilitated by focusing on two key relationships — first, the causal relationship, if any, between claimant's employment and the injury or disease and second, the causal relationship, if any, between the injury or disease and claimant's disability. There are some principles to be kept in mind in examining the record

as it relates to both those key relationships. The burden of proof is upon the claimant to establish his case by a preponderance of the evidence. *Almquist v. Shenandoah Nurseries,* 218 Iowa 724, 254 N.W. 35 (1934); *Lindahl v. L. O. Boggs,* 236 Iowa 296, 18 N.W.2d 607 (1947). The burden is not discharged by creating an equipoise. *Griffith v. Cole Brothers,* 183 Iowa 415, 165 N.W. 577 (1918). Claimant may sustain his burden by the use of circumstantial evidence, but such evidence is governed by the rules which ordinarily apply to that class of evidence. *Haverly v. Union Construction Co.,* 236 Iowa 278, 18 N.W. 2d 607 (1945). In order to establish a proposition by circumstantial evidence, the evidence must be such as to make the claimant's theory reasonably probable, not merely possible, and more probable than any other theory based on the evidence, but the evidence need not exclude every other possible theory. *Latham v. Des Moines Electric Light Co.,* 229 Iowa 1199, 296 N.W. 375 (1941). *Jennings v. Farmers Mutual Ins. Assn.,* 260 Iowa 279, 149 N.W.2d 298 (1967).

Compensable injuries in the workers' compensation field are those "arising out of and in the course of employment". The phrase "arising out of" is universally held to require causal relationship between the employment and the injury — the first of the key relationships mentioned above. *Volk v. International Harvester Company,* 252 Iowa 298, 106 N.W.2d 649 (1960). The Iowa Supreme Court, in *Pace v. Appanoose County,* 184 Iowa 498, 168 N.W. 916 (1918), quoted with approval the language of *McNicol v. Patterson Wild and Co.,* 215 Mass. 497, 102 N.E. 697, as follows:

> An injury 'arises out of' the employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Under this test, if the injury can be seen to have followed as a natural incident of the work, and to have been contemplated by a reasonable person familiar with the whole situation, as a result of the exposure occasioned by the nature of the employment, then it arises 'out of' the employment. But it excludes an injury which cannot fairly be traced to the employment as a contributing proximate cause, and which comes from a hazard to which the workman would have been equally exposed apart from the employment. The causative danger must be peculiar to the work, and not common to the neighborhood . . . It needs not to have been foreseen or expected, but after the event, it must appear to have had to origin in a risk connected with the employment, and to have flowed from that source as a rational consequence.

Whether an injury or disease had a direct causal connection with the employment or arose independently thereof is essentially within the domain of expert testimony. *Musselman v. Central Telephone Company,* 154 N.W.2d 128 . (Iowa 1967). *Bradshaw v. Iowa Methodist Hospital,* 251 Iowa 375, 101 N.W.2d 167 (1960). However, expert medical evidence must be considered with all other evidence introduced bearing on the causal connection. *Burt v. John Deere Waterloo Tractor Works,* 247 Iowa 691, 73 N.W.2d 732 (1956). While the mere possibility of a causal connection is not sufficient to support an award, if the 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). Note also that the opinion of experts need not be couched in definite, positive or unequivocal language. *Dickinson v. Mailliard,* 175 N.W.2d 588 (Iowa 1970). See also *Becker v. D. & E. Distributing Co.,* 247 N.W.2d 727 (Iowa 1976).

The evidence bearing on this first key question is synthesized to the following: Dr. Brehm and Dr. Madden both opined the "most probable source", the "most likely source" of the infection was contamination from defendant employer. Those opinions are buttressed by the testimony of claimant and his wife showing circumstantially that there was no other likely source of infection. Balanced against this evidence is the testimony of Dr. Custer who had neither witnessed nor heard of such a case in seven and one-half years' experience; and the testimony of Mrs. Burds and Mr. Jaeger showing circumstantially no *known* or *diagnosed* case of Salmonella at defendant employer's premises that might have been a source. Cross-examination of these witnesses indicated a great possibility of such a carrier or source having been present on the premises without having been identified or diagnosed as a potential source. Claimant has met his burden of proof in establishing the first key relationship.

Having established that relationship, claimant has a burden of proving by a preponderance of the evidence that the injury was the cause of the disability on which the claim is based, the second key relationship previously mentioned. *Lindahl v. L. O. Boggs,* supra. The injury need not be the sole proximate cause if the injury is directly traceable to the disability. *Langford v. Kellar Excavating and Grading, Inc.,* 191 N.W.2d 667 (Iowa 1971). It should be noted that if claimant's employment resulted in a personal "injury" in the nature of an aggravation to his already impaired physical condition, claimant 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). That is, if an employee suffers from a preexisting disease and that condition is aggravated, accelerated, worsened or lighted up by "injury", so that it results in disability, the employee is entitled to recover benefits under the workmen's compensation statute. *Rose v. John Deere Ottumwa Works,* 247 Iowa 900, 76 N.W.2d 756 (1956). *Nicks v. Davenport Produce Co.,* 254 Iowa 130, 115 N.W.2d 812 (1962). Here again, the question of causal connection is essentially within the domain of expert testimony. *Bradshaw v. Iowa Methodist Hospital,* supra.

Dr. Brehm was the first doctor involved in claimant's illness, having examined claimant on January 25, 1975. He had the most familiarity with the case, having followed it from the onset of the complaints until after the operation in Iowa City. He had access to claimant's prior medical history and records as well as the benefit of laboratory tests at defendant employer. Dr. Brehm was also familiar with the development of the Salmonella disease by other members of claimant's family. It was his opinion that there was a causal relationship between the Salmonella infection and the bowel disease that resulted in claimant's disability.

Dr. Madden, Dr. Brehm's associate, had a great deal of continuing close contact with claimant's problem. Dr. Madden, as claimant's family physician, had treated claimant prior to the onset of this problem for unrelated ailments and was quite familiar with claimant's medical history. He testified that "it would be possible for a Salmonella infection to aggravate the bowel and produce an ulcerative colitis-like disease" and that "severe bacterial infections can produce ulcerations, erosions, changes in the bowel that microscopically may not be differentiated from ulcerative colitis."

Dr. Madden's testimony was substantially similar in many respects to that of Dr. Vernon who has had a great deal of experience in the field of pathology. He testified that Salmonella could cause ulcerative colitis, that it could produce results in the colon such as found in the section removed from claimant and that "Salmonella could produce a process in the colon which would be almost identical to ulcerative colitis."

The pathology report from University Hospitals signed by Dr. Dawel reads under the heading "Diagnosis" as follows: "Toxic Megacolon; more consistent with ulcerative colitis (see comment)." The comment referred to notes the reasons for assigning the cause as ulcerative colitis as opposed to Crohn's disease. Salmonella is not mentioned as a possibility although there is a reference to Salmonella in the rather cryptic comments under the heading, "History, Duration, clinical Data, and operative findings". That history gives no indication that Dr. Dawel was aware or informed to any great extent of the developments and history of claimant's ailment.

Dr. DenBesten has had a great deal of experience in dealing with Salmonella infections during his years of practice in Africa. He had no personal contact with claimant until after the removal by Dr. Zike of the infected colon. He testified that in his opinion, no relationship between ulcerative colitis and Salmonella has been medically and scientifically established and that in his clinical experience, he had not seen Salmonella leading to or contributing to ulcerative colitis or a condition similar to that of claimant. But Dr. DenBesten was not able to determine whether claimant's condition was in fact ulcerative colitis or whether it was Salmonella infection.

Dr. Zike operated on claimant and removed the colon section. He also saw claimant in post-operative examinations. He did not have the benefit of any extensive laboratory tests or extensive pre-operative examinations of claimant as claimant had been in University Hospitals less than twenty-four hours prior to the surgery. Dr. Zike was somewhat confused as to the development of the Salmonella disease among members of claimant's family. It was Dr. Zike's opinion that claimant's condition was not typical of Salmonella infection and that the Salmonella was not causally related to the condition.

Dr. Faber was also of the opinion that the Salmonella infection had no influence on claimant's condition. Dr. Faber's opinion is not accorded great weight as his testimony, based entirely on examination of records in the case and having had no personal contact whatever with claimant, is somewhat at odds with that of Dr. Brehm, Madden, Vernon, DenBesten and Zike in finding this "a rather typical case of toxic megacolon."

Claimant has met his burden of proving, by a preponderance of the evidence, the causal relationship between his injury and his disability. When the injury suffered is a general body injury, as in the case sub judice, 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 (1960). 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). 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. *Olson v. Goodyear Service Stores,* 255 Iowa 1112, 125 N.W.2d 251 (1963). Considering all of these factors the deputy found the claimant to have a 20% permanent partial disability to the body as a whole together with 27 2/7 weeks of healing period.

* * *

Signed and filed this 3 day of May, 1977.

ROBERT C. LANDESS
Industrial Commissioner

Appealed to District Court; Affirmed.
Appealed to Court of Appeals; Affirmed.
Appealed to Supreme Court; Pending.

ARISING OUT OF — STAPHYLOCOCCIAL INFECTION

GAYLORD N. BONDE,

Claimant,

vs.

HUMBOLDT COUNTY,

Employer,

and

HAWKEYE-SECURITY INSURANCE COMPANY,

Insurance Carrier,
Defendants.

Review Decision

This is a proceeding brought by the defendants, the County of Humboldt, and its insurance carrier, Hawkeye-Security Insurance Company, against the claimant, Gaylord N. Bonde, for review pursuant to the provisions of §86.24, Code of Iowa, for an arbitration decision wherein the claimant was found to have sustained an injury arising out of and in the course of his employment on June 12, 1973.

* * *

Claimant, at the time of the arbitration proceeding, was fifty-seven years old, married and the father of five children, two of which were dependent upon and residing with Claimant in Rutland, Iowa.

Claimant had been employed by Defendant Employer for two years prior to June 12, 1973. Claimant was a laborer in Defendant Employer's maintainance department

at a rate of $2.88 per hour, working nine hours per day, five days per week. Claimant contends that his overall deteriorated physical condition was precipitated by a seemingly minor incident which occurred at work.

On Tuesday, June 12, 1973 Claimant was working at a bridge site in Humboldt County. Calimant was working on this day with employees Raymond Stockdale and Wayne Westberg. Claimant's memory of the facts surrounding the alleged incident was not clear. Claimant testified at his deposition that "* * *It (the plank) hit me and all I can tell you, the next thing I remember was I got sick." Claimant continued to work for Defendant Employer the afternoon of Tuesday, June 12 through Friday, June 15, 1973.

Co-workers Raymond Stockdale and Wayne Westberg testified at the arbitration proceeding. Their testimony corroborates Claimant's testimony as to the facts surrounding the alleged injury. It establishes that while throwing bridge material (planks) onto the bed of a truck, a piece of material bounced back and hit Claimant on the upper right extremity. Both Stockdale and Westberg testified that Claimant told them he was in some pain after the incident. Westberg stated that he did not observe any apparent wound but that he did not look to see if the skin on Claimant's hand was broken. Stockdale testified that after Claimant was struck by the piece of old bridge, Claimant "danced around"; apparently, referring to dancing around in pain.

Mrs. Gaylord Bonde, wife of Claimant, testified at the arbitration proceeding that prior to June 12, 1973 her husband's health had been good. Mrs. Bonde stated that on the morning of June 12, 1973 she did not observe any nicks, cuts or bruises on Claimant's arms. However, on the evening of June 12, 1973, Mrs. Bonde testified at approximately 6:00 p.m. while they were "washing up for supper" she noticed two cut places on Claimant's right hand. Mrs. Bonde testified that the two areas were swollen and later than evening the hand was soaked in a solution of hot water and Epsom salts. Claimant's condition worsened on Friday, June 15, 1973. Mrs. Bonde attempted to secure the assistance of a physician on Friday, June 15, 1973 but was unable to schedule an appointment until Monday, June 18, 1973. Mrs. Bonde further testified that on June 20, 1973 she notified foreman, Joy Vesterby, and Ray Stockdale that her husband was ill and his condition was work-related. Mrs. Bonde also stated that she informed Mary Green, the bookkeeper in the County Engineer's Office, of her husband's condition.

An examination of the file discloses that a first report of injury was prepared by the defendant employer on June 22, 1973 and a copy of that report was filed in the Office of the Industrial Commissioner on June 25, 1973.

James Coddington, M.D., examined Claimant on June 18, 1973 in his office and immediately admitted him to the Humboldt County Hospital. Dr. Coddington conducted a second physical examination at the hospital. The positive findings of Dr. Coddington at that time were marked irregularity of the heart, blood pressure 104/60, rales in both lungs (posteriorly), Claimant's somewhat toxic appearance and inalertness. Dr. Coddington's final diagnosis was auricular fibrillation with heart failure and pneumonia.

Claimant was transferred to the Bethesda General Hospital, Fort Dodge, Iowa on June 19, 1973 at the suggestion of Dr. Coddington. D. G. Bock, M.D., was the attending physician at Bethesda General Hospital and made the following summary of Claimant's condition:

> The patient entered the hospital with an FUO, however, as the picture evolved, the patient had excellent evidence of cellulitis, right hand and forearm, related to an injury incurred several days prior to admission. A blood smear and culture revealed Staphylococcus (sic) [see details for differentiation of the Staphylococcus (sic)]. The patient was treated vigorously with antibiotics (see daily records in chart for the details of antibiotic administration).

On June 25, 1973 Claimant developed congestive heart failure and was transferred in a stuporous condition to St. Mary's Hospital, Rochester, Minnesota for additional studies. Numerous physicians examined and treated Claimant during the course of his hospitalization (6-25-73 through 8-8-73) at St. Mary's Hospital. After the completion of a series of tests, the diagnosis was staphylococcus aureus, endocarditic aortic valve. Calimant was discharged from St. Mary's Hospital on August 8, 1973.

After claimant's discharge from St. Mary's in August of 1973 he returned for re-evaluation in December of 1973. Claimant's condition was considerably improved in December, 1973; blood cultures were negative and the endocarditis was cured. It was determined at that time that Claimant had a moderate aortic insufficiency and to a lesser extent a mitral valve insufficiency. Bonde's cardiac condition was thought to be relatively precarious because the "two leaky valves pose risk of rapid left ventricular failure".

On October 3, 1974 open heart surgery was performed upon the claimant by Dr. Robert Wallace at the Mayo Clinic. The nature of the surgery involved the replacement of the aortic valve with a aortic ball valve prosthesis. Claimant was hospitalized October 3, 1974 through October 10, 1974. The records indicate Claimant has not returned to the Mayo Clinic since October, 1974.

The major portion of the evidence presented consists of expert medical testimony. The defendants offered the deposition of Dr. Coddington taken on June 11, 1975. Dr. Coddington testified physical examination of Claimant's extremities on June 18, 1973 revealed the previous amputation of a small amount of the distal end of the right thumb. The defendants attempt to establish that because Dr. Coddington did not note the existence of a puncture wound or the manifestation of infection on June 18, 1973 that the staphylococcus bacteria entered the claimant's body subsequent to June 12, 1973. However, it is noted Dr. Coddington is a general practitioner and his testimony is not unequivocal. On page 11 of direct examination Dr. Coddington testified that as far as the time interval necessary for cellulitis to develop, "Dr. Northup said three days. I am not going to say that that is absolutely true. I mean, perhaps somebody better qualified than I am can tell you more specifically just exactly how long it takes." On cross examination Dr. Coddington (page 18) stated that if upon receiving a puncture wound, Bonde had proceeded to soak the wound and to apply mercurochrome, this could have an affect of retarding the spread of infection and thus,

be a possible explanation for the six day period rather than the normal three day period. Dr. Coddington ended his testimony on cross examination by stating it was possible that the staph infection was in a dormant stage on June 18, 1973.

Joseph E. Geraci, M.D., a specialist in internal medicine with a subspeciality in infectious diseases, board certified in 1950 and a staff physician of the Mayo Clinic since 1951 testified by way of evidentiary deposition as to the treatment afforded Claimant while a patient at St. Mary's Hospital. Dr. Geraci initially examined Claimant on July 13, 1973 after Claimant had been hospitalized for approximately five weeks. Dr. Geraci stated the subsequent valve disorder was related to the staphylococcial aureus, the original diagnosis. Dr. Geraci on pages 16 and 17 of his deposition causally connected Claimant's heart condition and the puncture wound:

> Q. Doctor, based upon reasonable medical certainty, his heart condition that you have described that Mr. Bonde suffered from, is this condition in your opinion related to and causally connected to this puncture would for which Mr. Bonde made an original complaint?
>
> (Objection to Mr. Ulstad)
>
> MR. BICE: You may answer. Do you remember the question?
>
> A. I think your question was, was the heart condition that the patient had and the further damage to his status and the necessity for the operation related to the puncture wound that he suffered on 2-13.
>
> Q. On 6-13?
>
> A. 6-13, right. I would say it probably is, although we cannot prove that. At least the temporal relationship as noted in the record by Dr. Brewer and by Welkowski, and as summarized by Dr. Person would indicate that the temporal relationship and the development of symptoms and the positive blood cultures would be directly related to that previous injury.

Dr. Geraci has not examined Claimant postoperatively. Dr. Geraci, based upon his experience in dealing with the type of physical problems sustained by Claimant, testified heavy manual labor was out of the question and light to moderate labor would be permissible.

Maurice L. Northup, M.D., a general practitioner, testified by way of evidentiary deposition as to Claimant's condition subsequent to the October, 1974 surgery. Dr. Northup is a partner with Dr. Coddington in Humboldt, Iowa and has been Claimant's family physician since 1954. Dr. Northup examined Bonde in December, 1974, January, 1975 and February, 1975. Dr. Northup was deposed in April, 1975. Dr. Northup testified that since the valve replacement surgery, Claimant has been maintained on anticoagulants and will remain on this medication for the remainder of his life. The primary purpose of these examinations was to regulate this medication. Dr. Northup was of the opinion Claimant sustained some undetermined amount of brain damage and is unable to resume his previous occupation. Dr. Northup stated this was a permanent condition.

The evidentiary deposition of Paul From, M.D., was secured by Defendants on April 21, 1976. Dr. From, a specialist in internal medicine, was provided various transcripts, letters and hospital records contained in the record on review. Dr. From has not personally examined or treated Claimant.

Dr. From was of the opinion Claimant's alleged injury of June 12, 1973 could not have resulted in the subacute bacterial endocarditic condition diagnosed. Dr. From summarized the factors on which he based his opinion on page 10 of his deposition:

> ***Now, my reasoning and my statement is that I don't think the injury of June 12 had anything to do with his subsequent problems as based upon the facts of the incubation period, the fact that he already had an enlarged heart and heart failure at the time when he was first seen, because his heart wouldn't get enlarged in a two or three day period and go into failure and get irregular, that heart disease had to predate this infection, that the signs of overt infection became manifested five or six days before it should have from the injury that he sustained, and that he had a very classical course for subacute bacterial endocarditis thereafter, and that almost always is secondary to rheumatic valvular heart disease, so from that reasoning and those trains of events, I don't think that the injury or the infection in his hand, even if it was there, had anything to do with the bloodstream infection.
>
> I don't say that there wasn't an infection there, but even if Staphylococcus was present in that infection, it had nothing to do with his endocarditis.

In the arbitration decision the deputy industrial commissioner found Claimant sustained an industrial injury arising out of and in the course of his employment on June 12, 1973. It was also found Claimant has been unable to perform acts of gainful employment from June 15, 1973 to and including April 29, 1975, the date Dr. Northup's deposition was taken. It was determined Claimant sustained an industrial disability of 70% of the body as a whole. Defendants were ordered to pay Claimant a healing period of 98 weeks at $68 per week, 350 weeks of permanent partial disability compensation at the rate of $63 per week and medical expenses.

It is the claimant's burden to prove by a preponderance of evidence that he sustained an injury arising out 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 (1967). A possibility is insufficient; a probability is necessary. *Burt v. John Deere Waterloo Tractor Works,* 247 Iowa 691, 73 N.W.2d 732 (1956).

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). Absolute certainity as to the cause of an injury is not required. *Jones v. Eppley Hotels Co.,* 208 Iowa 1281, 227 N.W. 153 (1929). 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.

The question presented on review is whether the claimant has established by a preponderance of the evidence the staphylococcus aureus entered his body while in the course of his employment on June 12, 1973.

The uncontradicted testimony of Claimant, Stockdale and Westberg establish Claimant was struck by a piece of old bridge material in the course of his employment on June 12, 1973. Mrs. Bonde testified as to Claimant's prior good health. Mrs. Bonde acted in a timely and understandable manner considering the symptoms Claimant exhibited during the period subsequent to June 12, 1973.

A crucial factor in the matter sub judice is the incubation period of staphylococcus aureus. The defendants stress a three-day incubation period and the fact Dr. Coddington in his examination on June 18, 1973 did not note the presence of infection or the wound to the hand. Defendants contend that the bacteria must have entered Claimant's bloodstream subsequent to June 12, 1973 through some later injury. Dr. Northup qualified his statement of a three day period on page 24 of his deposition by stating sometimes it takes that long to develop and sometimes it doesn't. Dr. Coddington, when questioned on this subject stated that application of mercurochrome and soaking the wounded area could retard the infection and be a logical explanation for a longer incubation period. Great weight must be given to the testimony of Dr. Geraci, who is a well-known expert in the field. The "seeding" or volume of bacteria which initially entered the body is a variable which would affect the length of incubation. Dr. Geraci causally connected the injury of June 12, 1973 to Claimant's subsequent condition, emphasizing the temporal relationship and the development of symptoms and the positive blood cultures.

The testimony of Dr. From, submitted by Defendants on review is not compelling. Dr. From is not a treating physician, consulted subsequent to the arbitration decision. Dr. From did not conduct a physical examination of Claimant. Dr. From's testimony was not based upon the full record on review; specifically, the deposition of Dr. Geraci was not provided. Dr. From agreed with Dr. Geraci's testimony that the volume of the bacteria entering the body would affect the incubation period, but qualified his position by remarking that the usual period is seven to ten days, but in this particular case, without antibiotic therapy within four days of the injury, the symptoms were pronounced. Furthermore, Dr. From on page 17 of his deposition, acknowledges his opinion is in part based upon the fact that Claimant had a preexisting rheumatic valvular heart disease. There was insufficient factual basis in the records he reviewed to support this finding.

Considering the evidence in light of the foregoing principles, Claimant sustained his burden of proof by a preponderance of the evidence that his disability arose out of and in the course of his employment with Defendant Employer on June 12, 1973.

Claimant's disability must be evaluated industrially, not merely functionally. *Dailey v. Pooley Lumber Co.,* 238 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 future inability because of his injury to earn a living. *Olson 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. *Barton v. Nevada Poultry Co.,* 253 Iowa 285, 110 N.W.2d 660 (1961).

Claimant is fifty-seven years old with a high school diploma. Claimant's previous work history consists primarily of manual labor and semi-skilled occupations. The testimony of all the doctors is in agreement Claimant has suffered a severe disabling injury. Dr. Northup testified as to Claimant's condition subsequent to open heart surgery. Dr. Northup determined that this was a permanent condition and that because of the physical limitations on Claimant's heart, the existence of brain damage and that he was being maintained on anti-coagulants that Claimant is restricted to sedentary type activities. The extent of the resultant brain damage is not ascertainable from the current state of the record. Therefore, the finding of the deputy industrial commissioner that Claimant sustained an industrial disability of 70% of the body as a whole seems well warranted..

* * *

Signed and filed this 28 day of July, 1976.

ROBERT C. LANDESS
Industrial Commissioner

Appealed to District Court; Affirmed.

ARISING OUT OF – SUDDEN DEATH SYNDROME

FRANCES L. ERIKSEN,

Claimant,

vs.

AGDRUP B. ERIKSEN d/b/a
ERIKSEN CONSTRUCTION,

Employer

and

STATE AUTO AND CASUALTY UNDERWRITERS,

Insurance Carrier,
Defendants.

Review Decision

This is a proceeding brought by Frances L. Eriksen, claimant, surviving spouse of Frank T. Eriksen, pursuant to §86.24 of the Iowa Workmen's Compensation Act, seeking review of an arbitration decision wherein the claimant was denied recovery from Agdrup B. Eriksen d/b/a Eriksen Construction, defendant employer, and State Auto and Casualty Underwriters, defendant insurance carrier, as a result of an alleged injury resulting in the death of her husband.

* * *

Agdrup B. Eriksen, d/b/a Eriksen Construction, is the brother of Frank T. Eriksen and was his employer on March 30, 1973, the date of Frank Eriksen's death. On March 30, 1973 Frank Eriksen was fifty-six years of age with a history of good health. For approximately the last twenty-seven years of his life, he had been a mason by occupation and had for approximately the last three years been employed on a full-time basis as weather permitted by Eriksen Construction Co. In addition to his normal forty-hour work week, Frank Eriksen participated in outdoor activities such as hunting, fishing, and the manual tasks of a homeowner such as shoveling the sidewalks and mowing the lawn. He had never had any serious illness, had never been hospitalized, had never complained of any chest pains or symptoms indicative of cardiovascular disease. For the last ten years, he had been tapering off the amount of his work. He no longer engaged in more strenous concrete work nor did he travel south in the winter in search of work.

On March 30, 1973 Frank Eriksen reported at 8:00 a.m. for work at Royal Memorial Park in Royal, Iowa. During the course of the day, he made no complaints or comments on his health indicating any cardiovascular problems. His fellow employees noticed no unusual indications of health problems. That day he laid a block partition and at approximately 1:30 or 2:00 p.m., he had just finished a bond bond beam over a doorway, the second such beam he had done that day. The procedure for a bond beam required Frank Eriksen to lift trowels of fill over his head. Agdrup B. Eriksen was talking with Frank as he finished up the beam, making plans to go fishing together after the day's work. Frank finished the beam and said, "That's it." His brother, Agdrup, picked up the mortarboard Frank had been using, took it and threw it on a stack of other mortarboards. When Agdrup turned around, Frank was lying on the scaffolding. Resuscitation efforts were to no avail and Frank Eriksen was pronouced dead on arrival at Spencer Municipal Hospital. An autopsy was conducted by Dr. Jerry X. Tamisiea.

The record on review includes the report of the autopsy results as well as the depositions of Dr. Tamisiea and Dr. Paul From. The issue on review is whether the death of Frank T. Eriksen arose out of his employment with Agdrup B. Eriksen d/b/a Eriksen Construction.

The supreme court of Iowa has held that: "The phrase 'arising out of' is universally held to require causal relationship between the employment and the injury." *Volk v. International Harvester Company,* 252 Iowa 298, 106 N.W.2d 649 (1960). The claimant has the burden of proving by a preponderance of the evidence the causal connection between the employment and the injury. *Lindahl v. L. O. Boggs,* 236 Iowa 296, 18 N.W.2d 607 (1945). The court, in *Almquist v. Shenandoah Nurseries,* 218 Iowa 724, 254 N.W. 35 (1934) states, "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." This does not mean there must be an accident or an unusual occurrence or some specific incident to render an injury compensable. *Lindahl v. L. O. Boggs,* supra. But it does mean there must be a "direct causal connection between the exertion of the employment and the injury upon which an award could be made." *Ziegler v. United States Gypsum Company, Inc.,* 252 Iowa 613, 106 N.W.2d 591 (1961). The question of causal connection is one which lies essentially within the domain of expert testimony. *Bradshaw v. Iowa Methodist Hospital,* 251 Iowa 375, 101 N.W.2d 167 (1960).

The final summary of the autopsy conducted by Dr. Tamisiea includes the following pertinent statements:

> The autopsy shows a localized atherosclerotic process involving a short segment of the right coronary artery. There is extensive, fresh, hemorrhage into the atherosclerotic plaque which presumably triggered a (sic) arteriospasm of the residual lumen of the right coronary artery with the production of a fatal arythmia. The patient shows evidence of a long standing myocardial ischemia by the presence of the diffuse patchy myocardial fibrosis and left ventricular hypertrophy.

Dr. Tamisiea, in his deposition taken on July 24, 1975, testified under direct examination that the death of Frank T. Eriksen "falls into a rather typical category of the 'sudden death syndrome'. The average 'sudden death syndrome' is more apt to occur during work, and in this instance we are not necessarily referring to employment. We are talking about work activity, and it's more apt to occur in usual work situations." Dr. Tamisiea further testified under cross-examination that this type of death could as well have happened during any normal work activity such as mowing the lawn. In his second deposition taken June 11, 1976, Dr. Tamisiea testified there was, in his opinion, a causal connection between the exertion of work activity and the death by "sudden death syndrome" but, in the exchange on pages 18 and 19 of his second deposition, he indicated the connection was with any ordinary work exertion. He reiterated that he was not indicating anything differently from first deposition.

Dr. Paul From, in his deposition taken October 23, 1975, found no causal connection between Frank Eriksen's employment and his death.

The supreme court of Iowa in *Sondag v. Ferris Hardware,* 220 N.W.2d 903. (Iowa 1974), has required the industrial commissioner to state his reasons for accepting or rejecting medical testimony. In this case, there is no reason to specifically accept or reject the testimony of Dr. Tamisiea or Dr. From. Reading all the medical testimony in the light most favorable to claimant, there is a failure to meet the claimant's burden of proof. The supreme court of Iowa has stated, "This court does not hold that, when an employee dies at his post of duty, a presumption arises that the death was one arising out of and in the course of the employment. This is a matter of proof, and the burden is on the claimant." *Bushing v. Iowa Railway & Light Company,* 208 Iowa 1010, 226 N.W. 719 (1929). The language of *Madden's case,* 222 Mass. 487, 495, 111 N.E. 379, 383, L.R.A. 1916D, 1000 as adopted in *Almquist v. Shenandoah Nurseries,* supra, and quoted in

Littell v. Lagomarcino Grupe Co., 235 Iowa 523, 17 N.W.2d 120 (1945) reads as follows: "A disease, which under any rational work is likely to progress so as finally to disable the employee, does not become a 'personal injury' under the act merely because it reaches the point of disablement while work for a subscriber is being pursued. It is only when there is a direct connection between the exertion of the employment and the injury that an award of compensation can be made." By the testimony of claimant's witness, Dr. Tamisiea, taken in the light most favorable to claimant, there is lacking in this case the nexus between the employment relationship and the injury that would warrant the application of the *Sondag v. Ferris Hardware,* supra, standards for awarding compensation.

* * *

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

* * *

Signed and filed this 6 day of January, 1977.

ROBERT C. LANDESS
Industrial Commissioner

No appeal.

ATTORNEY FEES

BRUCE A. BEARD,

Claimant,

vs.

NESBITT'S, INC.,

Employer,

and

IOWA MUTUAL INSURANCE COMPANY,

Insurance Carrier,
Defendants.

Attorney's Fees

This is a proceeding brought by the claimant, Bruce A. Beard, against his attorney, Robert N. Johnson III, for an adjudication of an attorney's lien pursuant to §86.39, Code of Iowa, which reads as follows:

> Fees---approval---lien. All fees or claims for legal, medical, hospital, and burial 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. For services rendered in the district court and appellate courts, the attorney's fee shall be subject to the approval of a judge of the district court.

* * *

The claimant was injured on August 20, 1975 and an Employer's First Report of Injury signed by the claimant was filed September 4, 1975. A Memorandum of Agreement was filed September 15, 1975 by Nesbitt's insurer, Iowa Mutual Insurance Company, calling for weekly entitlement of $106.94.

Iowa Mutual sent the claimant his first check for temporary total disability on September 11, 1975, some nine days after the claimant had consulted with [the attorney]. The first contact that [the attorney] had with the insurance company was on September 16, 1975 by phone, followed by a letter of confirmation under date of September 17, 1975, wherein he made arrangements for the weekly benefits for temporary total disability benefits to be sent to his office.

[The attorney] undertook the task of marshalling the evidence necessary to establish the extent of the claimant's permanent partial disability, if any, by contacting the local physician who had released the claimant to resume employment as of November 19, 1975. Claimant's attorney seemed to have been instrumental in convincing Dr. H. C. Rankin to send the claimant to Dr. Dudley Noble for orthopedic consultation as opposed to Dr. J. L. Jochims of Burlington.

[The attorney] collected $290.27 as partial payment of a contingent fee in March of 1976. The claimant had resumed different, less demanding employment, and in August of 1976 was contemplating the acceptance of surgical intervention as per Dr. Noble's recommendation.

The first time that the ultimate question of the application of the contingent fee arrangement to the award of permanent partial arises is in a letter of April 13, 1976, wherein claimant's attorney makes demand on the insurance carrier for $5191.00 plus attorney's fee of $1703.33.

The attorney filed an original proceeding on June 22, 1977, wherein the only issue was the claimant's wish for commutation contrary to Rule 500--6.1 and 6.2, Iowa Administrative Code.

At no time did [the attorney] seek reimbursement for the claimant's mileage expense incurred for the trips to Iowa City and Burlington.

A similar problem concerning attorney's fees was the sole subject of *Kirkpatrick v. Patterson,* 172 N.W.2d 259 (Iowa 1969) wherein the court on page 261 said:

> [2] In allowing attorney fees to plaintiff's attorney . . . the trial court should consider all the elements which have a bearing on attorney fees to be allowed in a given case including but not necessarily limited 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. In re Condemnation of Lands [Stanley v. City of Indianola], Iowa, 153 N.W.2d 706, 710; Gabel v. Gabel, 254 Iowa 248, 250-251, 117 N.W.2d 501, 503. See notes: 56 A.L.R.2d 13; 143 A.L.R. 672. Under some circumstances a one-third contingent fee might be reasonable, but it should be based on the facts and circumstances of the particular case rather than the contract between the employee and his counsel.

Counsel submits a five-page recapitulation of time and

charges in support of his oral one-third fee arrangement, but it appears that the claimant herein is being asked to pay a fee far in excess of the results achieved by [the attorney's] efforts. The claimant was receiving temporary total disability benefits at the time of [the attorney's] contact with the insurance carrier, and the claimant's need for legal services at that time is questionable. The attempt by [the attorney] to commute the claimant's entitlement demonstrates a lack of experience in the workings of the statute on the part of [the attorney].

THEREFORE, based upon the substantial evidence contained in this record, it is found that [a] reasonable fee for services be set at seven hundred dollars ($700.00).

* * *

Signed and filed this 15 day of February, 1978.

HELMUT MUELLER
Deputy Industrial Commissioner

No appeal.

BASIS OF COMPENSATION

BOBBIE JEAN LESLIE,

Claimant,

vs.

LUCKY STORES, INC.,

Employer,

and

TRAVELERS INSURANCE CO.,

Insurance Carrier,
Defendants.

Review-Reopening Decision

This is a proceeding in review-reopening brought by the claimant, Bobbie J. Leslie, against her employer, Lucky Stores, Inc., and its insurance carrier, the Travelers Insurance Company, to have a determination of a disputed matter relevant to workers' compensation benefits under the Iowa Workers' Compensation Law. The injury relevant to this proceeding occurred on November 11, 1976.

* * *

The evidence in the record consisted of two pages of a payroll summary and five pages of photocopies of payroll cards for the claimant, beginning with a pay period ending August 21, 1976 and ending with a pay period ending November 6, 1976. It should be noted that claimant has in no manner made a response that the record is complete on the data contained. However the parties were given until March 14, 1978 to submit the record. A letter dated March 14, 1978 from defense counsel, and received March 15, 1978, contained the above referenced documents as an attachment. The letter made reference to the fact that claimant's counsel acquiesced in the submission. A copy was sent to claimant's counsel. Claimant has made no response whatsoever to this submission. Such silence and the closing date of the record having gone by, it is the finding of this deputy commissioner that claimant has acquiesced in the record as submitted by defense counsel.

The sole issue to be determined in this matter is whether or not claimant's weekly compensation rate is to be determined under §85.36, first unnumbered paragraph and paragraph 1, §85.36(6), or §85.36(10). It is defendants' position that claimant is a part-time employee and the determination of the gross weekly wages would fall under §86.36(10, Code of Iowa. It is apparently claimant's position, as stated by defense counsel, that claimant seeks to be classified under the first unnumbered paragraph of §85.36 and paragraph 1 of that section, or under §85.36(6), Code of Iowa.

The first inquiry is into whether or not claimant is a part-time employee, and thus required to have the weekly rate determined under §85.36(10), Code of Iowa or whether or not claimant is a full-time employee, thus directing the inquiry to the other mentioned paragraphs of §85.36, Code of Iowa. Section 85.36(10), Code of Iowa, reads as follows:

> In the case of an employee who earns either no wages or less than the usual weekly earnings of the regular full-time adult laborer in the line of industry in which he is injured in that locality, the weekly earnings shall be one-fiftieth of the total earnings which the employee has earned from all employment during the twelve calendar months immediately preceding the injury but shall be not less than an amount equal to thirty-five percent of the state average weekly wage paid employees as determined by the Iowa Employment Security Commission under the provisions of section 96.3 and in effect at the time of the injury.

A "part-time" employee would be one who "earns less than the usual weekly earnings of the regular full-time adult laborer". No evidence was submitted whatsoever bearing upon what one who performed the same work as claimant would receive as a full-time employee, or whether or not claimant's hours as indicated on the records placed in evidence are sufficient to constitute that of a full-time employee. Accordingly, the determination of claimant's status as to a full-time or part-time employee must be done inferentially from the limited evidence available. It is officially noted that the usual full-time hours for most employments total 40 hours per week. The hours worked by claimant obviously total less than 40 per week. The payroll records show the employer classified the claimant as a part-time employee. The inference is drawn from such a fact that the hours worked by claimant were not full-time, as recognized by that employer for an individual performing the same work. It is therefore the finding of this deputy commissioner that claimant's rate determination must be made under §85.36(10), Code of Iowa.

The wage material shown does not give the total earnings of the claimant during the twelve calendar months immediately preceding the injury. Accordingly, the parties are given twenty days from the date of this decision to submit relevant wage data under §85.36(10), Code of Iowa, in effect at the time of the instant injury. It may be that the parties will be able to reach an agreement as to the weekly

rate based upon the instant order without the submission of the additional data. If so, this office is likewise to be informed within twenty days that no further decision from this office would be necessary.

THEREFORE, it is held that §85.36(10), Code of Iowa, applies to the determination of claimant's weekly compensation rate.

As no costs were incurred, none are taxed.

Interest on any additional compensation which might be due shall run from the date of this decision.

Signed and filed this 14 day of April, 1978.

ALAN R. GARDNER
Deputy Industrial Commissioner

No appeal.

CAUSATION

CAUSATION – CRANIOPHARYNGIOMA

DELVIN R. HOLM

Claimant,

vs.

NORTH CENTRAL LINES,

Employer,

and

EMPLOYERS MUTUAL CASUALTY COMPANY,

Insurance Carrier,
Defendants.

Review-Reopening Decision

This is a proceeding in review-reopening brought by Delvin R. Holm, claimant, against North Central Lines, employer, and Employers Mutual Casualty Company, insurance carrier, for the recovery of benefits as a result of an injury on April 3, 1975.

* * *

The issue to be determined is whether claimant is entitled to additional compensation and medical expenses as a result of the injury on April 3, 1975.

On April 3, 1975 claimant was injured when the truck he was driving for defendant employer went off a county road. He was examined on this date by G. B. Hogenson, M.D. Dr. Hogenson noted abrasions of the left leg, right leg, right arm and left cheek and hematomas of the right buttocks, left thigh and left leg. He also recorded a complaint by claimant of blurred vision of the left eye. Dr. Hogenson noted the blurred vision again the next day and referred claimant to Eric M. Swanson, M.D., an opthalmologist.

Dr. Swanson examined claimant on April 7, 1975 and recorded complaints of decreased vision in his left eye. His examination revealed claimant's vision in the right eye to be 20/20 and in the left eye to be hand movements at 2 feet. Dr. Swanson immediately referred claimant to the Opthalmology Department of the University of Iowa Hospitals and Clinics.

Claimant was examined at the University of Iowa Hospitals and Clinics by H. Stanley Thompson, M.D., and William Gillum, M.D. This examination revealed:

> . . . the right eye was essentially normal and the left eye showed hand motions vision at about 6 inches. His fields were severely constricted and on Goldmann perimeter showed a very narrow arc of vision remaining superiorly and temporally. There was of course a very large afferent pupillary defect on the left and there was no evidence of any trochlear or 6th nerve damage from his head trauma. . . . concluded that there must have been either a basal skull fracture or a rupture of a blood vessel supplying nutrition to the optic nerve caused by the head trauma. Skull x-rays revealed no fractures, however there was a question of some density behind the left eye in the orbit.

Follow-up examinations were conducted on April 14 and May 12, 1975 by Drs. Thompson and Gillum. Their last examination revealed:

> . . . his vision in the right eye was 6/6 and in the left eye was counts fingers at two feet. There was a large left afferent pupil defect. Slit lamp exam was normal. Fundus exam revealed a slightly pale disc in the left eye. Cup to disc ratios were 0.2 in the right eye and 0.4 in the left eye. Goldmann perimetery was performed and a large central scotoma was outlined in the left eye. However, this central scotoma was not at all the same as obtained on previous examinations which lead us to suspect that there is a certain amount of functional overlay in Delvin's visual loss. Our impression is therefore, (1) traumatic optic atrophy in the left eye with question functional visual loss . . .

Dr. Thompson scheduled a follow-up examination in July, 1975 but claimant did not appear for the examination.

Claimant returned to work in August, 1976. He worked sporadically for different employers through the second week of January, 1976. During this period, claimant experienced headaches which gradually increased in severity. Dr. Hogenson prescribed Darvon and Emperin Compound III for claimant's complaints. No evidence was offered of the treatment of Dr. Hogenson during this period.

On March 3, 1976 claimant was admitted to the Veterans Administration Hospital in Des Moines, Iowa for complaints of headaches and vomiting. Consultations were obtained from an opthalmologist and a neurologist. Impressions of the consultants were (1) optic atrophy of the left eye from old trauma and (2) tension headaches. He was discharged from the hospital on March 5, 1976.

Claimant returned to the Veterans Administration Hospital in Des Moines on April 19, 1976. He was transferred by Peter C. Black, M.D., to the Neurosurgical Service at the Veterans Administration Hospital in Iowa City. Dr. Black's diagnosis was:

> Intracranial mass lesion, manifested by headache, mental confusion, optic atrophy, left eye, lateral field defect and early papilledema, right eye, and clinical signs of increased intracranial pressure.

Further observations and studies of claimant were conducted at Iowa City. On May 7, 1976 M. Nikpour partially removed a craniopharynagioma. Dr. Nikpour described the surgery as follows:

> The tumor seemed invading the left olfactory tract and ball as well as left optic nerve and posterior extending to the left anterior clinoid as well as internal carotid artery. The anterior part of the tumor first was removed in piecemeal and the specimen was sent for frozen section, reported to be craniopharyngioma. Then, the further retraction was performed and the right internal carotid, as well as right the tumor of the left side and the tumor was removed with blunt dissection in piecemeal fashion in this area. Under the microscope the tumor was completely removed in this area and then attention was made to the posterior part of the tumor and this was gently separated from the left internal carotid artery. Again, this was cystic and the cyst was ruptured with No. 11 blade knife and the tumor was removed in piecemeal fashion. Attention was made further down identifying the diaphragmic sella and the pituitary stalk trying to preserve the pituitary stalk all of this was completely surrounded with the cystic tumor and at this point the tumor was mostly solid rather than its being cystic. This was removed as much as we could and also the posterior part of the left internal carotid artery, which still contained a large amount of the solid tumor was exposed and this also was removed. The necessary hemostasis was performed and at this point during the operation the vital signs were completely stable. The posterior clinoid was identified and at this point part of the tumor as far as we could see was removed. Anterior cerebral artery during the removal of the tumor also was identified and kept intact. However, after removal of the tumor there was still some tumor in the posterior part of the posterior clinoid and clivus, which did not resect.

Claimant offered the testimony of Paul From, M.D., an internal medicine specialist and William Gillum, M.D., a resident in opthalmology concerning the relationship of the craniopharyngioma and the injury on April 3, 1975. Defendants offered the testimony of Robert A. Hayne, M.D., a neurosurgeon, and Alexander Ervanian, M.D., a pathologist. Each of the physicians was provided copies of the medical reports of Dr. Hogenson, Dr. Swanson and Dr. Thompson and the Veterans Administration Hospital records.

Dr. Gillum examined claimant with Dr. Thompson at the University of Iowa Hospitals and Clinics during April and May, 1975. Dr. Gillum testified about his diagnosis in April and May, 1975 as follows:

> . . . We were suspicious of malingering, and we always are in a case like this, but maybe in retrospect what he had was a craniopharyngioma all along, and we were misled by this history of sudden visual loss, you know, and so we were just thinking along one track, you know, injury, and then the vision gets worse much later and that confuses us. So that's what led us to think maybe he was malingering, but now in retrospect, you know, that we just were being misled by this -- in terms of making a diagnosis of craniopharyngioma. I think we missed it because of this history of the trauma and the loss of vision at the time of the trauma. So in other words, I think he probably did lose vision at the time of trauma and then it probably got a little bit better at first when the swelling went away, and then it probably started getting worse again as this tumor started to grow, but that's only a guess, because I am talking about things that I can't see.

We further testified:

> In my opinion that craniopharyngioma could cause a sudden visual loss without a head trauma, because it could cause a sudden clotting off of an artery, and that would be a cause for a sudden visual loss, although the usual history from something like this is a gradual visual loss. So really I think it's very difficult to tell what actually went on, what actually happened, but if you were to ask me to guess, I would say that he probably lost some vision at the time of the accident, and that he may have been predisposed by this tumor to have this loss of vision. In other words, if he didn't have the tumor, he may never have lost his vision. But even then that's a guess, and it could be that that visual loss was there before the accident, that he didn't notice it because it was gradual, and then after the accident he got bumped on the head and he covered one eye for the first time in his life and suddenly realized he didn't have vision in one eye, and we see this all the time in people with retinal detachments and disease in one eye. They don't know they have lost vision in that eye until they cover the good eye, until they have something, some incident in their lives to cause them -- maybe they rub one eye, rub their good eye because it itches, and all of a sudden they realize they have lost vision, because when both eyes are open the other eye covers for whatever the one eye doesn't see. So that it is possible that he already had the visual loss and that the accident just caused him to look for a visual loss and he found it.

Dr. From expressed the opinion that the injury on April 3, 1975 delayed or interfered with the diagnosis of the craniopharyngioma. The significance of this delay or interference was described by Dr. From as follows:

> Q. Doctor, would you have an opinion within a reasonable medical certainty as to whether or not this delay that you have described would account for the

fact that the tumor was only partially removed?

A. Well, I think that is an extremely difficult question to answer. It depends upon so many variables. Had the tumor not been able to be diagnosed until it was diagnosed, it would make no difference. You know, even if the tumor had been diagnosed earlier, there is no assurance that you could ever -- no matter when a tumor is diagnosed, there is no assurance until the actual time of surgery that you could remove all of the tumor. A tumor situated in the brain-- and you have to understand that you are looking with tunnel vision, and you would just be able to get your fingers into these holes, that there are only certain accessible portions of brain. You can't go through brain tissue to get to an area. It must be a movable thing. It is one of the reasons that we are faced with so many technical problems in the brain because there isn't the possibility of exposure. It is wrapped around nerves, and in this case, it was very closely adherent to extremely important blood vessels, the internal carotid arteries.

A surgeon must be very careful that what he takes out is tumor tissue and that he doesn't damage good tissue, and in order to have a functioning human being afterwards, he often temporizes and leaves tumor rather than take a chance and tear into the right optic nerve, for example, which would then have made him totally blind. He would have been worse off probably than he was before.

If you were going to damage the internal carotid artery, the entire circulation to the front portion of the one side of the brain or the other is going to be disrupted, and it would have acted like a stroke, so that that question has so many variables that it is difficult to answer. All I can say is that from a common sense standpoint, theoretically the earlier one could attempt a treatment with a tumor, at which time it would be smaller, then there would more likely be the chance of successful treatment.

Dr. From stated that the craniopharyngioma was not caused by the injury on April 3, 1975. He testified about an aggravation of a craniopharyngioma as follows:

> Well, unless a trauma caused bleeding into the tumor or surrounding the tumor, actually caused the tumor to be dislodged and move, which then might aggravate the tissue, I don't think that trauma in any other way would affect the tumor. I mean that is the only way it could affect it.

Dr. Hayne testified about the relationship of claimant's loss of vision and craniopharyngioma and the injury on April 3, 1975. He stated:

> Q. Do you have an opinion, based upon your examination, your review of the records, particularly of the Iowa City records, within a reasonable medical certainty, as to what has caused the loss of vision that was demonstrated by Mr. Holm?
>
> A. I feel that the loss of vision that Mr. Holm has sustained is due to pressure on the optic nerve end, or the optic chiasm and optic tracts.
>
> * * *
>
> Q. (By Mr. Harrison) Doctor, do you have an opinion within a reasonable medical certainty whether or not the optic atrophy, as described in the records, was produced by trauma to the head?
>
> A. Yes, I have an opinion.
>
> Q. What is that, sir?
>
> A. I do not feel that it was secondary to the trauma; that is, the optic atrophy was not secondary to the trauma which he sustained in this accident he described as occurring on April 3, 1975.
>
> Q. Do you have a reason for that opinion, Doctor?
>
> A. Yes.
>
> Q. What is the reason?
>
> A. The trauma which he sustained to his head, from the description of the aftermath, I did not feel was but moderate in degree. Optic atrophy following head trauma is relatively uncommon unless the patient is unconscious for a long period of time or unless there has been a fracture of the skull such that the optic nerves are either transected or severly impinged upon. Secondly, optic atrophy is a very common finding in patients with craniopharyngiomas.
>
> * * *
>
> Q. Doctor, do you have an opinion within a reasonable medical certainty, based again upon your exam, your review of the records as contained in Exhibit A, as to whether or not trauma caused the craniopharyngioma that was later found in Mr. Holm?
>
> A. Yes, I do have an opinion.
>
> Q. What is that, sir?
>
> A. That it did not cause the craniopharyngioma which was found in Mr. Holm.
>
> Q. Do you have an opinion, again within a reasonable medical certainty, again based upon your exam and the review of the records, as to whether or not the head trauma described by Mr. Holm would aggravate a pre-existing craniopharyngioma?
>
> A. I would say it is possible, but not probable.
>
> Q. Under what conditions would it be possible, Doctor?
>
> A. I would say that if the trauma were sufficiently severe to produce such things as hemmorhage (sic) into the neoplasm, that such aggravation could take place, but I don't under the circumstances, that is, with the craniopharyngioma, see where the trauma could aggravate it.

Dr. Ervanian essentially concurred with the opinions of Dr. Hayne.

The 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. L. O. Boggs,* 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 supreme court of Iowa 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 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.*** 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.****

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 has 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.

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. 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).

Claimant failed to sustain his burden of proof that the injury on April 3, 1975 either caused or aggravated the health impairment on which he based his claim. All of the physicians that testified in connection with this hearing agreed that the craniopharyngioma preexisted the injury on April 3, 1975. Neither Dr. Hayne nor Dr. Ervanian believed that the injury on April 3, 1975 aggravated the craniopharyngioma or caused his loss of vision. Dr. Gillum speculated that the injury may have aggravated the craniopharyngioma and temporarily caused a loss of vision. Little weight was given to the opinion of Dr. From concerning this issue since he testified on direct examination:

> Q. Okay. As to whether or not the accident directly started it to grow or become manifest, this is something that you would rather defer to the neurosurgeon and the doctors that did treat him, or to a neurosurgeon, is that correct?
>
> A. Yes, Well, I think they would be more familiar with, you know, what it looked like grossly, whether there were any little spots of blood or swelling that they might recognize that didn't get into a report, or something. They could certainly have a better opinion as to what was going on than you would get from just a cold report.
>
> Q. Okay. This is more particularly their specialty than yours, is that true?
>
> A. That is true, yes.

Dr. From described the possibility of the injury in delaying or interfering with the diagnosis of craniopharyngioma as conjecture. Claimant may also have contributed to the delay in diagnosis by his failure to return to the University of Iowa Hospitals and Clinics for a follow-up examaination scheduled by Dr. Thompson in July, 1975.

WHEREFORE, it is found that claimant failed to sustain his burden of proof of a causal connection between the health impairment on which he based his claim and the injury on April 3, 1975.

* * *

Signed and filed this 20 day of April, 1977.

DENNIS L. HANSSEN
Deputy Industrial Commissioner

Appeal to Commissioner; Affirmed.
Appeal to District Court; Pending.

CAUSATION – DIRECTLY TRACEABLE – INCIDENT

RONALD LEE MARANELL,

Claimant,

vs.

WILSON FOODS,

Employer,
Self-Insured,
Defendant.

Appeal Decision

This is a proceeding brought by defendant employer, self-insured Wilson Foods Corporation, appealing a proposed arbitration decision wherein claimant, Ronald Lee Maranell, was awarded one week of temporary disability compensation.

* * *

At issue here is whether or not claimant suffered an injury arising out of and in the course of his employment.

On October 9, 1976, claimant was assigned to the task of splitting hogs which entailed sawing the carcass in half while it was being held by spreader hooks. When the sawing was completed, claimant removed the hooks. Claimant who testified that he was injured at approximately eight o'clock related the incident as follows:

> As I was splitting hogs, I was reaching for hooks. When I got behind you don't always get the saw blade stopped, and while the saw blade was still turning, I was trying to avoid that, and pull, and I got kinda off balance, and as I was pulling the hooks, I felt something pull.

Continuing to work, claimant said:

> Well, I've pulled muscles before, and I've always worked them out, and I've never had as much pain as this. Usually when you pull a muscle, you know, if it isn't pulled very bad, you can usually work it out. If you went down and reported every little accident, you would have more reports than what you would have injuries, actually, because they don't always last as long as this.

Testifying to later activities that day, claimant stated:

> Oh, when I was riding home, I could feel the soreness; and as I got out of the car, well, I had kind of a pull in my left leg, and I just kinda walked with a little bit of a limp. Then after that, when I went out to do chores, I went to pick up a basket of feed, and that's when I really noted a sharp pain, and it got worse.
>
> * * *
>
> So then I set it back down, and my wife continued to finish doing chores, and I just took it kinda easy. Then the next morning I still had pain, and I called in and told them I was going to come in to the plant doctor, which I did.

The following day claimant recounted speaking with the employment manager who instructed him to come to the plant, to make out a report and to see a doctor if he had not previously done so. Claimant testified to telling the plant nurse and J. N. Harten, M.D., of the Cherokee Clinic the story related above. When claimant filed his report he was apparently told it would not be compensable as his suffering pain also occurred when he picked up a basket of feed at home. Claimant, who missed ten days of work, was x-rayed, medicated and received twelve therapy treatments.

At the time of the appeal Leo Jordahl, labor relations manager, and Lottie Sweet, plant nurse, testified as to Wilson Foods Corporation's procedure for handling injuries.

Expert medical testimony was provided in the form of reports by J. N. Harten, M.D. and M.C. Myers, D.C. Although it appears that claimant told Dr. Harten he was injured at home, he later discussed the injury's compensability with the doctor. Dr. Myers' report deals with a running incident on November 27, 1976.

The claimant must prove by a preponderance of the evidence that the disability on which the claim is based was one arising out of and in the course of employment. *Lindahl v. L. O. Boggs,* 236 Iowa 296, 18 N.W.2d 607 (1945). A possibility is insufficient; a probability is necessary. *Anderson v. Oscar Mayer & Co.,* 217 N.W.2d 531 (Iowa 1974). Establishing causal connection is within the domain of expert testimony. *Bradshaw v. Iowa Methodist Hospital,* 251 Iowa 375, 101 N.W.2d 167 (1960). Claimant need not prove that an employment injury be the sole proximate cause of disability, but only that it is directly traceable to an employment incident or activity. *Langford v. Kellar Excavating & Grading, Inc.,* 191 N.W.2d 667 (Iowa 1971).

The fact that claimant suffered a second episode of pain as he was doing his chores after work does not defeat his claim. Under the rule enunciated by the Iowa Supreme Court in *Langford,* supra, the employment incident is not required to be the *sole* proximate cause of a claimant's disability. While both claimant and defendant's personnel in the case sub judice mistakenly may have believed that claimant's injury at work was not compensable because of subsequent pain suffered at home when claimant lifted a basket of feed, claimant has testified with specificity regarding an employment incident's causing a pull. This is the directly traceable incident found necessary in *Langford,* supra. Claimant has sustained his burden of proving an injury arising out of and in the course of his employment on October 19, 1976, resulting in temporary disability from October 20, 1976 through November 2, 1976, and entitling him to one week of compensation.

* * *

Signed and filed this 16 day of February, 1978.

ROBERT C. LANDESS
Industrial Commissioner

No appeal.

CAUSATION – SUBSEQUENT INJURY PROXIMATELY CAUSED BY INITIAL INJURY

RICHARD JOHN WATERS,

Claimant,

vs.

BACKMAN SHEET METAL WORKS,

Employer,

and

BITUMINOUS CASUALTY CORP.,

Insurance Carrier,
Defendants.

Decision on Appeal

This is an appeal brought by the employer, Backman Sheet Metal Works, Inc., and its insurance carrier, Bituminous Casualty Corporation, seeking a review under the provisions of Rule 500-4.26, Iowa Administrative Code, and §86.24 of the Iowa Workmen's Compensation Act of an arbitration decision wherein the claimant, Richard John Waters, was awarded benefits under the Workmen's Compensation Act for injuries he sustained on December 19, 1975.

* * *

Claimant's injury occurred on December 19, 1975 at the Swift Soybean plant where the claimant and four fellow employees had been sent to install dryers. Claimant testified to two episodes of sharp pain in his left knee on that date. The first happened prior to his morning break while he was straddling an "A" frame tightening bolts on a soybean dryer; the second, when he started to sit down in the boiler room of the Swift plant to have lunch. On December 30, 1975 claimant had surgery performed by Peter Wirtz, M.D., to remove the medial meniscus of the left knee.

Defendants contend that the arbitration decision is not supported by the medical evidence with respect to causation and that claimant was not within the course of his employment at the time of the alleged lumch period incident.

The claimant's attestation to two pain-producing incidents is analogous to the situation in *DeShaw v. Energy Manufacturing Co.,* 192 N.W.2d 777 (Iowa 1971), where the Iowa Supreme Court dealt with two separate incidents which produced pain in the claimant's back. The court first cited *Oldham v. Scofield & Welch,* 222 Iowa 764, 767-68, 266 N.W. 480, 482 (1936), for the proposition that "the employer is liable for all consequences that naturally and proximately flow from the accident." The court, at 780, went on to find that a claimant in Mr. DeShaw's position would have to 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) was proximately caused by the first injury."

The claimant must prove by a preponderance of the evidence that his injury arose out of and in the course of his employment. *Musselman v. Central Telephone Co.,* 261 Iowa 352, 154 N.W.2d 128, (1967). "Arising out of" suggests a causal relationship between the employment and the injury. *Crowe v. DeSoto Consolidated School District,* 246 Iowa 402, 68 N.W.2d 63 (1955). When "there is sufficient evidence to support the conclusion that there was reasonable probability claimant's condition . . . was caused or contributed to by his employment, there can be no question of its 'arising out of' his employment." *Burt v. John Deere Waterloo Tractors Works,* 247 Iowa 691, 700, 73 N.W.2d 732, 737 (1956). Whether or not an injury "arose out of" employment is essentially determined by expert testimony. *Musselman v. Central Telephone Co.,* supra. The Iowa Supreme Court in *Burt v. John Deere Waterloo Tractor Works,* supra, indicated that the correct rule is that the testimony of the expert must be taken in its entirety along with all other testimony bearing on a causal relation.

The claimant's testimony as to the first injury was that prior to his morning coffee break, he was straddling an "A" frame. As he moved to change position he felt a pain in his knee. The claimant's medical expert, Dr. Wirtz, testified in response to a hypothetical question regarding the "A" frame incident that "an internal derangement is caused by knee flexion and rotation and this patient's history is one that would be compatible with the type of an injury which would cause such an internal derangement of the knee." This first injury on the "A" frame was "an initiating cause" which became asymptomatic and a later second injury further tearing the cartilage caused the limitation of knee motion which was apparent at lunch time. The doctor's relevant testimony relating the first injury to the second was that:

> [a]s the cartilage becomes torn, of course, there has to be an initiating cause and many times there is an initiating cause that becomes asymptomatic in that there is another minor injury that caused another injury to the cartilage that may become asymptomatic for a period of time and then there may be another slight injury that causes such an injury that there is disability; in other words, inability to extend or fully flex the knee. Assuming this history of the episode where the knee was flexed and he had the searing pain, this was probably an injury to the knee that, you know, caused an injury to the cartilage and then, as it was stated, the patient was capable of continuing his activity until the point when it was again injured and then it was torn to the point where the cartilage was in between the condyles of the joint causing the disability.

Claimant's co-workers said that claimant's gait prior to beginning work was normal. Later in the morning before coffee break, one fellow employee observed that claimant was limping and appeared to be in pain and that he was also limping when he came in to lunch. The totality of the testimony is sufficient to establish a causal relationship between the employment and the injury. Because the initial injury happened during a work period while the claimant was working on the dryer, the subsequent injury which was proximately caused by the initial injury is compensable as one arising out of and in the course of employment.

While the evidence substantiates an injury occurring on the "A" frame, the same result would be reached in this case had claimant been injured during his one-half hour lunch period. Defendants argue that an injury during the lunch period is not within the course of employment and that claimant was not on the premises. It is well established that "an employee does not cease to be in the course of his employment merely because he is not actually engaged in doing some specifically prescribed task, if, in the course of his employment, he does some act which he deems necessary for the benefit or interest of his employer." *Crowe v. DeSoto Consolidated School District,* supra. It is equally well established that "[a]n injury occurs in the course of the employment when it is within the period of the employment, at a place where the employee may reasonably be in performing his duties, and while he is fulfilling those duties or engaged in doing something incidental thereto." *Bushing v. Iowa Railway & Light Co.,* 208 Iowa 1010, 1018, 226 N.W. 719, 723 (1929).

Defendants argue that the premises of the employer are confined to the dryer upon which they were working and did not extend to the boiler room. The record indicates that the boiler room is where claimant and his co-employees regularly took their coffee and lunch breaks while working on this job site.

The boiler room was on the premises of the Swift plant where the claimant was working. It was 50-60 yards away from the dryer upon which claimant was working and a part of the total remodeling being done to the plant. Since no specific place was provided for breaks to be taken, it is not unreasonable to assume that on December 19 an employee would avail himself of a location that would provide him shelter while on such breaks. The boiler room apparently was such a place and not an unreasonable distance from the dryer to take the claimant out of his employment.

Professor Larson in 1 Larson, *Workmen's Compensation Law,* §21.21a (1972), points out that:

> (i)njuries occurring *on the premises* during a regular lunch hour arise in the course of employment, even though the interval is technically outside the regular hours of employment in the sense that the worker receives no pay for that time and is in no degree under the control of the employer, being free to go where he pleases.

In this situation although claimant was not required to remain on the premises for lunch, in reality, the short period of time allotted for eating and the absence of nearby restaurants in effect left the workers with no choice. The boiler room was not equipped with tables or chairs, and the employees who ate there were subject to the traditional hazards of the industrial setting. It can be argued that by remaining on the premises the claimant was indirectly benefiting the employer. If claimant had gone out to lunch, there would be a danger that he might not return on time with a resulting loss in work time. Under these circumstances, an injury to claimant during his lunch period would arise in the course of employment.

* * *

Signed and filed this 16 day of March, 1977.

ROBERT C. LANDESS
Industrial Commissioner

No appeal.

Additional Cases — Arising out of section, supra.

CHILDREN

COMPENSATION — AGREEMENTS

RICHARD LEE HALFERTY II,

Claimant,

vs.

ROLLINGS CONSTRUCTION,

Employer,

and

UNITED STATES FIDELITY AND GUARANTY COMPANY,

Insurance Carrier,
Defendants.

Arbitration Decision

This is a proceeding in arbitration brought by the claimant, Richard Lee Halferty II, against Rollings Construction, his employer, and United States Fidelity and Guaranty Company, the insurance carrier, to recover benefits under the Iowa Workmen's Compensation Act by virtue of an alleged industrial injury which occurred on July 23, 1975.

* * *

Claimant, age 21 and single, was employed as a pipeline laborer on July 23, 1975, when he fell from the rear of a truck which was being used to transport pipe. Claimant was taken to the Lucas County Memorial Hospital where he came under the care of James P. Wilson, M.D., a family practice physician. The fall resulted in the claimant's being unconscious for an undetermined interval. The doctor's examination disclosed the claimant as being confused and very apprehensive. The claimant also had multiple abrasions and contusions, especially over the shoulders, arms and upper torso. The claimant was discharged from the hospital August 9, 1975, and due to continuing complaints of headaches, Dr. Wilson referred the claimant to Robert C. Jones, M.D., a neurosurgeon. Dr. Jones prescribed cervical traction but could find no evidence of a permanent injury. A further referral was made to the Mayo Clinic, and Robert S. Cofield, M.D., an orthopedic surgeon, reported as follows:

> On my examination there was normal cervical and lumbar spine motion. He was tender over the entire perispinal muscles. There was no spasm, however. There was no demonstrable weakness. Straight leg raising tests were negative. Spinal x-rays revelaed a grade I spondylolisthesis of L5 with a spina bifida occulta in addition. Skull films were normal. Additional studies included chest x-ray, a hematology grouping, a serology, a sedimentation rate, and a urinalysis all of which were normal. I felt that he had some residual muscular and ligamentus tenderness from his injury, that he should continue with a home program of physical medicine and analgesics. I discussed the nature of spondylolisthesis with him and suggested that he should consider returning to work at this time. (Claimant's Exhibit 5)

On October 27, 1975, the claimant requested and received a release to accept light duty. The claimant continued under the care of Dr. Wilson, who was particularly concerned about the lumbar muscle spasms he found. Dr. Wilson saw the claimant professionally on January 16, 1976, and suggested the claimant go to Iowa City Hospitals for a brain scan since the complaints of headaches continued.

The claimant accepted employment on October 29, 1975, as a guard for the Lewis System, and on December 3, 1975, enrolled in the Des Moines Area Community College, carrying eleven quarter hours of study.

Stanley Lamphers, a practicing attorney who was in the past personnel director for Hy-Vee Foods, testified as the expert witness as to the claimant's capacity to find employment. He expressed the opinion that 50% of the jobs available to the claimant would be denied him because of the type of injury sustained by the claimant.

The issues requiring determination are numerous. The first is that of the affirmative defense filed by the defendant employer alleging that the claimant's injuries were the result of intentional acts of co-employees.

This record does not contain a scintilla of evidence in support of this allegation, which must therefore fail.

The claimant has the burden of proving by a preponderance of the evidence that the injury of July 23, 1975, is the cause of his disability on which he now bases his claim. *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. 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 medical testimony. *Bradshaw v. Iowa Methodist Hospital,* 251 Iowa 375, 101 N.W.2d 167. The claimant has sustained his burden of proof.

There is testimony and documentary evidence that the defendant employer paid some type of benefits. However, as previously noted, no filings were made by the defendant employer prior to the commencement of litigation. No Memorandum of Agreement as contemplated by Section 86.13, Code (1975), was filed nor was a Form 5 submitted as contemplated by Rule 500--3.1 of the Iowa Industrial Commissioner. It is clear that an attempt has been made to circumvent the filing requirements of Chapters 85 and 86, Code (1975) by the defendant employer in that the payments so made were made contradictory to the filing requirements.

The next issue requiring determination is the status of such payments as made by the defendant employer.

The commissioner cannot approve an unfiled agreement without terms upon which he can test their legality in accordance with Chapters 85 and 86, Code. A memorandum susceptible to the commissioner's consideration does not become so unless and until it meets the requirements of Section 86.13, Code, supra. *French & Hecht v. Robert C. Landess Ind. Comm. and Robert Wilmington,* Polk County District Court CE6-2932, filed September 15, 1976, by Anthony M. Critelli, Judge, Fifth Judicial District of Iowa.

It follows then that the payments made by the defendant employer cannot now receive consideration in determining its liability of the claimant.

* * *

Signed and filed this 7 day of January, 1977.

HELMUT MUELLER
Deputy Industrial Commissioner

No appeal.

Additional Case Page

CONCLUSIVELY PRESUMED DEPENDENTS

CONFIDENTIAL OR PRIVILEGED INFORMATION

CONTESTED CASES – APPEAL TO INDUSTRIAL COMMISSIONER

CONTESTED CASES – APPEARANCE

CONTESTED CASES – COMPLETION OF RECORD

ELEANOR FRANK, wife of
AMBROSE FRANK, Deceased,

Claimant,

vs.

W. R. D. PIPELINE CONSTRUCTION CO., INC.,

Employer,

and

TRAVELERS INSURANCE COMPANY,

Insurance Carrier,
Defendants.

Order

NOW on this 15 day of December, 1977, claimant's Application To Extend Time Within Which To Complete The Record And To Take Further Expert Evidentiary Testimony comes on for ruling.

The evidence will be limited to the depositions of the physicians referenced in the letters of both counsel, received November 16, 1977. The parties were informed by ruling at the time of the hearing that unless exceptional circumstances could be shown, the medical evidence would be limited to the doctors referenced in the above noted letters. No exceptional circumstances showing merit are recited. The parties were informed their decisions as to all evidence were to be made on the date of trial or hearing. The parties were directed to arrive at independent decisions as to medical witnesses and inform the undersigned by letter no later than November 16, 1977. This was to resolve all matters relevant to Rule 500-4.31 IAC and a prior order of November 8, 1977. (See also Rule 500-2.1 IAC). The letters of November 16, 1977 resulted. Such action was taken to prevent the selection of doctors, ad infinitum.

Claimant's request is contrary to the prior ruling and its intent. Although the prior ruling disposes of claimant's request, as claimant presents nothing that was not considered in that request, claimant's request must be denied. Claimant's need for a cardiologist should have been considered when preparing the case, not at this late date.

Claimant's application is overruled.

Signed and filed this 15 day of December, 1977.

ALAN R. GARDNER
Deputy Industrial Commissioner

No appeal.

**CONTESTED CASES –
LACK OF PROSECUTION** Page
Shelby v. Iowa School for the Deaf 21

CROSS PETITION

LOIS A. MCCOY,

Claimant,

vs.

STEWART MEMORIAL HOSPITAL,

Employer,

and

ARGONAUT INSURANCE COMPANIES
and U.S. FIRE INSURANCE COMPANY,

Insurance Carrier,
Defendants.

Order

NOW on this 4 day of October, 1977, defendant United States Fire Insurance Company's Motion to Dismiss Cross-Petition of Argonaut Insurance Company and the defendant Argonaut Insurance Company's Resistance thereto comes on for determination.

Although actions against each insurer of the defendant are alleged in the same petition, the allegations indicate two distinct injuries occurring at times when each insurer was independently on the risk. Each claim of claimant is susceptible to separate determination. Nothing appears which would make the defendant United States Fire Insurance Company responsible for the injury occurring at the time the defendant Argonaut was on the risk. A determination of the resultant effect of each injury could be made in separate hearings on each injury even if claimant had not combined the allegations in the same petition. Claimant's decision to try, and defendant's acquiescence in trying the injuries together, does not create any right contemplated by the use of a "cross-petition" (cross-claim) under RCP 33. RCP 33 is an inappropriate proceeding for the instant set of facts.

THEREFORE, defendant Argonaut's cross-petition is dismissed.

Signed and filed this 4 day of October, 1977.

ALAN R. GARDNER
Deputy Industrial Commissioner

No appeal.

DEATH CASES – DEPENDENTS

MARTHA ADAMSON,

Claimant,

vs.

WAYNE SAMPLE,

Employer,

and

MFA INSURANCE COMPANY,

Insurance Carrier,
Defendants.

Arbitration Decision

This is a proceeding in arbitration brought by the claimant, Martha Adamson, to recover compensation under the Workmen's Compensation Act by virtue of the death of the claimant's decedent, Carl J. White, on December 4, 1973.

* * *

The issues for determination herein are whether the claimant is a dependent of the decedent, Carl J. White, and if the claimant is a dependent, the extent of her dependency upon the decedent.

* * *

Claimant, Martha Adamson, is the married daughter of Carl White, decedent. On December 4, 1973 Carl White received an injury resulting in his death arising out of and in the course of his employment with Wayne Sample.

Claimant, Martha Adamson, the youngest of six children of Carl J. and Hallie White, was born on April 8, 1953. Carl J. White had been married previously and had two children from that union. The only claimant in this case is Martha Adamson. The claimant was married to Robert Adamson on January 2, 1970. On December 4, 1973, the claimant and Robert had two daughters. Robert was employed part-time at the Holiday Inn at Ottumwa. During the period from 1970 to 1973, the claimant and her husband lived with the decedent either at the home of the decedent and his deceased wife, Hallie White, who died in 1972, or at a mobile home which was held in the name of Robert Adamson. After his spouse's death, the decedent's marital domicile was sold for taxes. About October 1973 the decedent, the claimant and her husband then moved into a mobile home. The decedent made the down payment on the mobile home. He paid $88.97 per month to the lending institution for payments, paid $37.50 per month to the mobile home court for lot rental, and paid about $75.00 per month toward the grocery expenses. He also bought clothes, shoes and a bed for the claimant's elder daughter and paid for towels and diapers for the younger daughter. The claimant's decedent provided transportation to the claimant's husband so that he could go to and return from work at the Holiday Inn. He would let the claimant use the car. At the time of Carl White's death, Robert Adamson received $75 to $100 every two weeks in wages at the Holiday Inn.

The claimant's decedent shared his meals with the claimant and her family. Claimant did decedent's laundry and cleaned the premises.

Section 85.44, Code of Iowa, provides:

> Payment to actual dependents. In all other cases, a dependent shall be one actually dependent or mentally or physically incapacitated from earning. Such

status shall be determined in accordance with the facts as of the date of the injury. In such cases if there is more than one person, the compensation benefit shall be equally divided among them. If there is no one wholly dependent and more than one person partially dependent, the compensation benefit shall be divided among them in the proportion each dependency bears to their aggregate dependency.

Section 85.31(1), Code of Iowa, provides:

Death cases--dependents.

1. When death results from the injury, the employer shall pay the dependents who were wholly dependent on the earnings of the employee for support at the time of his injury, during their lifetime, compensation upon the basis of eighty percent per week of the employee's average weekly spendable earnings, commencing from the date of his death as follows:

a. To the 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 benefits.

b. To any child of the deceased until the child shall reach the age of eighteen, provided that a child beyond eighteen years of age shall receive benefits to the age of twenty-five if actually dependent, and the fact that a child is under twenty-five years of age and is enrolled as a full-time student in any accredited educational institution shall be a prima facie showing of actual dependency.

c. To any child who was physically or mentally incapacitated from earning at the time of the injury causing death for the duration of the incapacity from earning.

d. To all other dependents as defined in section 85.44 for the duration of the incapacity from earning.

The weekly benefit amount shall not exceed a weekly benefit amount, rounded to the nearest dollar, equal to sixty-six and two-thirds percent of the state average weekly wage paid employees as determined by the Iowa department of job service under the provisions of section 96.3 and in effect at the time of the injury, provided, that as of July 1, 1975; July 1, 1977; July 1, 1979; and July 1, 1981; the maximum weekly benefit amount rounded to the nearest dollar shall be increased so that it shall equal one hundred percent, one hundred thirty-three and one-third percent, one hundred sixty-six and two-thirds percent and two hundred percent, respectively, of the state average weekly wage as determined above; provided further, that such weekly compensation shall not be less than thirty-six dollars per week, then the weekly compensation shall be a sum equal to the full amount of his weekly earnings. Such compensation shall be in addition to the benefits provided by sections 85.27 and 85.28.

The evidence at the hearings of this matter showed that this claim is based upon the operation of §85.31(1)(d).

Dependency is related to the dependent's station in life. A showing of actual dependency does not require proof that, without decedent's contributions, claimant would have lacked the necessaries of life. The test is whether his contributions were relied on by the claimant to maintain claimant's accustomed mode of living. It follows that income from other sources is not necessarily inconsistent with a state of actual dependency. *Murphy v. Franklin County*, 259 Iowa 703, 145 N.W.2d 465, quoting Larson, *Workmen's Compensation Law*, Volume II, section 63.11, page 102.

Decedent's most important contribution to the claimant was housing, a significant amount of food, clothing and transportation to the claimant, her husband and her children. It is clear that the claimant's decedent received a roof over his head, his laundry, his meals and other basic comforts as part of his contribution. As outlined in *Murphy*, supra, dependency is related to the dependent's station in life. The record conclusively shows that but for the contributions by the claimant's decedent, the claimant would have had extreme difficulty in surviving at all. Much of the food, much of the transportation, many clothes, and virtually all of the housing was provided by the claimant's decedent. It is therefore found that the claimant, Martha Adamson, was dependent upon Carl J. White on December 3, 1973.

The next issue which must be determined is the extent and duration of this dependency. The record indicates that the claimant's husband provided roughly $75 to $100 per week in contribution. The decedent contributed groceries ($75), housing ($87.97 per month), rent ($37.50 per month), for a total of $127.47, and certain transportation and clothing expenses.

The approximate monthly contribution by the claimant's husband in December, 1973 was $378.87 [$87.50 (75 + 100 = 175 ÷ 2 = $87.50) x 4.33 (weeks) = $378.87]. The appropriate monthly contribution by the decedent was $250 [$75 (groceries) + $127.47 (housing) + transportation and clothing] for a total of $628.87. This means that the decedent was providing roughly 40% of the needs of the family unit, including the decedent. Discounting the decedent's own consumption of food, housing and transportation (which he would have expended in any case) it is found that Carl White contributed one-third of the claimant's support and that claimant was dependent upon him to that extent. See §85.33(3), Code of Iowa.

The next finding which must be made is the "duration of the incapacity from earning" as outlined in §85.31(1)(d).

There is insufficient evidence in the record to determine that the claimant was incapacitated from earning.

Defendant's counsel, on cross-examination, elicited from claimant that the claimant was physically normal, unhandicapped, and of average intelligence. There was no showing that the claimant was herself incapacitated from earning.

* * *

THEREFORE, it is ordered that the claimant take nothing from these proceedings.

* * *

Signed and filed this 23rd day of February, 1978.

JOSEPH M. BAUER
Deputy Industrial Commissioner

No appeal.

Additional Cases

DELARATORY RULINGS

DEFAULT

FRANCES SHERWOOD,

Claimant,

vs.

COLLINS RADIO COMPANY,

Employer,
Self-Insured,
Defendant.

Order

NOW on this 13 day of June, 1978, the claimant's motion for default comes on for ruling.

An examination of the Industrial Commissioner's files reveals an original notice and petition filed March 31, 1978 and delivered to the defendant on March 23, 1978 by certified mail, return receipt requested, alleging an injury of April 6, 1976. No answer has been filed. Claimant filed a motion for default on May 24, 1978 which has been on file over ten days, with no response filed by defendant.

It is therefore found that the defendant Collins Radio Company is in default for failure to timely respond to an original notice and petition as required by Rule 500-4.9, IAC. All aspects of the liability of the employer for the injury of April 6, 1976 are thus determined against them. A hearing will be set for the claimant to establish the damage sustained by the injury of April 6, 1976.

Signed and filed this 13 day of June, 1978.

ALAN R. GARDNER
Deputy Industrial Commissioner

No Appeal.

DEFAULT

DALE E. JENSEN

Claimant,

vs.

CONGER CONSTRUCTION COMPANY

Employer,

and

EMPLOYER'S INSURANCE OF WAUSAU

Insurance Carrier,
Defendants.

Ruling

On June 20, 1977, a deputy industrial commissioner ordered that an entry of default be entered against defendants for having failed to answer within the prescribed time. Industrial Commissioner's Rule 500-4.9 (86) states that an appearance must be filed "within twenty days after filing with the industrial commissioner of a copy of the original notice and petition . . ." The original notice and petition were filed with the industrial commissioner on May 6, 1977. On July 5, 1977, defendants moved to set aside the default. In their motion defendants recited the train of events which caused the delay. This recitation appears to be a fair statement of the facts. The original notice was served upon C. T. Corporation, defendant employer's registered agent on May 13, 1977. (The sheriff returned the petition and original notice on May 24, 1977.) The Des Moines office of C. T. Corporation sent the papers to the Minneapolis office of that corporation which sent them to the general counsel for the defendant Conger Construction Company. Then, on May 20, 1977 the general counsel sent the original notice and petition to the Conger Construction Company. Between May 23 and May 25, 1977, defendant Conger received the original notice and petition and in turn forwarded it to the insurance company office in Des Moines.

An affidavit signed by Mr. Rich Van Vleet, claim supervisor for the insurance company, states that the insurance company never received the original notice and petition. An affidavit by Mr. William Pickard, an employee of Conger Construction Company, states that he gave the original notice and petition to the Des Moines office of the insurance company. In his affidavit, Mr. Keeler states that he mailed the notice and petition to the insurance company's office in Des Moines.

Claimant filed his resistance to the motion to set aside the default, both parties filed a memorandum of authorities, and oral arguments were waived. It appears that the registered agent of employer and the employer were not particularly speedy in sending the matter to the insurance company; however, they acted within or nearly within the prescribed time. The insurance carrier, of course, had no knowledge of the filing of the original notice and petition and therefore was unable to take any action. The facts show that the default may be set aside in accordance with the requirements of rule 236, Rules of Civil Procedure. Also, the facts show that the action of the employer's agent and the employer were within the general requirements stated for excusable neglect found in *Dealers Warehouse Co. v. Wahl & Associates,* 216 N.W. 2d 722 (Iowa 1974) and *Hobbs v. Martin Marietta Co.,* 257 Iowa 124, 131 N.W. 2d 722 (1964).

WHEREFORE the order of default entered on June 20, 1977 is hereby set aside.

Signed and filed at Des Moines, Iowa this 2 day of September, 1977.

BARRY MORANVILLE
Deputy Industrial Commissioner

No Appeal.

DEFENSES – WILLFUL INJURY BY EMPLOYEE

LAVERNE FELDER,

Claimant,

vs.

HOWARD STEEL COMPANY,

Employer,

and

BITUMINOUS INSURANCE COMPANIES,

Insurance Carrier,
Defendants.

Decision on Appeal

This is a proceeding brought by defendant employer, Howard Steel Company, and its insurance carrier, Bituminous Insurance Companies, pursuant to Iowa Code §86.24 appealing an arbitration decision wherein it was found that claimant's injury arose out of and in the course of his employment on September 16, 1976.

* * *

The parties stipulated the sole issue to be determined at the arbitration was whether or not the injury to claimant arose out of and in the course of his employment for defendant employer.

On September 16, 1976 claimant was assigned to work on an angle cutting machine and a co-worker, Lloyd J. Mohr, was assigned to a rebar bending machine which was approximately 15 feet from claimant's machine. The angles used by claimant and the air hose used by Mohr to blow metal chips off his machine were located between the two men. Mohr testified that claimant threw some angles on the air hose. After uncovering the hose, Mohr said he asked claimant not to cover it again. Later, Mohr's air hose and claimant's angles again became tangled resulting in an altercation between the two men. At this point the witnesses' views of what transpired became divergent.

Claimant testified Mohr:

> . . .came stomping across there yelling at me, and I couldn't understand what he was yelling. It was noisy. At the same time, he just inhaled like that, spitting at a fellow, and walked right on up to a fellow's face and spit right into it. Well, by the time I had turned around, I couldn't get any action. The only action I could do was reach up and cover my face and wipe the spit off.

After that claimant said Mohr "plowed him" with his fist knocking him against the machine and finally onto the floor.

Mohr reported that he "just slobbered" on claimant because he had false teeth and that when he got mad and talked, he slobbered. Following the slobbering Mohr stated "he [claimant] slapped me in the face, knocked my glasses off. I pushed him away, and that's when he stumbled backwards and half fell down."

Two co-workers gave their perceptions of what occurred. Donald Teal saw the incident from 20-25 feet away and did not see any spitting although he thought he would have been able to do so. He saw claimant make a half-swing, Mohr's glasses fly off, and claimant's being shoved and falling. Harry Matelski, who was about 30 feet from claimant, heard arguing and witnessed Mohr's push, Mohr's glasses being knocked off, and Mohr's pushing claimant which he thought resulted in claimant's staggering but not falling. It is unnecessary to determine whose version of the incident is to be believed for reasons developed below.

Defendants argue on appeal that *Ford v. Barcus,* 261 Iowa 616, 155 N.W.2d 507 (1968) and *Wittmer v. Dexter Manufacturing Co.,* 204 Iowa 181, 214 N.W. 700 (1927) are applicable here on the basis that claimant's conduct constituted horseplay. These cases stand for the proposition that an employee who voluntarily initiates and aggressively participates in horseplay and who is injured does not sustain an injury arising out of and in the course of his employment. The facts of *Ford* and *Wittmer,* supra, are distinguishable from the case sub judice.

Claimant has the burden of proving by a preponderance of the evidence that the injury on September 16, 1976 arose out of and in the course of his employment. "In the course of" relates to the time, place and employment circumstances surrounding the injury. *Sister M. Benedict v. St. Mary's Corp.,* 255 Iowa 847, 124 N.W.2d 548 (1963). "Arising out of" implies some causal relation between the employment and the injury. *Volk v. International Harvester Co.,* 252 Iowa 298, 106 N.W.2d 649 (1960).

The situation here presented is one in which the subject matter leading to the assault forms the causal link with the employment. Professor Larson in *The Law of Workmen's Compensation,* §11.12 at 3-132 (1972 ed.) states:

> . . . it is universally agreed that *if the assault grew out of an argument over the performance of the work* the possession of the tools or equipment used in the work, delivery of a paycheck, quitting work, trying to act as peacemaker between quarreling co-employees, and the like, the assault is compensable. (emphasis supplied)

See also, cases cited by Larson within this section. The physical contact between claimant and Mohr resulted from the dispute over the location of Mohr's air hose and the performance of the men's work, thereby placing this action in the universally compensable area of assaults with subject matter linkage to employment.

Defendants have raised the affirmative defense provided in Iowa Code §85.16(1) which reads: "No compensation under this chapter shall be allowed for an injury caused: 1. By the employee's willful intent to injure himself or to willfully injure another." The key phrase to be interpreted is what constitutes "willful intent to injure." Larson in his treatise, supra, at 3-155 suggests the phrase contemplates

"behavior of greater deliberations, gravity and culpability than the sort of thing that has sometimes qualified as aggression." According to Larson, the factors to be examined in evaluating this defense are: the seriousness of claimant's initial assault and the weighing of premeditation against impulsiveness. Larson sees consistency in decisions construing "willful intent to injure" in that "[p]rofanity, suffering, shoving, rough handling, or other physical force not designed to inflict real injury" do not arise to the requisite degree of seriousness.

Applying these principles to the case sub judice, the alleged initial blow delivered by claimant is variously described by the witnesses with claimant saying it was not a blow at all, Mohr saying it was a blow from claimant's fist, and Teal saying it was a half-swing. It should be noted that at the time of confrontation leading to this incident, it was Mohr who went to claimant's work area which seemingly negates premeditation on claimant's part. While any physical violence in the work situation is to be deplored, actions of claimant do not reach the status of severity necessary to be designated as a "willful intent to injure."

* * *

THEREFORE, it is ordered:

That this matter be assigned for hearing regarding the extent of claimant's disability and medical expenses resulting from the September 16, 1976 injury.

* * *

Signed and filed this 30 day of January, 1978.

ROBERT C. LANDESS
Industrial Commissioner

No appeal.

DEFENSES – WILLFUL INJURY BY EMPLOYEE

REDGINALD DeWAYNE CADY,
Deceased,
ROBERTA KAY CADY, Widow,

Claimant,

vs.

CEDAR RAPIDS COMMUNITY SCHOOL,

Employer,

and

BITUMINOUS CASUALTY CORP.,

Insurance Carrier,
Defendants.

Review Decision

This is a proceeding brought by defendants, Cedar Rapids Community School, and its insurance carrier, Bituminous Casualty Corporation, seeking a review of an arbitration decision pursuant to §86.24 of the Iowa Workmen's Compensation Act, wherein claimant, Roberta Kay Cady, spouse of a decedent, was awarded compensation for the death of Redginald DeWayne Cady.

* * *

Decedent, Redginald D. Cady, and a third party, Graydon A. Caslavka, were hired by defendant employer in September, 1974. Eventually both men were assigned to Harding School. On the date of decedent's death, he and Caslavka arrived for work at about the same time and parked their vehicles in an area designated for custodians. Testimony by Paul L. Loeffelholz, M.D. indicated as the two arrived, Cady drove his car close to Caslavka's and made the remark, "I almost got you that time." Police reports indicate Caslavka had decided to carry a gun for protection; and, when he was confronted by decedent "looking bug-eyed", he drew the gun, fired and then threw the gun in the grass. Decedent died following this incident.

The issue on appeal is whether or not decedent's injuries and subsequent death arose out of and in the course of his employment.

In order to receive compensation a claimant must prove by a preponderance of the evidence that his injury arose out of and in the course of his employment. *Musselman v. Central Telephone Co.,* 261 Iowa 362, 154 N.W.2d 128 (1967). "In the course of" the employment refers to time, place and circumstances of the injury. *McClure v. Union County,* 188 N.W.2d 283 (1971). "An injury occurs in the course of employment when it is within the period of employment, at a place where the employer reasonably may be performing his duties, while he is fulfilling those duties or engaged in doing something incidental thereto." *Bushing v. Iowa Railway & Light Co.,* 208 Iowa 1010, 1018, 226 N.W. 719, 723 (1929).

The general rule stated in 1 Larson, *Workmen's Compensation Law,* §15 at 4-2 (1972) [hereinafter, Larson] is "[a]s 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 . . . are compensable . . . ."

> 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* . . . (emphasis added) Code of Iowa §85.61(6).

The section previously has been interpreted to include employer-controlled parking lots. *Smith v. A.R.A. Hospital Food Management, Inc.,* 28th Biennial Report, Iowa Industrial Commissioner, 98; *McGhghy v. Keokuk Electro-Metals Co.,* 27th Biennial Report, Iowa Industrial Commissioner, 49. These holdings are in line with the majority position that parking lots owned or maintained by the employer for its employees are found to be within the company premises. 1 Larson, §15.41 at 4-41.

The record here shows the injury occurred in the school parking lot which was adjacent to the school building and which was specifically designated and posted for use by custodians and other staff. It was in this lot that decedent and his co-employee, Caslavka, parked their vehicles before beginning work. It is beyond question that this area is part of the defendant employer's premises leading to a finding that decedent's injuries were incurred in the course of his employment. This finding is further strengthened by the

fact that Caslavka, who ordinarily started work after decedent, on this particular day, was given explicit instructions by defendant employer to report to work early so that he might make up lost time. Caslavka's presence in the parking lot was in response to this specific request.

In addition to proving that an injury happened in the course of employment, claimant must show that it arose out of the employment. *McClure v. Union County,* 188 N.W.2d 283 (Iowa 1971). "Arising out of" suggests a causal relationship between the employment and the injury. *Crowe v. DeSoto Consolidated School District,* 246 Iowa 402, 68 N.W.2d 63 (1955). When "there is sufficient evidence to support the conclusion that there was reasonable probability claimant's condition . . . was caused or contributed to by his employment, there can be no question of its 'arising out of' his employment." *Burt v. John Deere Waterloo Tractor Works,* 247 Iowa 691, 700, 73 N.W.2d 732, 737 (1956). Whether or not an injury "arose out of" employment is essentially determined by expert testimony. *Musselman v. Central Telephone Co.,* supra. However, the testimony of the expert taken in its entirety must be considered along with other testimony bearing on a causal relation. *Burt v. John Deere Waterloo Tractor Works,* supra

The subissue to be decided is whether or not an assault by a co-employee is compensable under the Iowa Workmen's Compensation Act.

Dr. Loeffelholz, a psychiatrist and clinical director at the Iowa Security Medical Facility, first saw Caslavka on referral for psychiatric evaluation. At the time of Dr. Loeffelholz's deposition, Caslavka was a patient in the facility. The history related by the doctor indicated a great deal of suspicion on the part of Caslavka including the idea that a hit man was after him because of his involvement with women, that truckers were talking about him on their radios, that he was being set up by women in bars for assault and that it was necessary for him to carry guns. The doctor's diagnosis was schizophrenia with a delusional kind of thinking which was inconsistent with reality. In the doctor's view the catastrophe "was primarily delusionally forced based on a personality who's somewhat suspicious, resentful."

Dr. Shultice, a psychiatrist who saw Caslavka in October, 1974, testified that Caslavka himself had described his feelings as paranoid. The patient's history revealed that he had left one job in Waterloo, Iowa because he thought everyone there knew about his past and that this knowledge of his past put him in personal danger. He moved to Madison, Wisconsin. He blamed loss of a job there on a woman psychiatrist with whom he had an emergency interview. Although his thinking was unclear, his anxiety was apparent, as Caslavka expressed fears that his seeing the doctor would cause him to lose his custodian's job and seemed to be seeking protection. Dr. Shultice's diagnosis was schizophrenia, paranoid type. He characterized schizophrenia as being "a syndrome in which there are disorders of thought, of tension, of . . . a condition called ambivalence present . . . a lack of clarity in the process of forming a person's thoughts." His testimony indicated that schizophrenia of the paranoid type "would predominently have features of false beliefs or delusions." He further characterized Caslavka as having "a major thought disorder or major mental illness" and expanded his definition of schizophrenia by calling it "one of the psychoses that has to do with reality testing and the lack of reality testing, ability to perceive what is real in a person's environment, evidences of the lack of that capacity or the ones that I mentioned, . . and, therefore, . . . that his capacity to test what is real is limited." The delusions which the patient suffered were persecutory; that is, "People were after him and they wanted to punish him". Medical testimony shows that Cady's employment environment placed him in contact with a co-employee who suffered from paranoid schizophrenia accompanied by delusions of persecution. Action by this co-worker caused decedent's death, which is held to have arisen out of his employment.

Larson suggests in §11.31 at 3-190 that willful assault may be divided into three groups: those having some inherent connection with the employment, such as work disputes, a lawless environment or the nature of the job; those personal to the employer; and those arising from blind or irrational forces, such as attacks by irresponsibles or attacks which are unexplained or mistaken.

Defendants allege that Caslavka's attack on his co-employee was for personal reasons. A case presenting a factually similar situation is *Cleland Simpson Co. v. Workmen's Compensation Appeal Board,* 332 A.2d 862 (Pa. Commw. Ct. 1975) in which claimant's decedent, McLaughlin, worked for five weeks with a co-employee, Evans, who, as Caslavka, suffered from paranoid schizophrenia with delusions. Evans' delusions resulted in a belief that he made dates with decedent which she failed to keep; therefore, he stabbed her thirteen times. Defendants sought to have the claim denied because the stabbing was based on personal grievances. The court at page 865 applying a statute which was essentially the same as Iowa Code §85.16(3) cited its own previous decision in *United States Steel Corporation v. Workmen's Compensation Appeal Board,* 10 Pa. Commw. Ct. 247, 309 A.2d 842 (1973) for the proposition that the workmen's compensation act "is remedial in nature and is to be liberally construed in favor of the employe and that the burden is on the employer to prove that the assailant intended to injure the claimant/employe owing to reasons personal to the assailant." An examination of the record convinced the court at page 865 that "[a]ll of Evans' reasons for his conduct were the result of his schizophrenic paranoid mental illness." Therefore the reasons for the attack were not *personal* within the exclusionary provisions of the Act. An award of compensation was affirmed by the court.

The defendant in *Pacific Employers Insurance Co. v. Industrial Accident Commission,* 139 Cal. App.2d 260, 293 P.2d 502 (1956) contended claimant's decedent's death did not arise out of and in the course of employment and in addition, contended as the defendant in *Cleland,* supra, that an employee's attack on his co-employee was for personal reasons. Decker and Schultz were co-employees who had worked together for nine or ten years. Schultz who was Decker's superior, was completely deaf and was presumed mute. Decker communicated with Schultz through sign language. The only contact between the two men was on

the job. There had been some friction between them with Schultz complaining that Decker was not producing enough work and with Decker purporting that Schultz was making mistakes and unfair allocations of the work load. One morning Schultz took a revolver from his desk, killed Decker, and astounded his fellow employees by responding verbally when he was asked why he had done it. Schultz was examined by a psychiatrist who discussed with him the reasons for the shooting. The doctor later testified that Schultz believed Decker was telling lies about him saying he was sexually perverted and was faking muteness. It was this doctor's opinion that Schultz was a paranoiac schizophrenic with delusions of persecution. The court's opinion at 265-266, 506 quoted the decision by the referee who found:

> [t]he most reasonable inference appears to be that the incident was the outgrowth of Schultz' delusions, which centered themselves around deceased because of the employment that these men were brought together and this situation was created. It is, then, comparable to the situation . . . where the injured employee was allowed to recover because employment put him in a place or position of peril or danger.

The award of compensation was affirmed with the California court finding no personal grievances.

On final analysis, *Cleland Simpson Co. v. Workmen's Compensation Appeal Board,* supra, *Pacific Employers Insurance Co. v. Industrial Accident Commission,* supra, would fall into the third category of cases described by Larson as those arising from blind or irrational forces.

The majority position is to award compensation for such injuries received in the course of employment. Larson cites the Connecticut Supreme Court's decision in *Anderson v. Security Building Co.,* 123 A. 843 (1924) at 844-45 as correctly stating the rationale behind these decisions as follows:

> When an employer puts an employee at work on a machine, although the employer may have exercised all reasonable care to provide that it is safe . . . which, without fault on his part, has a latent defect, which causes it to break down and injure the employee, the injury is unquestionably one arising out of a condition of his employment. It is immaterial, under the act, whether the employer knew or ought to have known of the existence of the dangerous condition. So in this case, although the employer may not have had knowledge actual or constructive that . . . [the co-employee] was insane and liable to run amuck, yet such liability . . . was in fact a condition under which the plaintiff was employed on the night in question, and if such condition of . . . [the co-employee] caused an injury to the plaintiff, as it did, then the injury arose out of his employment as truly as if it had arisen from the negligence of . . . [the co-employee] in doing his work.

Defendants' answer in the case sub judice asserts "that the injury and death of the Decedent was caused by the willful act of a third party directed against the employee, Redginald Cady, for reasons personal to such employee." Such an assertion falls within Iowa Code §85.16(3).

The 63rd General Assembly of the State of Iowa amended Iowa Code §85.61 (1966) by striking paragraph (b) of subsection 5 which read: "The words 'injury' or 'personal injury' shall be construed as follows: . . . b. They shall not include injury caused by the willful act of a third person directed against an employee for reasons personal to such employee, or because of his employment." At the same time, paragraph (b) of subsection 5 was stricken, the legislature added a new subsection to §85.16 (1966) which reads: "By the willful act of a third party directed against the employee for reasons personal to such employee." See S.F.1281 63d G.A.2d Sess. Ch. 1051 (1970). This rearrangement within the Workmen's Compensation Act indicates the intent of the legislature to move a provision which had been included in a definition section to a section covering willful injury. The willful injury section already contained two subsections and read: "No compensation under this chapter shall be allowed for an injury caused: 1. By the employee's willful intent to injure himself or to willfully injure another. 2. When intoxication of the employee was the proximate cause of the injury."

The willful injury section as it stood prior to this amendment was discussed by the Iowa Supreme Court in *Reddick v. Grand Union Tea Co.,* 230 Iowa 108, 296 N.W. 800 (1941). There the court said that once claimant sustains the burden of showing that an injury arose out of and in the course of employment, claimant prevails unless defendant can prove by a preponderance of the evidence an affirmative defense. The section added by the amendment was given similar treatment in *Everts v. Jorgenson,* 227 Iowa 818, 289 N.W. 11 (1939) with the court finding that the party relying on the section as an exception to the general rule must establish facts to bring the case within the exception.

Applying this discussion to this case on review, we find that claimant has carried her burden of showing that her spouse's death arose out of and in the course of his employment. Defendants must now establish their affirmative defense by showing by a preponderance of the evidence decedent's death was the result of a willful act by a third party directed against the employee for reasons personal to the employee.

A parade of witnesses testified the two men had no relationship other than that of co-employees. Decedent's spouse testified decedent had mentioned Caslavka on only one ocassion. Dr. Shultice testified that Caslavka mentioned neither his job, other than to say he liked it, nor Mr. Cady. Both the daytime and the nighttime supervisors testified the men rarely if ever worked together and neither knew of any argument or fights between the two. Testimony by John R. Huston, detective with the Cedar Rapids Police Department, indicated that Caslavka was not even aware of decedent's name until Huston told him. A report by Police Detectives Engrav and Fuller shows the weapon involved in this action was purchased by Caslavka October 8, 1974, a considerable period of time prior to the date he and decedent became co-employees. There is no indication that Caslavka's action was in response to a personal grievance. Defendants have failed to establish their affirmative defense by a preponderance of the evidence.

* * *

Signed and filed this 17 day of June, 1977.

ROBERT C. LANDESS
Industrial Commissioner

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

DEPENDENTS – ACTUAL Page

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DEPENDENTS – ADOPTED CHILDREN

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DEPENDENTS – CONCLUSIVELY PRESUMED

JUDITH LOU MONTGOMERY,
(Raymond, dec.) et al,

vs.

SMITTY'S TRUCK LINE,

Employer,

and

LUMBERMAN'S MUTUAL CASUALTY CO.,

Insurance Carrier,
Defendants.

Equitable Apportionment

This is a proceeding for Equitable Apportionment of workers' compensation benefits among the defendants of the deceased, Raymond George Montgomery.

* * *

An appearance was filed on behalf of Bruce Kyle Montgomery by Judy Carrol Montgomery as the next friend and natural parent. The appearance alleged that Bruce Kyle Montgomery was the natural child of the decedent. Bruce Kyle Montgomery was not named in the petition as a party. Floyd E. and George A. Montgomery, for whom service was had via Judy Carrol Montgomery, filed no appearance.

An appearance was filed by Judith Lou Montgomery as surviving spouse and as the mother and natural guardian of Dale Shane Mace, J. C. Mace, Arnold Brent Mace, and Jennifer Ray Montgomery.

At the hearing held Monday, April 17, 1978, petitioner appeared by its attorney, and Judith Lou Montgomery appeared with counsel on her own behalf, and on behalf of Dale Shane, J. C. and Arnold Brent Mace and Jennifer Rae Montgomery. Counsel for Bruce Kyle Montgomery did not appear, and had indicated his intentions not to appear by a letter.

The exact status of Bruce Kyle Montgomery as a party to this proceeding is not clear. The petition did not name him as a respondent. Service via his mother and natural guardian was not performed. He did, however, through the mother and natural guardian, file an appearance. Accordingly it is found that this tribunal has jurisdiction of him.

The status of Floyd E. and George A. Montgomery is likewise unclear. The two were named in the petition and service was sent to them via the mother and natural guardian. No appearance was filed on their behalf nor did they appear at the hearing. This tribunal holds, therefore, that as the two named respondents were listed on the petition and service was sent to the last known address of the mother and natural guardian, jurisdiction was obtained over the two named respondents. The mother and natural guardian apparently instructed counsel not to make appearance on behalf of the two named children.

Sections 85.42, 43 and 44, Code of Iowa, set forth the individuals who qualify for the title of "dependent". Thus the surviving spouse, and natural children under 18 years of age are "conclusively" presumed dependents. Judith Lou Montgomery is the surviving spouse. No evidence indicates any exception [see §85.42(1)(a) and (b), Code of Iowa] to her status. Jennifer Rae Montgomery is a natural child of the decedent and under 18 years of age on the date of injury causing death. Both Judith Lou and Jennifer Rae Montgomery are "conclusively presumed" dependents.

Dale Shane, J. C., and Arnold Brent Mace are, according to the evidence presented at the hearing, stepchildren of the deceased. The deceased provided the principle support for the children. Money sent to the three Mace children by their natural father was negligible. Accordingly the three Mace children are "conclusively presumed" dependent upon the deceased as provided in §85.42, Code of Iowa.

Bruce Kyle and George Allen Montgomery are not established as natural children of the decedent. No evidence whatsoever supports the allegations that Bruce Kyle Montgomery is a natural child of the decedent. Likewise no evidence indicates that George Allen Montgomery is a natural child of the decedent. No evidence was presented to indicate that the two named children were in any manner dependent upon the decedent. Accordingly, the two named children do not qualify as dependents under the Iowa Workers' Compensation Law.

Floyd Eugene Montgomery is shown by the birth certificate to be the natural child of the decedent. The birthdate on the certificate shows that Floyd was two days short of being 13 years old on the date of the decedent's death. Floyd Eugene Montgomery is thus found to be a "conclusively presumed" dependent under §85.42, Code of Iowa.

No evidence was presented to show that Floyd, Bruce, or George Montgomery were in any matter actually dependent on the decedent, in need of financial assistance, or in any other manner equitably entitled to any portion of the death benefits. Accordingly, insofar as any one of the three may be considered a dependent of the decedent, no equitable share of the death benefit is found to be due any of the named three children.

The three Mace children and Jennifer Rae Montgomery reside with the widow, Judith Lou Montgomery. The burden of support of the children is now solely upon the widow. The widow appears to have the interest of the four children in mind. It is the judgment of this deputy commissioner that the children will receive benefits from the weekly compensation if the weekly compensation is paid to the widow. Accordingly, the entire weekly benefit

is to be paid to the widow until death or remarriage. In the event either contingency occurs, the weekly benefit is to be divided in equal shares among the three Mace children and Jennifer Rae Montgomery who, at the time of the widow's death or remarriage, would not have had their entitlement under §85.31, Code of Iowa, terminated. Once the right to the weekly compensation benefits vests in the children, it shall be divided in equal shares among those entitled under §85.31, Code of Iowa. Thus, when any child's right to benefits terminates as provided in §85.31, Code of Iowa, the child's share is then to be equally divided among the remaining children still entitled.

* * *

Signed and filed this 9 day of May, 1978.

ALAN R. GARDNER
Deputy Industrial Commissioner

No appeal.

DEPUTY INDUSTRIAL COMMISSIONERS – REVIEW OF DECISIONS

MIKE CARTER,

Claimant,

vs.

QUINN MACHINERY,

Employer,

vs.

EMPLOYERS MUTUAL CASUALTY CO.,

Insurance Carrier,
Defendants.

Decision on Appeal

This is a proceeding brought by claimant, Mike Carter, pursuant to Iowa Code §86.24 for review of an arbitration decision filed January 26, 1977 denying him compensation.

* * *

Mike Carter, claimant, began working for Quinn Machinery in September of 1974. On October 16, 1974 claimant described his situation thusly:

> I shaking out the flask. Well, I wasn't shaking out. They kept stacking. I had just gotten everything all ready--shook out, and they were getting ready to pour the new molds and flask. They lay them with about as much--to conserve as much space as possible, and I was standing on one, and somebody said, "Look out." I was looking down. I just got it stacked, and somebody said, "Look out." They were coming in with the bucket to pour, and as I moved--. . .
>
> It was on a hoist, tipped and coming, getting ready to pour. As I looked up, I started to move to the right, and my right leg fell between two flasks. I started to fall forward, which they were pouring stuff, and I didn't want to get burned, so I twisted very sharply to the right, but my leg was pinned--. . . .
>
> Up to my thigh, or better. The whole force of the twist went in my lower back. Well, I could not pivot on the ball of my foot, which was my intention to do.

Other witnesses testifying in claimant's behalf were Lola Gail Van Wyk, the claimant's former wife, and Nancy Weiss, claimant's employee. Testifying in behalf of the defendants were Alan Gardner, Larry Paul Anderson and Harold C. Pingree. Medical testimony came from John A. Grant, M.D. and Thomas E. Kane, M.D.

Claimant's petition for review alleges that the deputy industrial commissioner "did not take into account the medical testimony in its entirety or Claimant's testimony or witnesses [sic] testimony with regards to [sic] the causal relationship between claimant's injury of October 16, 1974 and his present disability."

A claimant has the burden of proving by a preponderance of the evidence that his injury arose out of and in the course of his employment. *McClure v. Union County,* 188 N.W.2d 283 (1971). Whether an injury has a direct causal connection with the employment or arose independently of the employment is essentially within the domain of expert testimony. *Musselman v. Central Telephone Co.,* 261 Iowa 352, 154 N.W.2d 128 (1967). While the establishment of causal connection is "essentially" within the province of experts, the Iowa Supreme Court has repeatedly held that expert medical evidence must be considered with all other evidence.

The Iowa court in *Bradshaw v. Iowa Methodist Hospital,* 251 Iowa 375, 101 N.W.2d 167 (1960) at 383, 172 said that "medical testimony it is possible a given injury was the cause of subsequent disability or 'could have' caused it is insufficient, standing alone, to take such issue to the jury. Testimony indicating probability or likelihood of such causal relation is necessary." The court's awareness that "cautious medical evidence is not unusual" is evidenced in *Giere v. Aase Haugen Homes, Inc.,* 259 Iowa 1065, 1073, 146 N.W.2d 911, 915-16 (1966) by its recognition and approval of 2 Larson, *Workmen's Compensation Law,* §80.32 which states:

> The distinction between probability and possibility should not follow too slavishly the witnesses' choice of words, as sometimes happens in respect to medical testimony. A doctor's use of such words as 'might', 'could', 'likely', 'possible' and 'may have', coupled with other credible evidence of a nonmedical character, such as a sequence of symptoms or events corroborating the opinion, is sufficient to sustain an award. It is a common experience of compensation and personal injury lawyers to find that the more distinguished a medical witness is, the more tentative and qualified are his statements on the witness stand.

Although *Nellis v. Quealy,* 237 Iowa 507, 21 N.W.2d 584 (1946) was decided prior to either *Bradshaw* or *Giere,* it provides a good example of a doctor testifying that only *possibly* was there a causal connection between the foreign substance in the eye and the ultimate disability. The court noted at 512, 586 that [n]ot only must Dr. Martin's

testimony be taken in its entirety, but all other testimony bearing on the causal connection between the injury and the disability . . . . must be considered. The language in *Burt v. John Deere Waterloo Tractor Works,* 247 Iowa 691, 73 N.W.2d 732 (1956) is similar. Most recently in *Becker v. D & E Distributing Co.,* 247 N.W.2d 727, 730 (1976), the court found that " 'probability' may be inferred by combining an expert's 'possibility' testimony that the described condition of which complaint is made did not exist before occurrence of those facts alleged to be the cause thereof."

The finder of fact must not "arbitrarily or totally reject" testimony as "he has the duty to weigh it and determine its credibility." *Langford v. Kellar Excavating & Grading, Inc.,* 191 N.W.2d 667, 669 (Iowa 1971). The findings made "must be sufficiently certain to enable a reviewing court to ascertain with reasonable certainty the factural basis on which the administrative officer or body acted." *Catalfo v. Firestone Tire & Rubber Co.,* 213 N.W.2d 506, 509 (Iowa 1973).

The record presented by the case sub judice causes this commissioner to be concerned that the deputy industrial commissioner may have overlooked some evidence presented.

* * *

THEREFORE, the case is remanded to the deputy industrial commissioner to weigh and to consider all the evidence and particularly the lay testimony if he did not do so originally. If he did weigh and consider all the evidence, he should so state and his original findings shall stand. If he did not weigh and consider all the evidence, he should do so and render findings accordingly. Nothing in this order should be construed as indicating what the judgment should be.

Signed and filed this 26 day of July, 1977.

ROBERT C. LANDESS
Industrial Commissioner

No appeal.

Additional Cases

DISCOVERY – SANCTIONS

JORDAN R. THOMPSON,

Claimant,

vs.

R. J. WESTERMAN (Drive Inn Lumber Mart)
and
AMERICAN MUTUAL INSURANCE CO. OF BOSTON,

Insurance Carrier,
Defendants.

Order

NOW on this 30 day of September, 1977, defendants' request for sanctions against claimant comes on for ruling.

An examination of the pleadings, filings and testimony at the hearing on September 22, 1977 relevant to the motion in this matter indicates the facts are as follows.

Claimant's original notice and petition was filed November 15, 1976. On January 26, 1976 defendants filed interrogatories to claimant and a request for production of documents from claimant. Among other matters the interrogatories inquired into claimant's physical complaints as a result of the instant injury. Among other documents the request for production of documents sought "any written opinions" from any medical experts, "any medical bills" incurred by claimant since March, 1974, the month following the instant injury, and specified income tax records.

On May 9, 1977 claimant, by his attorney, filed a compliance with request for production of documents. No documents were attached. It was stated that Dr. Woodard's report would be sent to defendants when received. On May 31, 1977 claimant filed answers to interrogatories. No mention of a back complaint as a result of the instant injury was made, although claimant's leg was mentioned.

A prehearing conference was held in this matter before deputy commissioner Barry Moranville on July 21, 1977. Following this conference the deputy commissioner entered an order providing among other matters that:

1. Discovery be completed by September 14, 1977.
2. Witness lists be exchanged by September 14, 1977.
4. Claimant should comply with defendants' request to produce documents (filed January 26, 1977) by August 6, 1977.

Note is made that no motion to compel discovery was ever made. However, the failure to completely and fully answer the interrogatories and to respond to the request for production, when the matters sought were known or available at the time of answering the interrogatories and time of responding to the request for production, indicates a pattern of failure to properly respond to discovery.

Claimant testified at the hearing that although he had not informed his counsel that a bill of Dr. Sebek in the sum of $233 was outstanding, and that although Dr. Sebek had indicated a relationship between the claimant's leg injury of February, 1974 and some back problems, the claimant had received the bill a year ago. Claimant stated he had been informed by Dr. Sebek of a relationship of the back problem to the February, 1974 injury prior to May, 1977. The claimant also indicated he had continuously seen Dr. Sebek in the past year and received monthly bills, which would be in addition to the $233 bill from Dr. Sebek. No evidence indicated that defendant employer or insurer knew of Dr. Sebek's claimed treatment of claimant for the instant injury or claimant's claim that back difficulties were related to the instant injury until the receipt of an amendment by claimant to the original notice and petition mailed by claimant's counsel to defendants on September 16, 1977. Claimant also indicated the tax returns were available to claimant's counsel in May or June, 1977. No comments in this order are intended as indicative of a finding that any relationship exists between the knee injury of February, 1974 and claimant's back problems.

Claimant has therefore failed to fully furnish the above noted information available to him at the time of the first responses to the interrogatories and request for production. Claimant further failed to furnish the information by the time specified in the July 29, 1977 prehearing order. Note should be made that under RCP 125, even if claimant had not known or had the information or document available when the interrogatories were answered and "compliance" with production of document was filed, he had a duty to furnish the information when it became available.

A sanction is sought under Rule 500-4.36 IAC for failure to comply with orders and rules of the industrial commissioner. Claimant has failed to fully disclose information available to him and requested in interrogatories and a request for production of documents. Claimant has failed to comply with defendant's request for production in a timely manner after an order of this office. Several documents available to claimant were not furnished. A sanction is therefore appropriate in this issue alone.

It further appears that Dr. Woodard sent a report to claimant's attorney May 12, 1977. Claimant's attorney indicated he received the report shortly thereafter. The report was not disclosed to defendants until a second "Compliance With Request for Production of Documents" was sent to defendants on September 16, 1977. This is an improper compliance with the prehearing order as well as an improper compliance with Rule 500-4.18 IAC. A sanction is therefore appropriate on this issue.

This deputy commissioner notes a pattern of nondisclosure, for whatever motive, which cannot be ignored. The harshest sanction which could be applied is dismissal of claimant's original notice and petition, Rule 500-4.36 IAC, *Hoenig v. Mason & Hanger* 162 N.W.2d 188. However, defendants' principle concern is the issue dealt with in the amendment filed September 19, 1977. Most of the nondisclosure and noncompliance centered around the same matter raised in the amendment, claimant's claim for back problems.

Accordingly the sanction imposed is that claimant is barred from presenting any evidence of back difficulties claimed to be related to the February, 1974 injury. The decision to be rendered on the merits in this proceeding, which will by virtue of this order exclude a back condition, will be res judicata of matters occurring prior to that decision.

Costs of the motion are taxed to the claimant.

Signed and filed this 30 day of September, 1977.

ALAN R. GARDNER
Deputy Industrial Commissioner

Appealed to Commissioner; Affirmed.
Appealed to District Court; Affirmed.

Additional Case: Page

Tighe v. Morton Bldg. 242

DISFIRGUREMENT

RUTH TEVIS,

Claimant,

vs.

DOWELL'S PLEASANT HILL MANOR,

Employer,

and

U. S. FIRE INSURANCE COMPANY,

Insurance Carrier,
Defendants.

Review — Reopening Decision

This is a proceeding in Review-Reopening brought by Ruth Tevis, claimant, against Dowell's Pleasant Hill Manor, employer, and U.S. Fire Insurance Company, insurance carrier, for the recovery of benefits on account of an injury on May 28, 1976.

* * *

The issue to be determined is whether Claimant is entitled to permanent partial disability compensation.

On May 28, 1976, Claimant sustained burns on her right cheek, neck and right breast when a bottle of hot syrup exploded while she was working for Defendant Employer. She was treated for her injuries at Broadlawns Family Health Center by J. P. Morris, M.D. In a report dated September 9, 1976, Dr. Morris wrote:

> . . . the patient's burn has healed quite well and I do not believe that there will be any scarring or lasting effects from the burn. Ms. Tevis does complain

occasionally of shooting pains in the area of her breast: these pains are from regenerating nerves and should not be permanent . . . .

On January 26, 1977, Claimant was examined by Robert A. Modic, M.D., a dermatologist. His examination revealed:

> On examination she did indeed have hyperpigmentation of the right side of her face and the right side of her neck. Involving the entire medial anterior aspect of the right breast (upper inner quadrant) was an area of hyperpigmentation with mild scarring. Involving the medial inferior aspect (lower inner quadrant) of the right breast adjacent to the areola and extending radially for 4-5 cm was an area of more obvious scar tissue mixed with spots of hypopigmentation and hyperpigmentation.
>
> Impression: Pigmentary changes and scarring, historically from the thermal burn.

She was advised to use emollients to keep the area moist.

Although Claimant did not testify at the hearing, the first report of injury stated that she was a cook for Defendant Employer when the injury occurred.

Section 85.34(2)(t), Code of Iowa, provides:

> For permanent disfigurement of the face or head which shall impair the future usefulness and earnings of the employee in his occupation at the time of receiving the injury, weekly compensation, for such period as may be determined by the industrial commissioner according to the severity of the disfigurement but not to exceed one hundred fifty weeks.

The evidence offered by Claimant failed to prove that the permanent disfigurement to her face and head impaired her future usefulness and earnings as a cook. Additionally, the evidence failed to show that she sustained a permanent partial disability to her body as a whole which reduced her earning capacity as contemplated in *Olson v. Goodyear Service Stores,* 255 Iowa 1112, 125 N.W.2d 251, and *Barton v. Nevada Poultry,* 253 Iowa 285, 110 N.W.2d 660.

* * *

Signed and filed this 15 day of February, 1977.

DENNIS L. HANSSEN
Deputy Industrial Commissioner

No appeal.

DISMISSAL – LAÇK OF PROSECUTION Page

DOCTORS' REPORTS

ENID I. HONNOLD,

Claimant,

vs.

NATIONAL HANDCRAFT INSTITUTE, INC.

Employer,

and

CONTINENTAL INSURANCE CO.,

Insurance Carrier,
Defendants.

Review – Reopening Decision

This is a proceeding in review-reopening brought by the claimant, Enid I. Honnold, against National Handcraft Institute, Inc., the employer, and Continental Insurance Co., the insurance carrier, to recover additional benefits under the Iowa Workmen's Compensation Act by virtue of an injury which occurred on August 5, 1974.

* * *

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

Claimant, age 60, married with no dependent children, began her duties for the defendant employer September 4, 1969. She was required to operate a folding machine, including the loading and unloading of the paper stock used in production. On August 5, 1974 the claimant was placing paper material on shelving, using a step ladder for assistance. While so performing this assigned function, the claimant lost her balance, and while falling backwards, caught herself on an adjoining structure, preventing a fall to the floor. In so doing, the claimant felt a sharp pain in her lower back which became increasingly severe, requiring medical attention from Daniel F. Crawley, M.D. The claimant began to lose time from her employment on August 8, 1974. Dr. Crawley diagnosed the condition he found as a "sacro-iliac strain." (Joint Exhibit "M") On August 20 the claimant was seen by Peter Wirtz, M.D., an orthopedic surgeon, whose diagnosis was "musculo-skeletal strain, lower back," and after a series of shortwave therapy treatments, Dr. Wirtz released the claimant for duty on September 23, 1974. Upon return to work on September 23, 1974, the claimant suffered a recurrence of symptoms and began to miss time from her duties on September 30, 1974. Dr. Wirtz instituted a physical therapy program for a few weeks, releasing the claimant for a resumption of light duty on October 21, 1974. (Joint Exhibits "G" and "H")

The claimant kept up with her duties during the next four months; however, she did remain under the care of Dr. Wirtz. (Joint Exhibit "F") on February 27, 1975, while attempting to unjam a machine, the claimant reinjured her lower back. She spent all of the month of March and part of the month of April away from her job. The claimant was discharged on April 7, 1975, while she was seeing Dr. Wirtz, who reported in part as follows on June 11, 1975 (Joint Exhibit "C"):

> She was seen on numerous occasions throught (sic) the latter part of 1974 and through the early part of 1975 because of continuing low back pain aggravation with her activities. The treatment now includes continuation of the muscle relaxers and pain medications as well as the back brace while the patient is ambulatory.
>
> This patient's diagnosis continues to be musculo-

skeletal strain of the lower back in that she does not have any neurological involvement of any lower extremities nor does she have any boney abnormality on her x-ray examination. I have advised her to continue the use of this back brace on an intermittent basis and to continue the medications on a needed basis also. I do not feel that the symptomatology will clear over a short period of time and that she will continue to have difficulty along that line.

On June 23, 1976, Dr. Wirtz reported in part as follows (Joint Exhibit "A"):

> This patient was again seen in the office on this date. To briefly summarize her care, as you will recall from the previous letters I have sent to the employer and the insurance company that her accident occurred back on August 5, 1974. She was initially diagnosed as low back pain, musculo-skeletal strain and you will recall that she was treated on an outpatient basis in my office with therapy and medications; eventually returning to work on September 23, 1974 but over the ensuing months was restricted in her activities and off work on various occasions and was essentially released over a period of time. Since that time I have discontinued medications on a medical treatment of this back problem of approximately December of 1975.
>
> My examination at this date shows that she continues to have lower back pain masculature symptomatology. Her orthopedic examination shows full motion without any neurological involvement.
>
> My rex-ray (sic) at this time shows that she has no change from her x-rays taken on Ausut (sic) 20, 1974.
>
> I feel that this patient has a chronic musculo-skeletal strain but she has not suffered any permanent physical impairment from her injury. I would anticipate that she would have chronic muscular symptoms in the future and would require medications on an intermittent basis regarding this situation.

The claimant sought and received an evaluation examination from David B. McClain, D.O., an orthopedic surgeon, on October 26, 1976. Dr. McClain confirmed the diagnosis of Dr. Wirtz, finding muscle spasms present in both the claimant's lumbar and cervical area.

At the conclusion of the hearing [on July 6, 1977], the record was left open for thirty days to submit additional medical evidence. On August 1, 1977, the claimant requested an examination to be conducted by Dr. Wirtz, to which the defendants object, citing the Commissioner's Rules of Procedure. Dr. Wirtz's report was filed October 5, 1977.

The notes of the hearing kept by the undersigned do not reflect the precise understanding reached between counsel on this issue; however, it is appropriate to state that no agreement was made to allow for a medical examination of this claimant after the date of the hearing. Rule 500---4.17 (85,86,17A) reads as follows:

> Doctors' and practitioners' reports-evidence. In any contested case commenced after July 1, 1975, a signed narrative report of a doctor and practitioner setting forth the history, diagnosis, findings and conclusions of the doctor and practitioner and which is relevant to the contested case shall be considered evidence on which a reasonable prudent person is accustomed to rely in the conduct of a serious affair. The industrial commissioner takes official notice that such narrative reports are used daily by the insurance industry, attorneys, doctors and practitioners and the industrial commissioner's office in descisionmaking concerning injuries under the jurisdiction of the industrial commissioner.
>
> Any party against whom the report may be used shall have the right, at the party's own expense, of cross-examination of the doctor or practitioner. The cross-examination shall be performed no later than thirty days after the hearing unless notice prior to the hearing of the intent to offer specifically identified reports into evidence shall be given the party against whom the report is to be used by the party wishing to place the report in evidence. In that event, cross-examination shall be had within thirty days of the receipt of the notice by the party wishing cross-examination.
>
> Nothing in this rule shall prevent direct testimony of the doctor or practitioner.

The purpose of this rule is of a dual nature; first, it is a method of allowing appropriate medical reports into evidence without requiring the historic necessity of deposing the physicians, and second, it requires the parties to have their medical evidence completed within thirty days following the hearing, thereby putting an end to the practice of scheduling a medical examination after the lay evidence at the hearing was completed.

In applying this rule to the case at hand, it appears that neither of the purposes of this rule were violated. Both parties have adopted the evidence of Dr. Wirtz as their own evidence. The parties introduced his many medical reports as joint exhibits. The objection raised by the defendants to the last report of Dr. Wirtz as the result of another examination is therefore not well taken.

[Claimant was denied benefits with the exception of medical expenses as the hearing officer found Claimant had failed to prove she was unable to perform acts of gainful employment because of the industrial injury.]

* * *

Signed and filed this 29 day of December, 1977.

HELMUT MUELLER
Deputy Industrial Commissioner

No appeal.

DOCTORS' REPORTS

BERNICE SPONDER,

Claimant,

vs.

ARMOUR & COMPANY,

Employer,
Self-Insured,
Defendant.

Review-Reopening Decision

This is a proceeding in review-reopening brought by Bernice Sponder, the claimant, against her employer, Armour & Company, the holder of a certificate of exemption of insurance granted by the Iowa Insurance Commissioner in accordance with the provisions of Section 87.11, Code of Iowa, to recover additional benefits under the Iowa Workmen's Compensation Law by virtue of an industrial injury which occurred on January 17, 1975.

* * *

Claimant, married, age 53, has spent most of her adult working career in the packing industry, beginning in 1941. Claimant's formal education ended in the third year in high school. Claimant began to work for the defendant employer in 1957. On January 17, 1975 the claimant, while employed on the "kill floor" as a head-trim bench operator, fell to the floor after tripping over a bench.

The patient history taken by A. D. Blenderman, M.D., on February 3, 1975 was as follows:

> The patient states that on 1-17-75, she was in a dressing room at Armour's when she hit her foot on a protruding piece of metal on the floor and fell forward landing on the front of both knees and her right elbow. She said she twisted her head to one side so that she would not hit her head and she thinks this is how she happened to injure her neck.

The claimant remained under Dr. Blenderman's care, and on February 10, 1976 she returned to the same work station where she remained until December 28, 1976.

Beginning in September 1976, the claimant was required to work ten hours per day and testified this additional workload increased her difficulties. On November 29, 1976, Dr. Blenderman began another series of physiotherapy treatments, "and with this type of treatment the patient gradually improved." (Claimant's Exhibit # 1, Blenderman report, April 26, 1977)

The claimant was seen by Dr. Blenderman on March 4, 1977, and in his report of April 26, 1977, supra, the doctor's diagnosis was as follows:

DIAGNOSIS: 1. DISCOGENIC SYNDROME, CERVICAL SPINE C-5 LEVEL
2. POSSIBLE MINIMAL OSTEO-ARTHRITIS, RIGHT KNEE

Discussion: I have no doubt that the patient has some degree of discomfort in her cervical spine, but certainly this is not sufficient to entitle her to Social Security Disability benefits on a continuing basis.

At the time she was previously discharged for her prior problems, she was advised to seek some other type of employment other than that at the packing plant where she worked, because I felt that heavy lifting was producing her discomfort. I still feel the same way. I think that if she were employed doing some type of light work, where she could be sitting a large part of the time, she could get along satisfactorily and continue to earn a satisfactory income.

Rex L. Morgan, M.D., examined the claimant on February 11, 1977 for evaluation of a disability retirement application. Dr. Morgan concludes there is permanent impairment based upon his diagnosis of "discogenic disc disease cervical spine aggravated by trauma," together with the opinion that the "prognosis for this case: poor." (Morgan's report, February 11, 1977)

The issues requiring a ruling are the nature and extent of the claimant's industrial disability and the duration of the claimant's healing period.

The claimant worked until December 28, 1976 when she again was examined by Dr. Blenderman, who discharged her on that day, issuing a report which read in part as follows:

> The patient has been told that I have nothing further to offer and we are DISCHARGING her as of this date. She has been told that she will either have to accept the fact that she is going to continue to have the degree of discomfort in the neck while working, or if she is unable to accept the degree of discomfort she has while working, then she will have to seek some other type of employment elsewhere.

The requirements of Section 85.34(1) have been met with this report and the claimant is not entitled to a healing period beyond this date.

Defendant produced as a witness the personnel manager for the Sioux City Plant, Ms. Pat Cyferts. This witness confirmed the claimant's complaints over the "draft" that was caused by the fans that are in use in the "kill floor" department. The strong movement of air aggravates the claimant's neck complaints. The claimant was offered her choice of jobs in March of 1977, together with an offer of transfer into another department. No specific job was offered nor was there a position that the claimant felt she could perform. The claimant quite candidly said that she already has one of the easiest jobs available in the production end of the packing industry.

This record contains the opinion of Dr. Morgan as to the "capability of returning to work" as follows:

Disability Claim Information on Employee: Berniece Sponder

NOTE: This employee's capability of returning to work will be determined by his or her physical condition plus the type of work that is available. Therefore, the following section is of the utmost importance.

PLEASE DESIGNATE IN EITHER THE "NO LIMITATION" OR THE "LIMITED TO" COLUMN YOUR OPINION REGARDING THIS PATIENT'S PHYSICAL CAPABILITIES AT THIS TIME:

No Limit	Limit To				
	x	Sitting	30-45 Min.	Hours Per Day	longer in certain positions
	x	Standing	2 hr.	Hours Per Day	
x		Walking		Hours Per Day	not comfortable walking
	x	Kneeling		Hours Per Day	
	x	Squatting		Hours Per Day	
	x	Repeated Bending		Hours Per Day	
	x	Climbing Stairs	Flights	Times Per Day	
	x	Climbing Ladders	Over Feet	Times Per Day	
x		Lifting Single Maximum Load	25	Pounds	
		Lifting repeat small loads	5-10	Pounds	Times Per Day 2-3
	x	Pulling & (Single Maximum Load	25	Pounds	Times Per Day only with rt arm
		Pushing (Repeat Small Loads	5-10	Pounds	Times Per Day
	x	Forceful Use of	Right Left Both	Hands	
	x	Forceful Use of	Right Left Both	Arms	rt arm only
	x	Forceful Use of	Right Left Both	Legs-Feet	
	x	Overhead Work of Arms and Hands			
	x	Working Above Ground Level (Platforms/Scaffold)			
		Working Below Ground Level	Doesn't understand what this would mean		
x		Working Near Moving Machinery			
	x	Operating Vehicles or Mobile Equipment	limited because of turning neck		
x		Unusual Heat (Over F)			
	x	Unusual Cold (Under F)			
	x	Dampness	Hours Per Day		
x		Unusual Fumes, Dust or Smoke			
x		Prolonged Noise Exposure			
		Handling Solvents or Other Chemicals	never has used		
	x	Unusual Nervous Stress Such as:	Tension bothers neck		
x		Use of Eyes (Specify and Limitations)			
x		Work Requiring Normal Hearing (Communications, Etc.)			
x		Work	Full-Time;	Part-Time at Above Duties	depending on number of hours
	x	Work Over-Time	Over	Hours Per Day	Days Per Week
	x	Shift Work on Rotating Shifts			
	x	Shift Work on Regularly Scheduled		Even'g	Night Shift

XII Remarks: Drives car – difficulty with turning neck to back up car.

This claimant handled work assignments successfully for the period preceding the episode in question, and it is apparent that she has an industrial disability, which is defined in *Diederich v. Tri-City Railway Co.*, 219 Iowa 587, 593, 258 NW2d 899, as follows:

> It is, therefore, plain that the legislature intended the term "disability" to mean "industrial disability" or 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 noted in *Martin v. Skelly Oil*, 252 Iowa 128, 106 NW2d 95, and again in *Olson v. Goodyear Service Stores*, 255 Iowa 1112, 125 NW2d 251. This department is charged with the statutory duty of determining a claimant's industrial disability. In an attempt to further clarify this issue, we quote from *Olson*, supra, at page 1021:

> Disability * * * as defined by the Compensation Act means industrial disability, although functional disability is an element to be considered (citing the Martin case, 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.
>
> * * * *

The doctrine was further noted in the case of *Barton v. Nevada Poultry Co.*, 253 Iowa 285, 110 NW2d 660, where the reduction of a claimant's earning capacity must be determined.

The claimant had been earning $227.60 in weekly wages prior to the industrial injury in question and in applying the foregoing principles to the case at hand, it is concluded that the claimant has suffered an industrial disability of 37% of the body as a whole.

* * *

Signed and filed this 13 day of July, 1977.

HELMUT MUELLER
Deputy Industrial Commissioner

No appeal.

DOCTORS' REPORTS

CARL GOWIN,

Claimant,

vs.

WEBCO TANK, INC.,

Employer,

and

UNITED STATES FIDELITY & GUAR.,

Insurance Carrier,
Defendants.

Order

NOW on this 22 day of June, 1977, the following motions and requests for orders come on for ruling:

Defendants' motion to strike or for alternative relief, filed April 18, 1977, and Claimant's resistance thereto.

Defendants' application for order to obtain medical information, filed April 22, 1977, and Claimant's resistance thereto.

Defendants' first motion was filed in response to Claimant's notice of intent to offer the medical reports of Dr. M. E. Lins, M.D., of Tulsa, Oklahoma, under Rule 500-4.17, IAC. Defendants indicate that as the reports come from 100 miles distant from the borders of Iowa, RCP 147 deprives Defendants of the ability to obtain a deposition. Defendants claim that deposing a witness beyond the limits contemplated by RCP 147 is a burden and expense which should not be placed on Defendants. Defendants' request that Claimant's notice of intent previously referenced should be stricken. As an alternative Defendants would ask the Industrial Commissioner to direct Claimant to produce his physician within the state of Iowa, to require [the claimant?] to take the physician's deposition within the confines of RCP 147, or to offset the expense of travel time and costs of taking the deposition.

RCP 147(a) refers to the taking of oral depositions outside a place 100 miles from the nearest Iowa point. It does not appear to be limited to discovery. However the court, or in this case the Industrial Commissioner (see Rule 500-4.35) may order the deposition taken at any other place. RCP 147 thus appears a limit, unless extended by order, on the party who seeks to take a deposition. This deputy commissioner would certainly permit the deposition. However, the party with the rule created right to take the deposition is not seeking to take the deposition. The party seeks to restrict evidence or if the deposition is to be taken, be reimbursed certain expenses. RCP 147 notes no provision for restriction of evidence or costs of a deposition. RCP 147 seems inappropriate.

The proper frame of reference is as follows. Rule 500-4.17, IAC, is intended to implement the evidential provision of the IAPA, Section 17A.14 of the Code. In doing so, Rule 500-4.17, IAC, recognizes a specific category, certain medical reports, as subject to the reasonably prudent-serious affairs test of Section 17A.14 of the Code. Rule 500-4.17, IAC, allows a party against whom a report is offered a right of cross-examination. The administrative rule makes no reference to the locus of the cross-examination. Cross-examination can be taken or not as desired. Rule 500-4.17, IAC, does not indicate that a report be excluded if cross-examination by the opposing party is difficult to obtain.

If evidence does not qualify under Rule 500-4.17, IAC, and many medical reports do not, the inquiry goes into whether or not the evidence or medical report is independently admissible as sufficiently reliable under the "reasonably prudent person-serious affairs test" of Section 17A.14(1), of the Code, notwithstanding inadmissibility in a jury trial. Examination of the instant reports indicates a very reliable tone. The report would thus be admissible unless 17A.14(3) of the Code affects admissibility.

Section 17A.14(3), of the Code, assures a right to cross-examination when testimony in written form from an *"available"* witness is necessary for a *"full and true disclosure of facts"* Rule 500-4.17, IAC, gives a general right to cross-examination perhaps broader than Section 17A.14(1) of the Code. If Section 17A.14(3), of the Code, is a limit on the admissibility of evidence under Section 17A.14(1) of the Code, no rule of an administrative agency can limit the broader admissibility of the statute. Rule 500-4.17, IAC, is subject to such a principle. If the instant report is admissible under Section 17A.14(1) and not Rule 500-4.17, IAC, then only 17A.14(3) would affect the admissibility. Unfortunately Defendants own argument to the unavailability of the witness would tend to defeat the applicability as to inadmissability of the report of the provision of Section 17A.14(3), of the Code, if such a provision is a limit on admissibility. The availability of the witness appears an essential element. Thus the reliability of the report and unavailability of the witness would seem to insure its admissibility. Once the item of evidence is deemed admissible, no cost reimbursement as sought by Defendants is provided for in the IAPA, RCP or Code Chapters and Rules applicable to workers' compensation cases.

Defendants, however, may proceed to take the deposition for cross-examination purposes under Rule 500-4.17 if they so desire, but at their own expense.

At the hearing Claimant requested a protective order under RCP 123 in the event Defendants proceed to take the deposition. As Claimant seeks to introduce the evidence prompting any deposition, Claimant is not in the best equitable circumstances to request such relief. In any event, RCP 123 is inapplicable as the instant issue goes more to one of admissibility of evidence and the right to cross-examination, not to discovery. Claimant's request is denied.

II

Defendants seek to obtain material relevant to a military service connected disability rating. Claimant resists saying the nature of the difficulty resulting in the rating is separate and distinct from the injury in the instant case and is therefore irrelevant under Section 85.27 of the Code. Relevancy under section 85.27 of the Code is to the "claim". Preexisting disability is certainly relevant to a determination of the instant "claim". Accordingly, Claimant is directed to furnish relevant authorizations to Defendants for the obtaining of the appropriate records or to insure that the facilities involved furnish records to Defendants. If further protective procedures are necessary, appropriate requests can be made. Claimant is to send requests and authorizations to Defendants or furnish appropriate requests and authorizations to the facilities within twenty (20) days of the above date.

Signed and filed this 22 day of June, 1977.

ALAN R. GARDNER
Deputy Industrial Commissioner

No appeal.

EMERGENCY TREATMENT

EMOTIONAL AND PSYCHOLOGICAL INJURY

JOAN MILDRED ADAMS,

Claimant,

vs.

WATERLOO COMMUNITY SCHOOL DISTRICT,

Employer,

and

EMPLOYERS MUTUAL CASUALTY COMPANY,

Insurance Carrier,
Defendants.

This is a proceeding brought by the defendant employer, Waterloo Community School District, and its insurance carrier, Employers Mutual Casualty Company, seeking review of an arbitration decision filed August 13, 1976 and a supplemental decision filed October 12, 1976 wherein the claimant, Joan Mildred Adams, was awarded medical expenses, healing period benefits and permanent partial disability based on injuries received September 15, 1972.

* * *

The claimant is a forty-one year old elementary school teacher. She had several accidents prior to the accident for which she sought compensation including three falls and two automobile crashes with one of the automobile incidents resulting in back surgery in 1967 and 1968.

The surgery in 1967 which was performed by John R. Walker, M.D. involved what the doctor described as "the usual laminectomy, excision and complete curettage of the lumbosacral disk, the L-5, or the fifth lumbar disk, decompress[ion of] the S-1 nerve root, and . . . a so-called bilateral fusion of McElhaney from L-4 through the sacrum." Further surgery was performed by Dr. Walker in 1968 consisting of an anterior diskectomy and fusion of the cervical spine.

In addition to the collision necessitating surgery, claimant was involved in auto accident in 1969 when her car skidded into a snowbank, a fall in February of 1970 on the icy playground at school, a fall in November of 1970 in another parking lot and a fall in gym class at school in April of 1972. The accident for which claimant was awarded compensation happened on September 15, 1972 when she fell on the stairs at school as she was leading her class from the building during a practice fire drill. Dr. Walker saw Adams in consultation on September 15. He found multiple body bruises; soreness in her wrists, neck and tailbone; pain in the L-4 and 5 region; a sprained cervical spine and low

back sprain; and a sprain of both ankles. These injuries were treated with physical therapy and Folbesyn treatments.

Defendants argue that claimant has failed in her burden of proving by a preponderance of the evidence that her present symptoms were caused by the incident of September 15, 1972 and additionally, has failed to prove she has suffered industrial disability. Defendants also charge that the deputy industrial commissioner erred in giving weight to the testimony of Philip R. Hastings, M.D. because that testimony was based on an incomplete history and erred in computing industrial disability by considering the claimant's failure to get her master's degree.

Medical evidence offered in this case includes the testimony of Dr. Walker, Dr. Hastings and Dale G. Phelps, M.D. Dr. Walker, a board certified orthopedic surgeon, who had treated claimant from 1965 through 1972, estimated her disability following the 1967 surgery as 25% of the body as a whole. This rating was raised to 30% of the body as a whole after the May 1968 surgery. In July claimant complained of a fleeting numbness in her right arm and the doctor recorded some loss of grip. While Dr. Walker believed that the psychological aspects of claimant's illness had been present since 1965, because he had continued to treat her for only a short time subsequent to the event, he would not state whether or not the fire escape accident aggravated her emotional problems. The doctor agreed with a diagnosis of a psychophysical musculoskeletal reaction. It was his opinion that claimant suffered no permanent disability as a result of the fall.

Dr. Phelps, orthopedic surgeon, began seeing claimant in December of 1972. He believed that her neck and back problems were exacerbated by her fire escape fall. In assigning claimant's percentage of disability, the doctor considered the patient's history of being asymptomatic prior to that fall and used the Orthopedic Academy's manual for the evaluation. He testified that "[a] relatively asymptomatic lumbar fusion with the surgical excision of the disc is 15% whole body permanent physical impairment, and basing after a surgical excision of the disc with persistent pain, stiffness, the symptoms which she has had necessitating modification of her activities would give 25%." This the doctor noted was 10% above the assignment prior to the fall. His testimony relating to the cervical spine was that an "asymptomatic cervical fused spine carries with it a disability of 10%, and a symptomatic one being 20% with persistent pain, numbness and weakness." He further testified that it was his feeling there was severe depression present in claimant which he was unable to evaluate in terms of permanent impairment. He also thought there was a high probability that pseudoarthrosis from the original surgery was present.

Dr. Hastings, a psychiatrist, evaluated claimant for purposes of the arbitration hearing in order to determine whether or not claimant had emotional disability arising from her September fall. Claimant related a history of constant radiating neck and back pain with spasms, headaches, nausea and dizziness. Based on claimant's history, psychological testing and his own observations, the doctor felt that claimant's disability was partly physical and partly emotional in pathology. Dr. Hastings found aspects of her personality which made her "particularly susceptible to developing symptoms which may be partly emotional[ly] based . . . ." In other words, the doctor suggested an emotional predisposition which he analogized to "a person with brittle bones [who] is predisposed to fractures if they get hurt. This person with a kind of personal structure would be predisposed to psychiatric symptoms under certain conditions of stress or damage." Although Dr. Hastings did not think the fall was the entire cause of the psychiatric disability, he said "it was definitely an aggravating factor." Because he anticipated that claimant would not be a good candidate for psychotherapy, he felt her prognosis would not be good. Claimant had not told the doctor about her 1969 auto accident. Neither did she describe her three falls prior to September, 1972. The doctor stated that this information "might have [had] an affect on [his] opinion as to the primary cause of the impairments." However, "the trauma most significant in her mind was the fall down the fire escape . . . ." He did view claimant's ability as a teacher as being impaired by her injury.

Besides this expert medical testimony, there were depositions by two of claimant's co-workers, Margaret Wolf and Leslie Wade. Mrs. Wolf who was a student teacher in claimant's room in 1969 and who later in the year accepted a position in the building, testified that claimant had "always been a very difficult person to get along with, whether it's been before '72 or after '72 . . . ." She saw claimant's disposition in a continuing state of decline with increasing insensitivity and negativity.

Mr. Leslie Wade testified that claimant's complaints had increased since 1972, that she was wearing her neck brace more frequently, and that she was more easily upset.

The testimony of claimant herself discusses the ways in which she sees her fall affecting her employment. Physical difficulties included wearing a neck brace because forward extensions necessary for checking papers and writing reports caused a pull on her neck which resulted in dizziness and in using a pillow to ease pain on sitting. It was more physically difficult for her to get down on the children's level. She testified to constant pain eased by four to five valium tablets, six to twelve darvon tablets and excederin tablets as she needed them on a daily basis. She also used dalmane for sleeping and vivactil as an antidepressant. Daily therapy treatments cut into the time she would normally spend preparing for her classes. These physical problems and the demands made on her time by her therapy limited her opportunities to attend professional conferences and meetings. She had not been allowed a student teacher since the spring of 1973. She had been unable to complete work on her master's degree which would have placed her at a higher level on the salary scale.

The claimant must prove by a preponderance of the evidence that the injury is the cause of her disability on which she bases her claim. *Lindahl v. L. O. Boggs,* 236 Iowa 296, 18 N.W.2d 607 (1945). A possibility is insufficient; a probability is necessary. *Anderson v. Oscar Mayer & Co.,* 217 N.W.2d 531 (Iowa 1974). Establishing causal connection is within the domain of expert testimony. *Bradshaw v. Iowa Methodist Hospital,* 251 Iowa 375, 101 N.W.2d 167 (1960). Claimant need not prove that an employment injury be the sole proximate cause of her disability, but

only that it is directly traceable to an employment incident or activity. *Langford v. Kellar Excavating & Grading, Inc.,* 101 N.W.2d 667 (Iowa 1971). Personal injury has been defined by the Iowa Supreme Court to be *any* impairment to the employee's health which results from the employment. *Almquist v. Shenandoah Nurseries, Inc.,* 218 Iowa 724, 254 N.W. 35 (1934). An employer hires an employee subject to any active or dormant health impairments existing prior to employment. *Ziegler v. U.S. Gypsum Co.,* 252 Iowa 613, 106 N.W.2d 167 (1961). While claimant is not entitled to compensation for the results of a preexisting injury or disease, the claimant is entitled to compensation to the extent of the injury if the preexisting injury or disease is aggravated, accelerated, worsened or "lighted up". *Yeager v. Firestone Tire & Rubber Company,* 253 Iowa 369, 112 N.W.2d 299 (1961).

Although Dr. Walker rated claimant's disability at 30% following the May, 1968 surgery, he did not think she suffered a permanent disability. Dr. Phelps assessed a 10% disability as a result of the September accident. Dr. Hastings gave 25% permanent partial disability due to physical causes.

The deputy commissioner allowed 10% permanent partial disability attributable to psychological problems. Claimant's exhibit one includes a written opinion by Dr. Hastings which states:

> It is my opinion that Miss Adams is presently suffering a significant psychiatric disability in addition to her physical disability. It is my opinion that her present state of disability can be directly attributed to her fall on 9-15-72. The fall served as a definite aggrevating [sic] factor on her preexisting physical and mental state, rather than being the primary cause, but none-the-less, in my opinion, served as a precipitating factor for the degree of this present disability.

Dr. Hastings' opinion goes on to state claimant's neurotic personality structure would "predispose her to stress of the fall of 9-15-72." The claimant's predisposition is also found in Dr. Hastings' deposition which has been discussed in this opinion at pp. 3-4, supra. Dr. Phelps, too, recognized a severe depression in claimant. The claimant has proved by a preponderance of the evidence that the injury on which she bases her claim has "lighted up" her preexisting injuries.

When an injury is to the body as a whole, the claimant's disability must be evaluated industrially and not just functionally. *Martin v. Skelly Oil Co.,* 252 Iowa 128, 196 N.W.2d 95 (1961). 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 she is fitted. *Olson 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. *Barton v. Nevada Poultry Co.,* 253 Iowa 285, 110 N.W.2d 660 (1961).

Claimant's testimony as to the diminution in her earning capacity points to her inability to attend meetings and conferences, seemingly indicating that her opportunities for professional growth have been limited, and to her inability to obtain student teachers. Supervision of student teachers had provided income for Adams in the past. Dr. Hastings testified that claimant's "ability as a teacher is impaired by her present symptoms" because of the manner in which she perceived her performance as a teacher.

Based on all the factors to be considered, it is determined that claimant has suffered an industrial disability of 25% related to the accident of September 15, 1972.

Medical expenses of Schoitz Hospital; Dale Clark Prosthetics; Waterloo Sickroom Supply Co., Inc.; Mayo Clinic; Weight Watchers; Waterloo Surgical and Medical Group; Surgical and Orthopedics Association; Northeastern Psychiatric Clinic, P.C.; Waterloo Physical Therapy Clinic and Hurdle Drug, Hartleip Drug and Osco Drug were stipulated by the parties to be fair and reasonable. Costs in excess of $7,500 will therefore be allowed. As the claimant was told by Dr. Phelps to lose weight, the charge of Weight Watchers is allowed. Additionally, it is to be noted that the fee of Dr. Hastings (Northeastern Psychiatric Clinic, P.C.) was for psychological evaluation needed for the arbitration hearing and was not for treatment. For that reason the cost of his services will not be allowed.

* * *

Signed and filed this 14 day of July, 1977.

ROBERT C. LANDESS
Industrial Commissioner

No Appeal.

Additional Cases:

EMPLOYEE – AGRICULTURAL

MARSHALL KIM BRINTON,

Claimant,

vs.

GENE F. BRINTON,

Employer,

and

IMT INSURANCE COMPANY,

Insurance Carrier,
Defendants.

Arbitration Decision

INTRODUCTION

This is a proceeding in arbitration by Marshall Kim Brinton, claimant, against his father, Gene F. Brinton, employer, and IMT Insurance Company, insurance carrier, for the recovery of benefits as a result of an injury on April 25, 1975. A Special Appearance filed by defendant insurance carrier raised the issue of whether a valid and

enforceable workmen's compensation policy was in effect between defendant employer and defendant insurance carrier.

* * *

FACTS

In 1973, defendant employer purchased a 250 acre farm near Ellsworth, Iowa. Defendant employer and his family resided in Wilmar, Minnesota but commuted to Ellsworth to operate the farm. During the late summer of 1974, claimant began residing at the house on the farm of defendant employer near Ellsworth. He resided at the farm until his injury on April 25, 1975. As a result of the injury, claimant lost a significant portion of his vision in one eye.

During the calendar year of 1974, defendant employer paid cash wages in connection with his farming operation. The following list depicts the date of the payment, the payee, the relationship, if any, to defendant employer, and the amount:

Date	Payee	Relationship	Amount
April 13	Steven Amundson	father-in-law	$ 100.00
April 20	Steven Amundson	father-in-law	144.00
April 20	Larry Dalbey		27.00
May 5	Steven Amundson	father-in-law	267.00
May 28	Steve Amundson	father-in-law	63.00
June 8	Steve Amundson	father-in-law	120.00
June 16	Steve Amundson	father-in-law	45.00
July 30	Cash		50.00
August 30	Claimant	son	128.34
September 3	Claimant	son	30.00
September 10	Jackie Brinton	daughter	250.00
November 22	Claimant	son	647.00
November 30	Claimant	son	60.00
December 9	Claimant	son	20.00
December 13	Claimant	son	20.00
		TOTAL	$1,971.34

Defendant employer also paid trucking expenses in the amount of $42.50 and machine hire expenses in the amount of $751.00 during the year of 1974.

From January 1, 1975 to April 25, 1975, defendant employer paid the following cash wages:

Date	Payee	Relationship	Amount
January 6	Jackie Brinton	daughter	$500.00
January 10	Claimant	son	10.00
January 14	Steve Amundson	father-in-law	148.00
January 14	Claimant	son	10.00
January 18	Claimant	son	20.00
February 10	Claimant	son	20.00
March 1	Claimant	son	25.00
March 13	Claimant	son	35.00
March 15	Claimant	son	30.00
March 21	Claimant	son	32.00
March 22	Claimant	son	20.00
March 26	Claimant	son	30.00
April 5	Claimant	son	30.00
April 12	Claimant	son	25.00
April 21	Claimant	son	15.00
April 24	Claimant	son	45.00
		TOTAL	$995.00

An insurance policy was issued by defendant insurance carrier to defendant employer for the period from April 6, 1975 to April 6, 1976. The policy, FL-60189, was described as a "Farmers Comprehensive Personal Liability Policy". Attached to the policy was a "Contingent Workmen's Compensation Coverage Endorsement." The endorsement provided:

> Nothing herein contained shall be held to vary, waive, alter, or extend any of the terms, conditions, agreements of declarations of the policy, other than –
>
> It is agreed that:
>
> 1. Insuring Agreement 1 is amended to include:
>
> Coverage I – Contingent Workmen's Compensation
>
> If on the effective date of the policy, or the effective date of any renewal thereof, the named insured was not subject to the terms of any workmen's compensation law, and had not been so subject during the immediately preceding policy period, if any, then in that event and subject to any applicable exclusions contained in this endorsement or the policy to which attached, the Company will issue to the named insured, at the Company's normal rates and premiums, a Standard Workmen's Compensation & Employer's Liability Policy in the event the named insured becomes legally obligated to pay benefits under a Workmen's Compensation Law to any person employed by the named insured for an injury sustained during the policy period in connection with the ownership, maintenance, operation or use of the premises covered by the policy to which this endorsement is attached. The effective date of such Workmen's Compensation Policy shall be the date the named insured became subject to the applicable Workmen's Compensation Law and no earlier than the effective date or any subsequent renewal date of the policy to which this endorsement is attached.
>
> and H, to or on behalf of an injured employee prior to a determination that the employee is subject to the Workmen's Compensation Law, shall be credited any benefits payable or paid under any Workmen's Compensation Policy issued pursuant to the endorsement.
>
> If legally obligated to pay benefits under a Workmen's Compensation Law, the named insured agrees to maintain employee payroll records, to accept the Workmen's Compensation Policy herein provided for and, upon demand, to pay the premium therefor. The failure of the named insured to make his employee payroll records available or his refusal to accept the Workmen's Compensation Policy herein provided for or his failure to pay the premium shall relieve the Company from all liability with respect to any claim arising under Coverages A, B, F, G, H and I.
>
> Exclusion – (r) is added:
>
> (r) under Coverage I, if (1) the named insured has voluntarily elected to provide or pay compensation benefits according to the provisions of any Workmen's Compensation Law, or (2) there is in effect any policy providing Workmen's Compensation benefits to any injured employee on behalf of the insured or otherwise.

Prior to the issuance of this policy, a discussion took place between Richard Ellwood of Ellwood Insurance Agency in Ellsworth, Iowa and defendant employer. Defendant employer testified that Ellwood neither told him he had workers' compensation insurance nor discussed the contingent endorsement with him.

APPLICABLE LAW

On the date of the injury to claimant, agricultural workers were under certain conditions subject to the mandatory provisions of the Iowa Workers' Compensation Law. Section 85.1(3), Code of Iowa, provided that Chapter 85 shall not apply to:

> 3. Persons engaged in agriculture, insofar as injuries shall be incurred by employees while engaged in agricultural pursuits or any operations immediately connected therewith, whether on or off the premises of the employer, except that commencing January 1, 1974, this chapter shall apply to such persons if at the time of injury such person is employed by an employer:
>
> a. Whose total cash payments to one or more such persons amounted to two thousand five hundred dollars or more during the preceding calendar year, or
>
> b. Who employs at least one person regularly. An employer shall be deemed to employ a person regularly if he employs at least one person for forty hours or more per week for thirteen consecutive weeks during any part of the preceding twelve months.
>
> c. For purposes of paragraphs "a" and "b" of this subsection, commencing January 1, 1975, the following shall not be included within the classification of persons engaged in agriculture: (1) the spouse of the employer and relatives of either the employer or spouse residing on the premises of the employer, and (2) any person engaged in agriculture as an owner-operator or tenant-operator or spouse or relatives of either residing on the premises of such owner-operator or tenant-operator, while exchanging labor with an employer, or spouse, or relatives of either residing on the premises of such employer, for the mutual benefit of any or all of such persons.

If an employer was not subject to the mandatory provisions of the above statute, the employer could voluntarily elect to provide workers' compensation coverage. Section 85.1(5) provided:

> 5. Employers, including employers of household or domestic servants, employers of persons whose employment is of a casual nature, employers of persons engaged in agriculture, the employers of persons not in the course of the employer's business, may assume with respect to any such employee or person or classification of employees not within the coverage of this chapter, as otherwise provided in subsections 1, 2, 3 and 4 of this section, other than any such employee or classification of employees with respect to whom a rule of liability or a method of compensation has been or may be established by the Congress of the United States, a liability for compensation imposed upon employers by this chapter for the benefit of employees within the coverage of this chapter. The purchase of and acceptance by any such employer of valid workmen's compensation insurance applicable to such employee or person or classification of employees shall constitute as to such employer an assumption by such employer of such liability without any further act on the part of such employer, but only with respect to such employee or person or such classification of employees as are within the coverage of the said workmen's compensation insurance contract. Whenever under the provisions of this subsection an employer voluntarily elects to assume the liability for the payment of compensation to such employees or persons or such classification of employees by the purchase of valid workmen's compensation insurance, the liability of such employer shall take effect and continue from the effective date of such workmen's compensation insurance contract as long only as such insurance contract shall be in force. Upon such an election, such employee or person or classification of employees shall accept compensation in the manner provided by the chapter and the employer shall be relieved from any other liability for recovery of damage, or other compensation for such injury. An employer, upon the election to assume liability by the purchase of workmen's compensation insurance under the provisions of this subsection, shall give notice thereof to the industrial commissioner by certified United States mail.

ANALYSIS

Claimant argued that the mandatory provisions of §85.1(3), Code of Iowa, were applicable to defendant employer on the date of claimant's injury. However, the evidence in this case revealed that defendant employer on the date of the injury to claimant was not an employer who met either of the prerequisites for mandatory workers' compensation coverage provided in §85.1(3), Code of Iowa, i.e., cash payments of $2,500 to employees engaged in agricultural pursuits during the preceding calendar year or employing at least one person for forty hours or more per week during any part of the preceding twelve months.

During the preceding calendar year, defendant employer made cash payments to employees in the amount of $1,971.34. A portion of this amouht was paid to claimant while he was residing on the premises of defendant employer and would be excluded from the cash payments of defendant employer during the preceding calendar year by reason of §85.1(3)(c), Code of Iowa. The payments by defendant employer in 1974 for trucking services in the amount of $42.50 and machine hire in the amount of $751 were not cash payments to "employees" and were properly excluded by defendant employer.

Defendant employer did not employ anyone for forty hours or more during any part of the twelve months immediately preceding the injury. The only person who possibly met this prerequisite was claimant who was precluded by reason of §85.1(3)(c), Code of Iowa.

Claimant also argued that the purchase of a farm liability policy with a contingent workmen's compensation coverage

endorsement was sufficient to show the employer's voluntary election to come under the act as contemplated by §85.1(5). This argument is contrary to §85.1(5), Code of Iowa, and the facts of this case.

From the face of IMT policy No. FL-60189 and the testimony of defendant employer, no payment was made by defendant employer for the contingent workmen's compensation endorsement. Additionally, defendant employer was unaware of the endorsement until after the injury on April 25, 1975. Since no payment was made for the endorsement and defendant employer was unaware of the endorsement prior to the injury, it cannot be considered to be "purchase of and acceptance by" defendant employer of a valid workmen's compensation policy as required by §85.1(5), Code of Iowa.

Furthermore, the unequivocal language of the "Contingent Workmen's Compensation Coverage Endorsement" required defendant employer to become subject to the terms of the workers' compensation law at sometime after the effective date or renewal date of the underlying policy. On the date of the injury to claimant, defendant employer was not an employer who met either of the prerequisites for mandatory coverage provided in §85.1(3), Code of Iowa. Therefore, the necessary criteria to make the contingent endorsement operative had not occurred on the date of the injury.

Additionally, to consider the endorsement a voluntary election would give no effect to the terms of exclusion (r) which by its express terms negates the effect of the endorsement if a voluntary election was made or a workers' compensation policy was in force.

FINDINGS

WHEREFORE, it is found that the special appearance of defendant insurance carrier should be sustained.

THEREFORE, the relief sought in claimant's petition for arbitration is denied.

* * *

Signed and filed this 6 day of February, 1978.

DENNIS L. HANSSEN
Deputy Industrial Commissioner

Appealed to Commissioner; Affirmed.
Appealed to District Court; Affirmed.

Additional Cases:

EMPLOYEE

JUDITH L. KELLY, Mother,
Natural Guardian and Next Friend of
ERIN KELLY, D/O/B 11/24/63; and
STEVEN CHARLES KELLY, D/O/B 9/18/66, Minor
Children of WILLIAM T. KELLY, deceased,

Claimant,

vs.

ROBERT P. KELLY,

Employer,
Uninsured,
Defendant.

Arbitration Decision

This is a proceeding in arbitration brought by the claimant, Judith L. Kelly, against Robert P. Kelly, the alleged employer, uninsured, to recover benefits under the Iowa Workmen's Compensation Act by virtue of the death of the claimant's decedent, William T. Kelly, on February 24, 1976.

* * *

Claimant, Judith L. Kelly, is the mother of Erin Kelly and Steven Charles Kelly, minors, and the divorced wife of William T. Kelly, deceased. The defendant, Robert P. Kelly, is the twin brother of William T. Kelly.

Judith L. Kelly testified at the hearing that she was married to the decedent for about ten years and bore two children by him. Claimant's exhibit "one" is a copy of the judgment of divorce entered in the Circuit Court of Milwaukee County Wisconsin, indicating that the claimant's decedent was paying $125.00 per month for the support of his children. Sporadic payments were made on this judgment.

Throughout their lives, William and Robert were extremely close and were involved in several common ventures. At one time they were partners in a farming operation and at another time the claimant's decedent worked in Robert's bar. Because of his alcoholism, William's management of the bar was the "town joke".

In September, 1975 the defendant bought and leased a truck to Sammons Trucking Company (hereafter referred to as Sammons) as evidenced by claimant's exhibit "three". The claimant's decedent, recently released from the Independence Mental Health Institute in Independence, Iowa, following his treatment for alcoholism, went along on several trips with defendant as a "helper". There was no agreement in regard to remuneration and the record fairly indicates that the defendant paid expenses and provided small amounts of money to his brother. Apparently none of these amounts were repaid.

It is interesting to note that Sammon's gave its approval to the brothers' working relationship and had veto power over persons selected as helpers on the trucks. To be a helper on a truck, the claimant's decedent had to give evidence of a chauffer's license and to be approved as a driver. This approval followed successful completion of a one-day school with a card being issued by Sammons indicating that Sammons authorized the card holder to act as a helper and a driver. The productivity of a driver was expanded somewhat when a helper accompanied him because the amount of time spent in actual driving was increased.

On February 12, 1976 the claimant's decedent and the defendant loaded a shipment of lumber at Lewiston, Idaho, to be taken to Erie, Pennsylvania. While preceeding down

the road which paralleled the Snake River, the truck overturned and the claimant's decedent died as a result of injuires received in that accident. The defendant was unconscious and was hospitalized for a significant period of time after this accident.

The issue for determination in this case is whether the decedent, William, was an employee of the defendant, Robert, at the time of his death. Important in the determination of the relationship between the Kelly brothers is the relationship between the defendant and Sammons and between the claimant's decedent and Sammons.

The Iowa Supreme Court has repeatedly held that the criteria used to determine the existence of an employer-employee relationship are: (1) The employer's right of selection or to employ at will, (2) The responsibility of the payment of wages by the employer; (3) The right to discharge or terminate the relationship; (4) The right to control the work; and (5) Whether the party sought to be held as the employer is the responsible authority in charge of the work or for whose benefit the work is performed. *Hjerleid v. State,* 229 Iowa 818, 295 N.W. 139; *Sister Mary Benedict v. St. Mary's Corp.,* 255 Iowa 846, 124 N.W.2d 548 and *Nelson v. Cities Service Oil Co.,* 259 Iowa 1209, 146 N.W.2d 261. The burden is upon the claimant to prove these factors by a preponderance of the evidence.

The defendant had the right to select whatever helper he wished but his selection was subject to the approval or veto of Sammons Trucking Company who also had a right to fire the helper. This is evidence both from the contract existent between Sammons Trucking and the defendant and the fact that Sammons Trucking Company conducted a school and issued a card upon the successful completion thereof enabling the prospective helper to become so engaged.

As stated above, the defendant apparently paid small amounts of money to the claimant's decedent. However, there was no showing that Robert had any responsibility to do so. The evidence indicates that in the usual case the helper would be paid out of the gross recovery received by the driver. There was no showing that Robert fulfilled the responsibility for the payment of wages other than by providing occasional payments in the form of spending money, meals and lodging.

Although Robert could discharge William or terminate the relationship in that he could forbid William from riding in the truck, this power derives from ownership from the truck, not an ascendency over William.

Similarly, defendant had the right to control William's work; however, this was a right derived from Sammons, who had the ultimate right to determine the course of travel, where to pick up the next load and where to deliver that load, etc. Defendant's control of William extended only to less substantial areas such as when and how the truck would be unloaded and when William would drive.

As the lessor-driver of the truck, defendant was a "responsible authority" only within the confines of his ownership of the truck and the lease agreement; his authority was limited by those two factors to the point that his authority flowed from Sammons, not from his own status. On the other hand, William's work surely benefited defendant to the extent that it lessened the amount of work that he had to do. Yet the fact that defendant benefited from William's work does not by itself establish an employer-employee relationship for the benefit as easily may be said to flow from the filial relationship.

In short, the relationship which existed between the claimant's decedent and the defendant cannot be found to be that of an employer and an employee. The relationship herein is shown to have a strong historical basis in filial affection rather than employment.

Shriver v. McLaughlin Construction Co., 227 Iowa 580, 288 N.W. 657 involved issues similar to those in the instant case. In *Shriver* the claimant was a truck driver who drove a truck which was owned by a third party. This third party owned other trucks and drove one himself. The third party was engaged by a trucking company, the defendant, for the hauling of crushed rock and gravel. There was no definite contract of employment between the third party and the trucking company. However the third party, the owner of the truck, informed the trucking company of the activities of the claimant. The Supreme Court of Iowa held that the claimant was an employee of the trucking company.

Here, on the evidence presented at the hearing, one cannot conclude that William's status is the same as Schriver; however, one can go so far as to say that William was *not* an employee of Robert.

In short, the lack of an award in this case is dictated by the fact that the relationship between the defendant and the claimant's decedent was not that of an employer and an employee.

This is not to say that the liability for payment of workmen's compensation may not lay elsewhere. It is undisputed that the claimant decedent received injuries which resulted in his untimely death. What is in dispute in this case, at that point, is whether or not the claimant's decedent was an employee of the defendant. The basis of that relationship is not that of an employer and an employee but is rather based on a close filial relationship.

* * *

Signed and filed this 14th day of September, 1977.

JOSEPH M. BAUER
Deputy Industrial Commissioner

No Appeal.

EMPLOYEE

LEON JESSEN,

Claimant,

vs.

McLAUGHLIN FARMS,

Employer,

and

CONTINENTAL WESTERN,

Insurance Carrier,
Defendants.

Decision on Appeal

This is a proceeding brought by defendants, McLaughlin Farms, employer, and Continental Western, insurance carrier, appealing an arbitration decision wherein claimant, Leon Jesson, was found to be an employee of defendant employer on September 10, 1975.

* * *

The sole issue to be decided by the deputy industrial commissioner was whether or not claimant was defendant's employee at the time of his accident thereby rendering his injuries compensable under the Iowa Workmen's Compensation Act.

Claimant was hauling silage for defendant when his fuel pump went out. He saw another truck which was owned by his father coming into the field. He apparently endeavored to flag down the truck; and when it failed to stop, he attempted to jump onto the moving vehicle. Four truck tires came over claimant's leg after he slipped and fell from the truck.

Defendant employer owns and operates a large farm with fifteen trucks driven by employees of the defendant among the vehicles used on the farm. Defendant withheld state and federal taxes and social security from his employee drivers' paychecks. Repairs and maintenance work were done in the farm's shop on trucks owned by the defendant. Other truckers from three or four different sources were hired to supplement the defendant's trucks in hauling corn, silage, feed and freight. The supplemental truckers were hired for a particular job or for a particular season and maintained their own equipment. McLaughlin who is the owner of defendant employer testified that he might hire a trucker for the silage operation and then switch it to another task. Payment for hauling corn was by the bushel; silage, by the hour; and freight by the ton or mile. Individual truckers received a total sum for all of their trucks used by the defendant rather than a sum for each individual truck.

For several years defendant had done business with claimant's father, who owned two trucks, and was aware of claimant's driving his father's truck from time to time. McLaughlin's best recollection was that he had been approached by claimant's father offering trucks which could be used to haul silage for the defendant and that he had responded that he could use them. McLaughlin testified he "had nothing to do with who was put in them [to drive]." Although he gave directions on the first day of the silage haul, including the starting time, he gave few instructions thereafter with the exception of telling drivers where to dump their loads. There was little day-to-day contact with the drivers unless it was necessary to tell them there would be no work because of rainy weather. The truckers kept their own records with McLaughlin recording only the days on the job.

In 1974, claimant was paid by his father on an hourly basis to drive trucks. When the father became disabled by arthritis in the winter of 1974, and was unable to continue driving, the two entered into an agreement whereby claimant would continue to drive a truck with the earnings from its use being paid to the father as a down-payment on the truck. Claimant's father testified as to the arrangement and as to what he had told McLaughlin;

> I remember distinctly of talking to Mr. McLaughlin in his shop and telling him that Leon was buying the truck and that everything that that truck earned went to me, but was as a payment on the truck, because I was a little concerned with the fact that Leon could go in and draw $300 and go buy a car or something like that, and then I'd end up with the truck with no money paid down on it, see.
>
> I had made arrangements prior to this with Mr. Roden in Glidden. I owed money on the truck and I told him the whole story, and I said after Leon gets a certain amount paid down on it, if you would put the truck in his name and just carry the rest of the loan against him, and that was agreed on.
>
> I contacted the used auto dealer there that inspects trucks in Scranton, and told him that I was selling that 1060 GMC truck to Leon, and asked him what it would require to be inspected in order to transfer from one party to another. You have to have it state inspected. So I had already made arrangements to have that done.

No transfer had been made as of the date of the injury. Claimant's father made claimant responsible for contacting the person who was driving his second truck.

Employee is defined in Iowa Code §85.61(2) as "a person who has entered into the employment of, or works under contract of service, express or implied, or apprenticeship, for an employer. . . ."

The Iowa Supreme Court has consistently applied the criteria it set out in *Hjerleid v. State,* 229 Iowa 818, 826, 295 N.W. 139, 143 (1940) to determine the existence of an employer-employee relationship. Those criteria are:

(1) the right of selection, or to employ at will;
(2) responsibility for the payment of wages by the employer;
(3) the right to discharge or terminate the relationship;
(4) the right to control the work; and
(5) is the party sought to be held as employer the responsible authority in charge of the work or for whose benefit the work is performed.

In *Usgaard v. Silver Crest Golf Club,* 256 Iowa 453, 456, 127 N.W.2d 636, 638 (1964), the Supreme Court of Iowa indicated that in addition to the five criteria from *Hjerleid,* supra, there is an "overriding element of the intention of the parties as to the relationship they are creating."

Although defendant did say that he had no objection to claimant's hauling silage, defendant did not specifically select claimant to drive. His contacts were with claimant's father who was paid an amount for all trucks employed in the haul and who in turn had financial arrangments with claimant. It would seem that if in view of the relationship between claimant's father and defendant that if defendant no longer wanted claimant's services, he would have contacted the father rather than the son. While there is some evidence of defendant's controlling claimant's work, that control was minimal and was limited to instructing claimant when to come to work, which field to go to, or

where to dump his loads. There is no evidence that defendant controlled other aspects of the job in terms of what route to take, which maintenance was to be done, or how to drive the truck. It cannot be denied that claimant's work brought a benefit to defendant. However, claimant's work also provided a direct financial benefit to his father. If claimant had not been driving the truck, it would have been idle. Defendant, here, did employ fifteen truck drivers on his farm whom he seemed to distringuish from truckers whom he used for seasonal work. Had he intended claimant to be an employee, he would have entered into the type of relationship with him that he maintained with those fifteen employee truckers.

* * *

It is found and held as findings of fact that claimant was not an employee of the defendant employer on September 10, 1975.

* * *

Signed and filed this 29 day of November, 1977.

ROBERT C. LANDESS
Industrial Commissioner

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

ESTOPPEL

MARTHA CARDWELL,

Claimant,

vs.

IOWA LUTHERAN HOSPITAL,

Employer,

and

ARGONAUT INSURANCE COMPANY,

Insurance Carrier,
Defendants.

Review – Reopening Decision

This is a proceeding in Review-Reopening brought by Martha Cardwell, claimant, against Iowa Lutheran Hospital, employer, and Argonaut Insurance Companies, insurance carrier, for the recovery of benefits as a result of an injury on October 10, 1972.

* * *

The issues to be determined are whether the petition of Claimant is barred by the provisions of Section 86.34, Code of Iowa (1971) or whether Defendants are estopped from asserting the limitation in Section 86.34.

Section 86.34 provides:

> Any reward 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.

An employee's receipt filed with this office on April 16, 1973 indicated the date of the last payment of compensation to Claimant to be April 6, 1973. The original notice and petition for review-reopening were served on Defendant Employer on April 10, 1976 and were filed with this office on April 13, 1973. The service on Defendant Employer and the filing with this office of the notice and petition were both more than three years from the date of the last payment of compensation.

Claimant amended her petition for review-reopening to plead estoppel. The burden to prove and establish estoppel is on the party asserting it, with strict proof of all the elements being demanded. *Dart v. Thompson,* 154 N.W.2d 82, 86.

The four essential elements of estoppel are: (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; and (4) reliance on such fraudulent statement or concealment by the party to whom made resulting in his or her prejudice. *Paveglio v.*

Firestone, 167 N.W.2d 636, 638.

There is support in the record for the following statement of facts:

On October 10, 1972 Claimant fell at work and sustained injuries. She was treated by W. B. Eidbo, M.D. In a report to Defendant Insurance Carrier, dated December 5, 1972, Dr. Eidbo described Claimant's injuries to be "Myofascial strain of neck and lumbar spine; Deep thrombophlebitis". The report also indicated that Claimant was hospitalized at the hospital of Defendant Employer from October 14, 1972 to October 21, 1972.

Defendant Insurance Carrier related this claim for the injury of October 10, 1972 to Otto B. Kahre of Central Claims Service on January 11, 1973. Dr. Eidbo sent Kahre a letter dated February 27, 1973. He provided the following information to Kahre:

> Re: Martha Cardwell
> Claim No.: X-12444
>
> I can give you the following information regarding Martha Cardwell. As you know Mrs. Cardwell was injured while she was working at Iowa Lutheran Hospital.
>
> She apparently slipped while working at the hospital and sustained a myofascial strain of the neck, of the back and a contusion of the right hip. Subsequently she developed a thrombophlebitis of the right leg, deep. This was felt to be related to her injury.
>
> She was hospitalized October 14, 1972 through October 21, 1972 at Iowa Lutheran Hospital. Since the time of discharge she has been treated at home and at the Clinic. She has been on treatment with Coumadin, anticoagulants, skeletal muscle relaxants, analgesics. She was advised to try returning to work half-time on January 31, 1973.
>
> She had considerable difficulty at first in returning to work and has called to advise me several times as to how much pain she was experiencing. She was seen on February 14 and was advised to continue work but only half days because of the multiple aches and pain. She is currently on this status and the plan is that she will resume full time work as and if she is able.
>
> If there is any further information which you desire, please let me know.

Claimant returned to full-time work for Defendant Employer on February 27, 1973 and worked without an incident until October 3, 1973. During this period she continued to consult with Dr. Eidbo and to take Parafon Forte and Tylenol No. 3 for pain. On October 3, 1973 Claimant slipped on grease and hurt her back while working for Defendant Employer. Dr. Eidbo sent a letter dated November 13, 1973 to Defendant Insurance Carrier with a copy to Kahre. Dr. Eidbo wrote:

> Re: 10-X-012444
> Martha Caldwell vs. Iowa Lutheran Hospital
> D/Injury: 10-10-72
>
> Regarding Martha Cardwell, I can give you the following information. Martha has been seen off and on up to the present time. She was last seen October 15, and October 29, 1973. She has been improving, but she still has some pain and "pulling in the back on motion."
>
> She was unable to work October 10, 1973, but is since back to work. My impression is the same as given on previous report at which time we concluded that she had a myofascial strain of the neck and lumbar spine and also. a deep thrombophlebitis, subsequently. She is back at work and we have continued to encourage her to try to continue working, although she continues to have some discomfort in the back and legs.
>
> I feel that Martha will probably have some discomfort off and on indefinitely. She continues to use the Parafon Forte and Tylenol No. 3 for pain.
>
> On October 8, (sic) 1973 she stated that she had again slipped on some grease and fell on the floor and had again hurt her back At that time she again strained her lumbar area on the right side and had paid going down the legs. She stated that she did not work that day because of the pain.
>
> Martha has again aggravated her old strain with a strain of the right lumbo-sacral area of the spine on October 8, (sic) 1973. She is currently back at work and we are treating her with skeletal muscle relaxants, local heat and analgesics. She is not really released as yet, but for practical purposes, I think she has reached a point where she will be having some pain and discomfort in her back. If there is any further information which you desire, please let me know.

A follow up report dated January 15, 1974 was sent by Dr. Eidbo to Defendant Insurance Carrier with a carbon copy to Kahre. Dr. Eidbo stated:

> Re: Martha Cardwell vs Iowa Lutheran Hospital
> 10-X-01244
> d/Incident: 10-10-72
>
> * * *
>
> Since that report, Mrs. Cardwell has been back to work to my knowledge. She has had some minor ailments including a cold in December with pleurisy and with myositis of the back for which she was treated with antibiotic and analgesics.
>
> It is my impression that as lohg as she is careful not to hurt herself further and as long as she does no excessive lifting, she should be able to get along with her work.
>
> * * *

Claimant received physical therapy from December 21, 1973 through February 18, 1974 and accrued charges in the amount of $196.80. Although Kahre closed his claim file for the injury of October 10, 1972 on February 21, 1974 Defendant Insurance Carrier paid the sum of $196.80 on March 8, 1974. Claimant accrued additional charges for physical therapy from February 28, 1974 through April 15, 1974 in the amount of $116.00. The physical therapy for Claimant was prescribed by John H. Kelley, M.D., an orthopedic surgeon.

In April, 1974 Kathryn Johnson, administrative secretary and employee insurance coordinator for Defendant Employer, was contacted by the health nurse for Defendant Employer about a different position for Claimant since she had a weight lifting limitation. Johnson discussed positions as a ward clerk and credits collections clerk with Claimant but Claimant desired to keep her position in the dietary department.

On August 24, 1974 Kahre opened a claim file for an injury to Claimant on October 3, 1973. The claim file was opened because Claimant was demanding payment of bills for physical therapy, drugs and treatment by Dr. Kelley. The bill for physical therapy was for services performed from February 28, 1974 through April 15, 1974. A conference was held on September 11, 1974 between Claimant, Kahre, and Johnson. Kahre sent a letter concerning this conference to Defendant Insurance Carrier on September 12, 1974.

On direct examination, Kahre testified about the letter and conference as follows:

> Q. Now, what was the conversation that you had with Mrs. Cardwell about that?
>
> A. She said the October 3, 1973, left her in a lot worse shape than she was before the accident and she didn't think she would recover to her previous state of health.
>
> Q. Will you tell us whether or not there was any question in your mind as to whether or not the conference you were having with Mrs. Cardwell and Mrs. Johnson related to the October, 1973, injury claim?
>
> A. Yes, that's related to the October, 1973 claim.

He further testified about the letter and conference on redirect as follows:

> Q. Now, you were asked to refresh your memory from a September, 1974, letter that you sent to your company in which you told the Commissioner that Mrs. Carwell (sic) said the injuries sustained on October 3, 1973, left her in a lot worse shape than she was before the accident, right?
>
> A. Yes.
>
> Q. Okay. In your report to the company of September 12, 1974, in paragraph two, do you recall stating that Martha Cardwell has been under treatment for her past complaints and the aggravation she sustained on October 3 or 8, 1973, by Doctor Eidbo, and it appears that he sent Mrs. Cardwell to Des Moines Orthopedic Surgeons on or about December 20, 1973?
>
> A. Yeah, this is one of the statements.
>
> Q. Now, again, the September 12 letter, as I understand your testimony, that letter allegedly said that there wasn't any question that you discussed the October 3, 1973, injury with Mrs. Cardwell and that is what the discussion was about and you indicated that to your company. You read to me in there where it says, "Dear Company: We discussed the October 3 incident." The only thing that is in there is where you say that Mrs. Cardwell said that after the October 3 incident she felt she hadn't gotten back to where she was.
>
> A. Yeah.
>
> Q. But there isn't anything where, "We sat down and discussed only this"?
>
> A. No.

Johnson recalled the conference as follows:

> A. She was upset because of some problems in connection with the drug bills. There was some confusion on which drug bills were for -- they were cash register receipts, which was difficult to tell what they were actually for, and she was upset with Mr. Kahre and I think she was upset with the hospital.
>
> And so what I was trying to explain to her was that the hospital doesn't settle the claims and Mr. Kahre doesn't settle the claim. The insurance company is the one that will take care of it, so she really had no reason to be upset with the hospital and Mr. Kahre. We were just trying to straighten it out so the insurance company could then make a decision on what needed to be done.

In approximately November, 1974 Johnson gave Claimant a check from Defendant Insurance Carrier for reimbursement of drug bills paid by her. At this time, Claimant testified she had a conversation with Johnson about her claim. She described the conversation as follows:

> Q. At the time that you had this conversation with Mrs. Johnson, she was employed by Iowa Lutheran Hospital as personnel director?
>
> A. Yes.
>
> Q. All right. Now, going back to this conversation, would you relate to the Court what conversation you had with Mrs. Johnson about your claim?
>
> A. Well, we were -- as I said, I signed the paper, the form, I guess you would call it, showing that she did bring the check to me. And so we were discussing different things and it came up to this settlement and at that time she told me that there could not have been any settlement made until, you know, the insurance -- in other words, the insurance company had to make the settlement, I presume, that there was no way the thing could be closed until the settlement was made and there had been no settlement made.
>
> Q. Prior to that conversation with Mrs. Johnson, had you for some reason called the Industrial Commissioner's office with regard to your case?
>
> A. Yes.
>
> Q. And what were you advised by the Industrial Commissioner's office?
>
> A. They told me at that time that the hospital -- the case had been closed as of the 13th of April of '73.
>
> Q. After you had been advised that the case had been closed by the hospital or by the Industrial Commissioner, however it had been closed, is that when you had this conversation with Mrs. Johnson?
>
> A. Yes.

Q. Did you relate to her your conversation with the Industrial Commissioner's office?

A. Yes, I did.

Q. And is that when she responded --

A. Yes.

Q. -- about the closing of your case?

A. Yes.

Q. And she advised you that it couldn't be closed until the final settlement had been made?

A. Yes.

On redirect, she testified about the conversation as follows:

Q. What was it that Mrs. Johnson told you about your claim being open?

A. Well, it was just in general conversation. She said that it could not be completely settled until a settlement had been made and there had been no settlement made.

Q. This would have been about November, 1974, as best you can recall?

A. The best I can recall, yes, sir.

On December 4, 1974 Kahre closed his claim file on the October 3, 1973 injury to Claimant.

Claimant testified as follows about another conversation with Johnson in January, 1975 concerning Dr. Eidbo's bill and her claim in general:

A. All right. Now, in January of 1975, did you at that time have additional conversation with Mrs. Johnson?

A. Yes.

Q. And was this also regarding your claim?

A. Yes.

Q. At that time what was the conversation regarding?

A. It's regarding to the claim and she told me at that time that nothing could be done until the doctor had sent, I presume, a percentage report. She did not say just what it was, Mr. Hyland, but a report.

She further testified about the conversation on redirect as follows:

Q. Now, did you have another conversation with her later on?

A. In '75.

Q. And do you remember when that would have been in 1975? I think you thought it was January.

A. It would have to be the latter part of January or the first part of February, as I had been in the hospital in January and I was at home recuperating.

Q. When you were in the hospital, that didn't have anything to do with the injury at work, did it?

A. No. I had a viral infection at that time.

Q. When you went in to see her at that time in 1975, did she give a check or have you sign anything?

A. No. And I didn't go into her office when we were discussing this. I talked to her on the phone and then when I went back to work she talked to me briefly in the cafeteria.

Q. Now, what was your conversation about on those two occasions?

A. About the claim and she again told me that they could not do anything until they received a report from the doctor.

Johnson's recollection of the conversations with Claimant in November, 1974 and January, 1975 on direct examination was:

A. Well, I've talked to her -- well, I did obviously talk to her several times and I do remember talking to her at one time in the cafeteria about -- she was wondering about what was going on and we were still at that time waiting for a percent of disability letter from Doctor Eidbo, I do recall that.

Q. Did you ever get that from Doctor Eidbo?

A. No.

Q. Now, there was some discussion here that there was some unpaid bills. Did you have a conversation with her about Doctor Eidbo's bills?

A. I don't recall.

* * *

Q. Would you tell us whether or not you have tendered a check to her in payment of some medication?

A. Why, I'm pretty sure that I did. I don't recall doing it, but I'm sure I did.

Q. Would you tell us whether or not you ever informed her that this case would never be closed until Lutheran and Argonaut made a settlement with her?

A. No.

Q. Had you ever intended to lull Mrs. Cardwell so that she would let any statute of limitations run by in regard to opening up her Workmen's Compensation claim?

A. No.

Q. Have you ever acted intentionally or not in the way you would expect her to believe that a statute of limitations would not run on a claim of 1972?

* * *

A. No.

On cross examination she testified:

A. Now, you have indicated that you did have some conversation with Mrs. Cardwell about the fact that her case couldn't be closed until something was done, isn't that right?

A. Yes. We weren't going to just drop it and leave her hanging in the air, yes.

Q. And do you have any idea when that conversation may have taken place?

A. I think it was during the time of the drug bills because that, I think to her, was an upsetting time.

Q. And she was concerned about the fact that she may just be left in the cold, and you indicated that it could not be closed until everything had been settled or taken care of or words to this effect?

A. Yes.

Q. You wanted to reassure her that the hospital or the insurance company could not just dump her, in other words?

A. Yes.

Q. Okay. And you indicated that some action, some affirmative action, had to be taken before her file could be closed?

A. Well, I informed her that she would be aware of everything that was going on, that I would keep her informed of what was going on.

Q. But you also, as I understand, indicated to her that something would have to be done to finally close it? Now, I think at one time you indicated in your testimony that there would have to be a percentage disability report?

A. Well, if she was going to claim a percentage disability, then it would have to be from the doctor. She came to me and said there was one and that didn't help me at all. I had to have something from the doctor that said that.

Q. Did you write the doctor?

A. No. I asked her if she would have him get a per cent of disability.

Q. You did not write the doctor and get the per cent of disability?

A. No. I wrote to Argonaut and explained to them that she had -- that she had a per cent of disability and would they please check into it. Now, if they wrote or not, I don't know.

Q. Argonaut was made aware that Mrs. Cardwell was claiming a percentage disability?

A. Yes.

Johnson was uncertain of the date she informed Defendant Insurance Carrier that Claimant had a per cent of disability but believed the date was in 1974. Kahre was neither advised by Defendant Insurance Carrier of any letter written by Johnson to them about permanent partial disability nor made inquiry on his own of any permanent partial disability. He testified:

> ". . . I just wrote for narrative reports. I think I was primarily interested in the length of disability."

Johnson testified on direct examination that in her conversations with Claimant she was discussing the injury in October of 1973 for which she received an incident report. On cross examination she testified:

> Q. And would it be fair to say that when you and Mrs. Cardwell discussed any accident or any injury instead of saying, "What about my September or October of 1973 injury," you referred to her injury and that's all, without a date?
>
> A. Oh, probably, yes.

Claimant sustained her burden of proof that Defendants should be estopped from asserting the limitation in Section 86.34, Code of Iowa. Johnson, who was hired by Defendant Employer in April, 1974 as administrative secretary and employer insurance coordinator even though she had no previous experience in workers' compensation and who Defendant Insurance Carrier involved in the handling of claims for them, falsely represented to Claimant when inquiry was made by her that her claim could not be closed until everything had been settled. Johnson intended for Claimant to rely on the representation since she wanted to reassure her that Defendant Employer or Defendant Insurance Carrier would not "drop it" and that she ". . . would keep her informed of what was going on." In furtherance of these objectives, Johnson wrote Defendant Insurance Carrier that Claimant ". . . had a per cent of disability and would they please check into it." No evidence was offered that Defendant Insurance Carrier responded to this request.

The evidence further revealed a lack of knowledge of the true facts on the part of Claimant of the misrepresentation made by Johnson and the reliance on such statement to her prejudice, i.e., the asserting of the limitation in Section 86.34, Code of Iowa, by Defendants. Although Claimant was represented by her present attorney in a lawsuit as a result of an automobile accident in 1970, the evidence failed to show that her attorney represented her for the present claim prior to the running of the limitation of Section 86.34, Code of Iowa.

The testimony of Johnson and Kahre that they were referring to the October, 1973 injury and not to the October, 1972 injury in their conversations with Claimant is ludicrous. As a result of the injury of October, 1972 Claimant was off work full-time from October 10, 1972 to February 5, 1973 and part-time from February 5, 1973 to February 27, 1973. Claimant missed approximately one day of work as a result of the October, 1973 injury.

The weight to be given to Kahre's testimony was further diminished by his creation of a separate claim file for the October, 1973 injury on August 24, 1974 when he already possessed information about same in his claim file for the October, 1972 injury. This information was availalbe to him prior to his closing the claim file for the October, 1972, injury on February 24, 1974. If Kahre believed that the October, 1973 incident was a new injury, he should have treated it as a new injury when he received Dr. Eidbo's letter dated November 13, 1973 in which he discussed the October, 1973 incident. The delay in creating a file for the October, 1973 incident raised questions about the motivations and competence of Kahre in handling this matter.

* * *

Signed and filed this 18 day of February, 1977.

DENNIS L. HANSSEN
Deputy Industrial Commissioner

Appealed to Commissioner; Dismissed.
Appealed to District Court; Dismissed.

EVIDENCE – ADMISSIBILITY

MARY WRIGHT,

Claimant,

vs.

GOLDEN AGE MANOR, INC.,

Employer,

and

UNITED STATES FIRE INSURANCE COMPANY,

Insurance Carrier,
Defendants.

Review Decision

This is a proceeding brought by the defendant employer, Golden Age Manor, Inc., and its insurance carrier, United States Fire Insurance Company, against the claimant, Mary E. Wright, pursuant to the provisions of §86.24, Code of Iowa, for review of an arbitration decision wherein Claimant was held to have sustained injuries arising out of and in the course of her employment on June 27, 1973 and awarded temporary disability compensation . . .

* * *

Claimant is fifty-five and single. On June 27, 1973 Claimant was employed by defendant, Golden Age Manor, Inc., as a nurse's aide. She had been employed by Defendant Employer for approximately five years prior to that date. In general, her duties included changing, feeding and caring for the patients at Golden Age Manor. Claimant worked six days per week at a rate of $14.40 per day.

On the evening of June 27, 1973 while turning a patient over in bed, Claimant allegedly injured her back. Claimant testified that she notified the nurse in charge of her injury. No medical care was offered by Defendant Employer at the time of injury. Claimant continued to work until July 14, 1973.

On July 17, 1973 Claimant sought medical attention from John J. Finneran, M.D., of the Gilfillan Clinic, P.C., in Bloomfield, Iowa. In the course of several consultations, an x-ray examination was conducted, medication was prescribed and Claimant was referred to Herbert B. Locksley, M.D., in Cedar Rapids, Iowa. Dr. Locksley, a neurosurgeon, examined Claimant on August 20, 1973. The last consulting physician of record was David B. McClain, D.O.P.C., who conducted an orthopedic evaluation of Claimant on July 18, 1974.

* * *

The arbitration hearing was conducted on July 17, 1975 at the Office of the Industrial Commissioner in Des Moines, Iowa. Claimant was the only witness who testified. Claimant's counsel offered into evidence Exhibits 1-6. Initially Defendants objected to the admittance of Claimant's Exhibits 1-6 but subsequently waived their objection to all exhibits except Claimant's Exhibit 6, the letter to Oscar Jones from Dr. David B. McClain (page 9 of the transcript). The deputy industrial commissioner ruled that all the exhibits were properly admissible. The first issue of this review is the propriety of that ruling.

* * *

Exhibit 6 [was] – an original single-page narrative report addressed to Oscar E. Jones, dictated and signed by David B. McClain, D.O.P.C., dated August 29, 1974.

* * *

In Defendants' brief on review it is their position that the deputy industrial commissioner erred in admitting into evidence, for his consideration, the opinions and conclusions of physicians advanced or offered in the form of unauthenticated reports. Defendants contend that although the deputy industrial commissioner attempted to justify the admission of the exhibits under the provisions of §622.28, Code of Iowa, the claimant failed to provide the requisite foundational facts necessary for admission.

Section 622.28, Code of Iowa, provides:

> *Writing or record --- when admissible --- absence of record --- effect.* Any writing or record, whether in the form of an entry in a book, or otherwise, including electronic means and interpretations thereof, offered as memoranda or records of acts, conditions or events to prove the facts stated therein, shall be admissible as evidence if the judge finds that they were made in the regular course of a business at or about the time of the act, condition or event recorded, and that the sources of information from which made and the method and circumstances of their preparation were such as to indicate their trustworthiness, and if the judge finds that they are not excludable as evidence because of any rule of admissibility of evidence other than the hearsay rule.
>
> Evidence of the absence of a memorandum or record from the memoranda or records of a business of an asserted act, event or condition, shall be admissible as evidence to prove the nonoccurrence of the act or event, or the non-existence of the condition, if the judge finds that it was in the regular course of that business to make such memoranda of all such acts, events or conditions at the time thereof or within a reasonable time thereafter, and to preserve them.
>
> The term business, as used in this section, includes business, profession, occupation, and calling of every kind.

Before ruling upon Defendants' objection to the admission of Claimant's Exhibit 6, the deputy industrial commissioner engaged in the following dialogue with Claimant (pages 9 and 10 of the transcript).

> THE DEPUTY COMMISSIONER: How did the report of Dr. McClain come into your custody, Mrs. Wright, in the normal course of business?
>
> THE WITNESS: Yes.
>
> THE DEPUTY COMMISSIONER: I will overrule the objection and allow Dr. McClain's report to come in, as well as Exhibits 1 through 5, and would suggest

that that portion of the doctor's report that counsel fees is objectionable or is incomplete, that he provide me with appropriate questions and answers, interrogatories, of the doctor, in order to clarify and expand the report that I will allow in evidence. Proceed. (Claimant's Exhibits 1 thru 6 received in evidence.)

Section 622.28, Code of Iowa, requires that the offered writing or record is admissible if the judge finds that it was ". . . made in the regular course of a business . . .", not that the record or writing came into the offering party's custody in the normal course of business. This distinction is crucial because the writing is offered for the truth of the matter asserted therein; hence, knowledge of the circumstances and methods of preparation of the writing is important to assure trustworthiness. Therefore, under the provisions of §622.28, Code of Iowa, the deputy industrial commissioner asked an improper question in an attempt to establish a requisite foundation for the admission of Claimant's Exhibit 6. It might also be noted that Claimant testified that she received the report of Dr. McClain but an examination of the exhibit reveals that in fact the document was addressed to Oscar Jones, her attorney. In light of the foregoing circumstances and principles, Defendants' objection to the admission of Claimant's Exhibit 6 (a report of Dr. David B. McClain) will be sustained on the ground of lack of foundational facts to justify admission under §622.28, Code of Iowa. In so holding, it is recognized "strict rules of evidence are not to be applied in proceedings before the industrial commissioner. Nonetheless, some rules must apply." See *Giere v. Aase Haugen Homes, Inc.*, 259 Iowa 1065, 1074; 146 N.W.2d 911, 916 (1966).

[The commissioner went on to find Claimant sustained her burden in showing an injury arose out of and in the course of her employment. The case was remanded to the deputy to determine the length of temporary disability.]

* * *

Signed and filed this 15 day of July, 1976.

ROBERT C. LANDESS
Industrial Commissioner

No appeal.

EVIDENCE – MOTION PICTURE

LEROY HAWS,

Claimant,

vs.

ESMARK, INC.,

Employer,

and

ROYAL-GLOBE INSURANCE COMPANY,

Insurance Carrier,
Defendants.

Appeal Decision

This is a proceeding brought by Esmark, Inc., defendant employer, and Royal-Globe Insurance Company, its insurance carrier, appealing a review-reopening decision wherein Leroy Haws, claimant, was awarded medical expenses, healing period benefits and permanent partial disability compensation resulting from an injury arising out of and in the course of his employment on January 5, 1976.

* * *

Defendants on appeal place primary reliance on surveillance films taken by James H. Hicks, private detective, who testified that he observed claimant for two and a half hours and photographed him for forty-five minutes of that period. On appeal it was indicated by defendants' counsel that the pictures which were shown at the appeal hearing were taken on two different occasions, July 4 and July 7, 1976.

The admissibility of motion picture evidence and the weight to be given that evidence in workmen's compensation cases has presented a continuing dilemma for courts across the country. *John B. Kelly Co. v. Workmens' Compensation Appeal Board,* 303 A.2d 255 (Pa. Commw. Ct. 1973); *Powell v. Industrial Commission,* 418 P.2d 602 (Ct. App. Ariz. 1966); *Lambert v. Wolf's, Inc.,* 132 So.2D 522 (Ct. App. La. 1961); *De Battiste v. Anthony Laudadio & Son,* 74 A.2d 784 (Super. Ct. Pa. 1950). Professor Arthur Larson in 3 *Workmen's Compensation,* §79.74 (1976 ed.) points out that "[a]lthough on the surface it might appear that nothing could be more cogent and even dramatic refutation of a disability claim than motion pictures of claimant jacking up a car or playing tennis, the courts have rightly observed that such evidence must be used with great caution."

Some of the limitations of motion picture evidence were alluded to by the Pennsylvania Superior Court in *De Battiste,* supra, at 787 with the court noting that claimant's activities were shown for a restricted period and that movies could not accurately record "speed, energy and efficiency at work."

In following *De Battiste,* the Pennsylvania Commonwealth court in *Kelly,* supra, at 257 acknowledged another potential difficulty with motion picture evidence cautioning that "pictures must be carefully scrutinized because of the ease with which true films can be altered and distorted into frames of damaging fabrications." See also *Powell,* supra.

The Louisiana Court of Appeals accurately pinpointed problems with filmed evidence in *Lambert,* supra, at 527, stating that "pictures show only very brief intervals of the activities of the subject, they do not show rest periods, they do not reflect whether the subject is suffering pain, and they do not show the after effects of his activities."

The films presented in the case sub judice show claimant playing with children and lighting firecrackers. Although to this commissioner the films did not appear to show anything out of the ordinary, all the limitations of moving picture evidence cited by other courts seem applicable. Claimant was observed for less than three hours and photographed for less than an hour. The films are of recreational as opposed to work activities. Because the filmed activity was confined to a brief period, it is not

possible to evaluate claimant's stamina or to discern whether or not claimant had adverse after effects or to substantiate claimant's pain or to determine in what way drugs are freeing claimant's movements.

[The deputy's decision was affirmed and benefits were awarded to claimant.]

* * *

Signed and filed this 29 day of December, 1977.

ROBERT C. LANDESS
Industrial Commissioner

No appeal.

EVIDENCE – MOTION PICTURES

WARREN H. AHRENS,

Claimant,

vs.

WARREN AHRENS,

Employer,

and

AETNA INSURANCE COMPANIES,

Insurance Carrier,
Defendants.

Review-Reopening Decision

INTRODUCTION

This is a proceeding in review-reopening brought by Warren H. Ahrens, claimant, against Warren Ahrens, employer, and Aetna Insurance Company, insurance carrier, for the recovery of additional benefits on account of an injury on December 12, 1974.

* * *

CLAIMANT'S TESTIMONY

In December, 1974, claimant was performing two jobs. He worked as a contract hauler of grain for Pillsbury and operated a salvage business. On December 12, 1974, claimant was working for his salvage business when he fell approximately 40 feet. He was immediately hospitalized at the Franciscan Hospital in Rock Island.

At the Franciscan Hospital, claimant was treated by Clement Cunningham, M.D., K. J. Duyvejonck, D.D.S., and Harold J. Jersild, M.D. for injuries to his vertebrae at T-9, T-11, L-1 and L-2 and to his left hand, right knee, jaw and face. He was discharged from the hospital on May 2, 1975. Follow-up examinations were conducted by Dr. Jersild on March 15, 1976 and January 19, 1977.

During the fall of 1976, claimant worked four or five small salvage jobs. He testified about the jobs as follows:

> Q. How many of those four or five small jobs did you do cutting or working with the torch?
>
> A. One man done most of the work out there.
>
> MR. GOEBEL: I'm not sure – you did what?
>
> THE WITNESS: I'd just take one helper along to do the -- I do the buying, and they do the work. Let's put it that way.
>
> Q. (By Mr. Shepler) But on those jobs, I take it you did try to do some cutting with the torch.
>
> A. I tried, yes, and I didn't succeed.

Defendants continued to pay claimant workers' compensation benefits until February 25, 1977.

After February 25, 1977, claimant began working on a salvage job at Kewanee, Illinois. He described his duties on this job to be supervisory.

At the hearing, claimant testified about his present complaints and limitations from the injuries sustained by him on December 12, 1974 as follows:

> Q. Referring to that time period, the beginning of May, (1977) what did your back feel like while you were handling the welding torch?
>
> A. Pretty painful.
>
> Q. What area of the back?
>
> A. In the lower part and middle part of my back. I mean, where the portions of the injuries was.
>
> Q. What kind of pain are you talking about?
>
> A. Just sharp. I don't know how -- just sharp pains. I mean, it just constantly stayed there until you take some Anacins or take pain reliever.
>
> * * *
>
> Q. Do you have any difficulty at the present time in sitting or staying in a seated position?
>
> A. Yes, I do.
>
> Q. What kind of pain or problems do you have?
>
> A. Put the pressure on your hands. I mean, like, if I'm driving, I put the pressure on the steering wheel, and this one hand to relieve the pressure on my lower part of the back.
>
> * * *
>
> Q. Referring to your hands, do you experience any problems or difficulties with your hands at the present time from this accident?
>
> A. Well, later on in the day, they tire. I mean -- which they never did before. I mean, they --
>
> Q. What do you mean "they tire"?
>
> A. I mean just -- you haven't got the grip that you had prior to my accident before. That's what I'm trying to explain to you.
>
> * * *
>
> Q. Does your knee or the condition with your knee give you any trouble at the present time?
>
> A. The leg or the thigh does. I mean, it --
>
> Q. What about the knee itself?
>
> A. Well, it seems like it's in pretty fair condition.
>
> Q. What are you referring to about your right thigh?
>
> A. It goes numb. It gets hards, [sic], feels hard. I don't know why it should do that, but it does. Goes to sleep.
>
> * * *

Q. Do you have any residual problems or pain with your face or your head?

A. Yes, I do when I get tired, or the weather. Change in weather.

* * *

Q. In the last month, have you been able to do any lifting of objects or things?

A. No. That's one thing I'm staying away. I mean, I just won't.

On cross-examination, claimant testified he hadn't operated any type of equipment except his pickup since the accident. He further testified he is unable at the present time to engage in any type of physical work.

DEFENDANTS' TESTIMONY

Defendants offered the testimony of Stanley D. Salvon, an investigator for Security Consultants. At the request of defendants, Salvon conducted an investigation to determine claimant's physical capabilities. He began his observation of claimant on November 15, 1976.

On November 18, 1976 Salvon observed claimant working on the engine of his pickup truck. After he finished with the truck, claimant performed several errands before he went to a warehouse, which was being emptied of heavy industrial equipment. Salvon observed claimant do the following:

> Mr. Ahrens was driving a forklift truck. He seemed to be supervising the people. He helped unload the heavy machinery from the pickup truck onto the flatbed truck. He used a sledgehammer. He used a pry bar. He pulled the machinery with a chain. He was up and down on both legs, on occasion standing completely on his right leg, jumping up and down from the warehouse to the ground level. There appeared to be no restriction on any of his movements.

Claimant also performed this activity on November 19, 1976. Films taken by Salvon of Claimant's activities on these dates were admitted into evidence and corroborated Salvon's testimony.

MEDICAL EVIDENCE

The only medical evidence offered was the deposition of Dr. Jersild.

Dr. Jersild examined claimant at the Franciscan Hospital on December 13, 1974. He was primarily responsible for the treatment of claimant's compression fractures of T-9, T-11, L-1 and L-2. Treatment of the fractures consisted of bedrest from the date of his hospitalization on December 12, 1974 until his discharge from the hospital on January 30, 1977.

A follow-up examination was performed by Dr. Jersild on May 2, 1975. The following history was taken by Dr. Jersild:

> He complained. He was wearing a brace, and he was having quite a bit of discomfort in his back toward the latter part of the day, particularly. He was on a markedly reduced level of activity. He stated that he was just supervising rather than pitching in and doing any physical activity. He complained of pain occasionally radiating down the front of his right side where he would have a sensation of numbness at times.

His examination revealed residual sensitivity with pressure, pain when bending forward, and weak abdominal muscles. X-rays showed satisfactory healing of T-9, T-11, L-1 and L-2. None of the vertebrae were reduced in height more than 25 percent.

Dr. Jersild recommended abdominal strengthening exercises and low back extension exercises for claimant. He further recommended to claimant that he ". . . start weaning himself off the brace."

The next examination of claimant by Dr. Jersild was on March 15, 1976. He obtained the following history:

> He still had some discomfort in his low back. If he was more than minimally active, he said he was and had a supervisory-type of job and was able to get along satisfactorily by avoiding active usage of his back.

Dr. Jersild's examination revealed discomfort with anterior flexion, some restriction of extension, and no neurological problems. X-rays showed the old compression fracture. No specific recommendations were made by Dr. Jersild.

The last examination of claimant by Dr. Jersild was conducted on January 17, 1977. A supplemental history was obtained by Dr. Jersild:

> He stated that at that time, he would get along quite well if he went easy during the day. His major problem was irritability in the back, and he pointed to the upper lumbar area. He stated that if he overdid things at all, he would have to lie down that evening when he would get home and suffer. He was very stiff and sore after any attempt at activity more than average. Riding in a car two or three hours produced pain in his back. When simply standing still, he would tend to lean on his hands against furniture in order to take the pressure off of his back. He stated that a knot would form in his back at times, and he would have to lie down about 15 minutes to relieve this sensation. Regarding his lower limbs, he stated that his right knee was giving him no trouble where he had the crack through the kneecap. Sometimes the front of his right thigh above the knee would go numb. He felt that his hands weren't as strong as they used to be, and he had the impression that there were fractures of both hands, but my record didn't indicate that. I didn't have the hospital records available to refresh my mind. He also stated at that time that he had been having dizzy spells for which I advised him to see his family physician. That was regarding his subjective complaints.
>
> His examination revealed:
>
> He would bend forward hesitantly but bring his fingertips about six inches from the floor. He showed satisfactory lateral bending and satisfactory extension.
>
> * * *
>
> Palpation or pressure with the examining hand

elicited sensitivity at about the L-4 level, L-2 Level, T-12 and T-14. Above this area, he did not have any sensitivity. Passive flexion, that is, bringing his knees up against his chest, produced a complaint of pain. Lowering his straight legs out in front of him produced pain also. So did passively extending or hollowing out his back while he laid on his abdomen produced a complaint of pain. Passive dorsiflexing his ankles while he was laying face down with his knees flexed produced a complaint of mild ache in the low back. Neurologically, deep-tendon reflexes were physiological and equal at the knees and the ankles. I could detect no motor or sensory deficit. He tended to stagger a bit as he walked backwards on his heels checking strength in his legs.

He estimated the loss in height of vertebra T-9 and T-11 to be 10%, L1 to be 25%, and L2 to be a little irregular on the anterior-superior margin of the body.

Dr. Jersild described the residuals of the compression fractures as follows:

> Q. Do the compression fractures such as you have described produce any limitation of mechanical functioning in and of themselves in the sense of being able to lift things or do heavy labor?
>
> A. Ordinarly not. You can only talk in statistics when you talk about residual problems following vertebral compression fractures, and in his case, one can only say that ordinarily, after a year, symptoms have disappeared. In the more severe 50 percent height loss, I have seen these people complain as long as two years. I know that there are cases, recorded where there is permanent trouble after this, but I haven't. I don't recall seeing permanent problems myself.

Although Dr. Jersild found no objective evidence of any restrictions of claimant, he believed the trauma experienced by claimant on December 12, 1974 caused a functional overlay.

ISSUE

Is claimant entitled to additional compensation as a result of the injury on December 12, 1974?

APPLICABLE LAW

Claimant has the burden of establishing by a preponderance of the evidence that the injury on December 12, 1974 was the cause of the disability on which claimant based 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 medical testimony. *Bradshaw v. Iowa Methodist,* 251 Iowa 375, 101 N.W.2d 167.

ANALYSIS

Claimant failed to sustain his burden of proof that he is entitled to additional compensation as a result of the injury on December 12, 1974. The testimony by claimant concerning the limitations incurred by him from the injury was impeached by defendants with the testimony and films of Salvon. Additionally, the testimony of Dr. Jersild failed to corroborate by objective findings the limitations described by claimant or to causally connect any permanent physical impairment of claimant with the injury on December 12, 1974.

* * *

Signed and filed this 3 day of October, 1977.

DENNIS L. HANSSEN
Deputy Industrial Commissioner

Appealed to Commissioner; Affirmed

EXAMINATION OF EMPLOYEE – EMPLOYER

ANTHONY S. KAMMERUDE

Claimant,

vs.

JOHN DEERE DUBUQUE WORKS

Employer,
Self-Insured.

Ruling

Now on this 22 day of December, 1977, the matter of the employer's Application For Examination of Employee comes on for determination.

The arbitration decision in this case is on appeal; however, the subject of the above mentioned application. Therefore, the undersigned deputy industrial commissioner will proceed to rule upon said application.

The employer's application asks that the employee be ordered to submit himself for "examination and evaluation by Steven R. Jarrat, M.D., Director of Rehabilitation Unit, Fransican Hospital, Rock Island, Illinois." For authority, the employer cites Section 85.39, Code of Iowa.

Section 85.39 provides that the employee after an injury, "if so requested by his employer, shall submit himself for examination at some reasonable time and place within the state as often as may be reasonably requested, to a physician or physicians authorized to practice under the laws of this state, without cost to the employee . . ." Since the statute clearly requires that such an examination take place within the state and by a physician authorized to practice in this state, it is clear that the Industrial Commissioner cannot order Claimant to be examined outside the state by a physician not known to be licensed to practice in Iowa.

WHEREFORE the employer's Application For Examination of Employee, filed December 7, 1977, is hereby overruled.

Signed and filed at Des Moines, Iowa this 22 day of December, 1977.

BARRY MORANVILLE
Deputy Industrial Commissioner

No appeal.

EXAMINATION OF EMPLOYEE – EMPLOYER

JEAN K. SHANNON,

Claimant,

vs.

DEPARTMENT OF JOB SERVICES,

Employer,

and

STATE OF IOWA,

Insurance Carrier,
Defendants.

Order on Appeal

NOW on this 10 day of November, 1977, the matter of defendants' appeal of an order by the deputy industrial commissioner filed July 26, 1977 wherein defendants were ordered to pay the expenses of an examination under Iowa Code §85.39 which was conducted by Dr. Tai J. Pak at Immanuel Medical Center in Omaha, Nebraska comes on for determination.

On March 14, 1977, claimant requested an 85.39 examination at Immanuel Medical Center, Omaha, Nebraska. At a May prehearing defendants agreed to pay the costs of the examination which had been carried out in April. On July 25, 1977, at the review-reopening proceeding, two bills from Immanuel Medical Center were presented by claimant, but no report had been received. These bills were objected to by defendants on the grounds of being unreasonable and of being treatment rather than evaluation. The deputy industrial commissioner, appearing to believe that no report was to be forthcoming until payment was made, indicated he would order defendants to pay with any overpayment being credited against any amount of compensation found due and owing. A formal order was issued with no provision for credit.

Defendants' brief lists three issues to be addressed:

1. WHETHER SECTION 85.39, CODE OF IOWA, CONTEMPLATES THAT AN EVALUATION NECESSARILY INCLUDES EXTENSIVE TREATMENT--IF ANY TREATMENT AT ALL?

2. WHETHER THE TERM "REIMBURSE" WHICH IS USED IN SECTION 85.39, CODE OF IOWA MEANS THAT AN EMPLOYER SHALL BE REQUIRED TO MAKE INITIAL AND DIRECT PAYMENT TO THE SERVICE OR INSTITUTION IN QUESTION FOR ANY MEDICAL EXPENSES INCURRED FOR AN ALLEGED MEDICAL EXAMINATION AND INCURRED PRIOR TO ANY SPECIFIC AGREEMENT OR ORDER PURSUANT TO SAID CODE SECTION?

3. WHETHER SECTION 85.39, CODE OF IOWA, LIMITS THE LOCATION OF THE EXAM AND SPECIFIES QUALIFICATIONS OF THE EVALUATING PHYSICIAN ONLY IN CASES OF EMPLOYER REQUESTED EXAMS, BUT NOT IN CASES OF EMPLOYEE REQUESTED EXAMS?

Iowa Code §85.39 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, upon application to the commissioner and at the same time delivery of a copy to the employer and its insurance carrier, be reimbursed by the employer the reasonable fee for a subsequent examination by a physician of his own choice, and reasonably necessary transportation expenses incurred for such examination. The 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.

Neither "evaluation" nor "examination" is defined in Iowa Code §85.61. Defendants are correct in stating that treatment and evaluation are not synonymous and that Iowa Code §85.39 does not contemplate reimbursement for treatment. However, defendants are incorrect in stating that charges for drugs and for physical therapy would not be connected with the evaluation. It is possible that use of either drugs or physical therapy could have been necessary to conduct range of motion studies or other testing. The purposes of the drugs and the physical therapy cannot be determined on the face of the bill.

Although Iowa Code §85.39 does not contemplate defendants' making an initial payment to an examination physician or institution, when reasonable expenses can be determined in advance, an order to defendants may be issued to avoid defeating the statute. Such an order would be appropriate when a physician refuses to make an evaluation because his payment is not assured. To prevent frustration of the intent of the statute it is necessary to construe "reimburse" more broadly than to say "reimburse" is limited exclusively to "paying back." This is turn averts the possibility of claimants' failing to avail themselves of the particular benefits of this statute because they lack the financial capacity to make an initial payment.

Iowa Code §85.39 expressly reveals the legislature's intent to distinguish between the obligation to submit to examination imposed upon employees and those imposed upon employers when it is the employee who is requesting the evaluation. The statute clearly limits the employer-requested employee exam to "some reasonable time and place within the state" and "to a physician or physicians authorized to practice under the laws of this state." This restriction has been seen as a protective shield for the employees who are submitting to an examination by physicians who are not chosen by them. When the employee is choosing the physician, as in the case in an employee-requested evaluation, the safeguard provided by requiring an examination within the state by an Iowa doctor is unnecessary. It is to be noted that the element of reasonableness pervades the employee-requested examination section and operates as a protective device for the employer. Because of the dearth of adequate evaluation centers within the State of Iowa which was exacerbated by the loss of facilities at the University of Iowa, it has become reasonable for claimant to seek examination at Immanuel

Medical Center in Omaha.

While the bill from Immanuel contains a number of items which are obviously examination-related, there are a significant number of listings which might be treatment. Employers are requested to pay only reasonable examination costs. The burden to establish the reasonableness of the examination charges rests with the claimant. It is not possible to discern from the fact of the submitted bill which entries are reasonable billings for the evaluation.

* * *

THEREFORE, it is ordered:

That claimant, Jean K. Shannon, submit evidence as to which charges made by Immanuel Medical Center were related to examinations as contemplated by §85.39, Code of Iowa, so that the amount of defendants' responsibility for this bill may be determined.

Signed and filed this 10 day of November, 1977.

ROBERT C. LANDESS
Industrial Commissioner

No appeal.

EXAMINATION OF EMPLOYEE – EMPLOYER

DUANE GREENWALT

Claimant,

vs.

AMF LAWN & GARDEN EQUIPMENT

Employer,

and

FIREMAN'S FUND INSURANCE CO.

Insurance Carrier,
Defendants.

Ruling

Now on this 15th day of November 1977, the matter of Claimant's Application For Medical Examination comes on for determination. The Industrial Commissioner's file shows:

1. That Claimant filed his application in arbitration; however that a memorandum of agreement was already on file and that Defendants admitted the action in review-reopening.
2. That on October 4, 1977, Claimant filed his employee's request for examination under Section 85.39, Code of Iowa; that on October 26, 1977, Defendants filed their resistance to the application for medical examination, stating that since no employer-chosen physician had made an evaluation of permanent disability, Claimant had no right to the benefits of Section 85.39 and that Claimant was being treated by a physician of his own choice and that "no evaluation of permanent disability has been given to the knowledge of the Employer or Insurer."

Unnumbered paragraph 2 of Section 85.39 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, upon application to the commissioner and at the same time delivery of a copy to the employer and its insurance carrier, be reimbursed by the employer the reasonable fee for a subsequent examination by a physician of his own choice, and reasonably necessary transportation expenses incurred for such examination. The 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.

It may be inferred from the Industrial Commissioner's file that, since a memorandum of agreement is on file, the employer acquiesed in the employee's choice of physician and, thus, that the employer furnished appropriate medical care under Section 85.27. However, it appears that no employer-chosen physician has made an evaluation of permanent disability.

It is clear that under the provisions of Section 85.39, that a condition precedent to the employee's right to examination by a physician of his own choice is a prior examination by an employer-chosen physician.

WHEREFORE Claimant's Application For Medical Examination is hereby overruled.

Signed and filed at Des Moines, Iowa this 15th day of November, 1977.

BARRY MORANVILLE
Deputy Industrial Commissioner

No appeal.

EXAMINATION OF EMPLOYEE – EMPLOYER

BRIAN MUNDEN

Claimant,

vs.

IOWA STEEL & WIRE

Employer,

and

PROTECTIVE FIRE & CASUALTY

Insurance Carrier,
Defendants.

Ruling

Claimant's application for medical examination filed in accordance with section 85.39, Code of Iowa, was resisted by defendants who stated, in essence, that no examination had been conducted by a defendant-chosen physician. Defendants claim that Dr. Ritter was chosen by claimant. The Industrial Commissioner's file shows a letter [written] by Dr. Ritter to defendants counsel; the letter contains a

rating of permanent disability.

Under section 85.27, Code of Iowa, the employer has the right to choose the physician. In this case, where defendants did not exercise that right they may be held to have furnished the care under the provisions of that code section and therefore to have acquiesced in claimants choice of physician. It is clear that defendants did obtain a rating of permanent disability and that claimant ought to have his opportunity to do so.

WHEREFORE defendants' resistance to employee's request for examination is hereby overruled and claimant may proceed with the requested examination.

Signed and filed at Des Moines, Iowa this 12 day of September, 1977.

BARRY MORANVILLE
Deputy Industrial Commissioner

No appeal.

EXAMINATION OF EMPLOYEE – EMPLOYER

ALBERT GREGORY,

Claimant,

vs.

U.S. Homes,

Employer,

and

INSURANCE COMPANY OF NORTHERN AMERICA,

Insurance Carrier,

and

THE SECOND INJURY FUND OF IOWA,

Defendants.

Ruling

On August 1, 1977, claimant filed his *application for medical examination* under unnumbered paragraph 2, section 85.39, Code of Iowa. The requested examination would take place at the Department of Rehabilitation, in Immanual Medical Center in Omaha, Nebraska.

On August 9, 1977, the Second Injury Fund, through the Attorney General of Iowa, filed its resistance to claimant's application, and August 15, 1977, the defendant employer and insurance company filed their resistance, claiming that the examination is not such as is contemplated by the above mentioned code section. Further, defendant employer and insurance company stated that section 85.39 does not contemplate a long period of "evaluation and treatment such as is performed at the Immanual Medical Center"; that "there is Comparable qualified and confident medical opinion available" in Des Moines, Iowa; that the expenses of travel from Des Moines to Omaha and return would be unreasonable; that section 85.39 "contemplates that said employee's examination shall be performed within the state of Iowa and by a physician licensed to practice in the state of Iowa"; and that, since, under section 85.39 the employer is confined to requesting the employee to submit himself for examination within the state of Iowa, that to allow claimant to be examined outside the state at the employer and insurance company's expense, would deny defendants due process and equal protection under the laws of the state of Iowa and the United States."

First, the Second Injury Fund cannot be construed to be an employer in this case, and it is hereby relieved from paying any expenses with respect to claimant's examination.

The code section makes no mention of the length of time involved in an examination. In the past few years, impressive medical facilities in Nebraska and Wisconsin have been developed for the express purpose of complete and rather lengthy evaluations. On the other hand, Iowa has lost its most thorough facility at the University of Iowa. The fact that the evaluation takes as long as one week does not mean that it is outside the limits of section 85.39; nor does it mean that the charges for an evaluation would be unreasonable.

Defendants claim that there is comparable qualified medical opinion in Des Moines is only partially accurate. It is true that Des Moines has many fine physicians; however, Des Moines does not have the facilities which aid the examining physicians such as those in the Immanual Center.

In this case, the transportation expenses necessary to send claimant to Omaha and return are no greater than the transportation expenses would be were claimant sent to a more distant part of Iowa.

With respect to claimant being examined by a doctor licensed to practice in Iowa, paragraph 2 of section 85.39 does not contain such a restriction. Further, with respect to defendants' claim of a denial of due process and equal protection under the laws, had the legislature intended that the examination take place in Iowa by a physician licensed to practice in this state, it would have said so since it clearly made such a limitation in the first paragraph in reference to physical examinations at the employer's request. It is obvious that the first paragraph of section 85.39 which requires the employee to "submit himself for examination at some reasonable time and place within the state and as often as may be reasonably requested to a physician or physicians authorized to practice under the laws of this state" is intended to be protection for the employee who is submitting to the examination by a physician not of his choice. Since it is unnecessary to extend this protection to the employer and insurance carrier, they cannot claim denial of due process and equal protection under the law. In other words, the right of the employee being protected is one against physical harm, not only as to choice of physician.

WHEREFORE, defendants' resistance to employee's request for examination is hereby overruled and claimant's application for medical examination is hereby granted.

Signed and filed in Des Moines, Iowa this 25 day of August, 1977.

BARRY MORANVILLE
Deputy Industrial Commissioner

No appeal.

EXAMINATION OF EMPLOYEE – EMPLOYER

MICHAEL R. BJORKLUND,

Claimant,

vs.

PITTSBURGH-DES MOINES STEEL COMPANY,

Employer,

and

EMPLOYERS INSURANCE OF WAUSAU,

Insurance Carrier,
Defendants.

This is a proceeding, filed July 26, 1977 by defendants, Pittsburgh-Des Moines Steel Co., and Employers Insurance of Wausau, insurance carrier, appealing an order filed July 8, 1977 which required defendants reimburse the claimant, Michael R. Bjorklund, for the reasonable fee of an examination by Tai J. Pak, M.D. of Immanuel Medical Center in Omaha, Nebraska. Defendants were further ordered to pay transportation expenses. This order was issued in response to claimant's request for an examination under Iowa Code §85.39. On August 3, 1977 claimant filed a resistance to the notice of appeal. Oral arguments were heard August 3, 1977.

Defendants in this action have admitted no injury arising out of and in the course of claimant's employment as is contemplated by the statute. Until such time as a liability for an injury is established either by the filing of a memorandum of agreement or an adjudication of the essential elements admitted by the filing of a memorandum of agreement [see *Freeman v. Luppes,* 227 N.W.2d 143 (1975)], the responsibility to pay for the examination contemplated by the second paragraph of §85.39 cannot be ordered. Although such an examination at Immanuel Medical Center at a later time might be found to be reasonable, the request for an examination at this time is premature.

* * *

Signed and filed this 4 day of August, 1977.

ROBERT C. LANDESS
Industrial Commissioner

No appeal.

EXEMPTION FROM COVERAGE

WILLIAM M. WELTER,

Claimant,

vs.

EDWIN ZELEZNY AND SHIRLEY R. ZELEZNY,
SHIRLEY R. ZELEZNY, Administrator of
the Estate of Edwin J. Zelezny,

Employer,

and

IOWA MUTUAL TORNADO INSURANCE COMPANY,

Insurance Carrier,
Defendants.

Order on Appeal

This is a proceeding brought by the claimant, William M. Welter, pursuant to Rule 500-4.26, Iowa Administrative Code, and §86.24, Code of Iowa, appealing an order denying the relief he sought in his application for arbitration.

* * *

The parties stipulated that the sole issue before the deputy industrial commissioner was whether or not the defendant employer voluntarily accepted liability for payment of compensation to the employee under §85.1(5) by the purchase of IMT Insurance Company (Mutual) policy FL62564. The parties also stipulated that the claimant's claim was not one falling under Iowa Code §85.1(3).

The stipulation that Iowa Code §85.1(3) is not applicable to the claim means that at the time of claimant's injury, defendant was not an employer who met either of the prerequisites necessary to mandate workers' compensation coverage, that is, paying $2,500 to employees engaged in agriculture during the preceding calendar year or employing at least one person regularly as defined.

Prior to January 1, 1974, agricultural workers were excluded from the mandatory conditions of coverage. Following the change in the law which required agricultural employers to provide coverage in either of the two circumstances outlined above, major writers of farm liability policies began to provide contingent workmen's compensation endorsements to their farm liability policies. This was deemed appropriate to avoid the possibility of a farmer who was not required to provide workmen's compensation coverage at the inception of the policy period becoming exposed during the policy period either by paying $2,500 during the previous calendar year (on a policy which covered a period other than a calendar year) or employing during the policy period one person for forty hours or more for thirteen consecutive weeks. These contingent endorsements were provided for either no premium or a minimal amount. In contrast, the purchase of even a minimum-premium workmen's compensation policy covering agricultural employees entails an expenditure in the hundreds of dollars.

Claimant argues that the mere purchase of a farm liability policy with a contingent workmen's compensation coverage endorsement is sufficient to show the employer's voluntary election to come under the act as contemplated by Iowa Code §85.1(5). Such as interpretation is entirely contrary to the wording of the statute which specifically says:

> The *purchase of* and *acceptance by* such an employer of valid workmen's compensation insurance applicable to such employer or person or classification of employees shall constitute as to such employer an assumption by such employer of such liability without any further act on the part of such employer, but

Signed and filed this 10 day of April, 1978.

ROBERT C. LANDESS
Industrial Commissioner

No appeal.

GUIDES TO PERMANENT IMPAIRMENT

Asay v. Industrial Eng'r. Equip. Co. Page 224

HEALING PERIOD

HERMAN A. CORY,

Claimant,

vs.

NORTHWESTERN STATES PORTLAND CEMENT COMPANY,

Employer,

and

UNITED STATES FIDELITY AND GUARANTY COMPANY,

Insurance Carrier,
Defendants

Review — Reopening Decision

This is a proceeding in Review-Reopening filed by Herman A. Cory, the claimant, against Northwestern States Portland Cement Company, his employer, and United States Fidelity and Guaranty Company, the insurance carrier, to recover additional benefits under the Iowa Workmen's Compensation Act by virtue of an industrial injury that occurred on February 26, 1974.

* * *

The claimant, age 52, has been employed by the defendant employer most of his adult life, having begun his career at age 18 as a laborer. Except for a 5-year period in a packing plant during World War II, the claimant has been an employee of the defendant employer. The claimant, one of ten children, completed his formal education at the ninth grade level.

On February 26, 1974, the claimant fell from a ladder some 12 feet onto a cement floor. Claimant was working on a palletizing machine, which he was required to operate and maintain as part of his duties. He has not been employed since that date.

The issue requiring our attention is the nature and extent of the claimant's industrial disability.

Following the accident, the claimant came under the care of Darrell E. Fisher, M.D., an orthopedic surgeon, while a patient at St. Joseph Hospital, Mason City. Dr. Fisher, as the attending physician, testified that he made the following initial diagnosis:

> This gentleman's fall resulted in injuries to these skeletal areas and did not render him unconscious, and on examination in the emergency room he had no apparent chest, head, or abdominal abnormalities, was well oriented, perfectly capable historian, and after appropriate examination and X-rays were taken, the diagnosis of the following was made: First, a crushing fracture to the right heel bone. Secondly, a fracture of the left tibia and fibula. Thirdly, a fracture of the right humerus, greater tuberosity and the neck of the humerus. He was treated initially in the emergency room and then admitted to the hospital.

Dr. Fisher treated the claimant on numerous occasions and last saw him as a patient on February 26, 1976. Dr. Fisher felt that the claimant has a functional disability of 50% of the body as a whole, with continuing medical care indicated. He expressed concern over the possible future surgical fusion of the claimant's right ankle joint to relieve the claimant's pain in that extremity.

A medical report from C. O. Adams, M.D., was offered by the defendant employer and was received into evidence. Dr. Adams, an orthopedic surgeon, expressed his medical opinion that the claimant sustained a 42% functional disability to the body as a whole.

The claimant has the burden of proving by a preponderance of the evidence that the injury of February 26, 1974, is the cause of his disability on which he now bases his claim. *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. 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. We conclude that the claimant has sustained his burden of proof.

The claimant argues, based upon his failure to return to gainful employment, that he is entitled to an award under Section 85.34(1), Code of Iowa, which reads as follows:

> *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.

In that the Iowa Workmen's Compensation Act does not contain a definition of the word *work,* we adopt a definition found in *Webster's Collegiate Dictionary,* 5th Edition, page 1162, which reads as follows:

> *work* 1. exertion of strength or faculties to accomplish something; toil; labor; also, employment; occupation; as, to be out of *work.*

It is apparent from the record that "recuperation" has been accomplished. Future improvement is unlikely.

Nowhere in the Workmen's Compensation Act is there a guarantee which requires the claimant to be able to return to his prior occupation. The test is and must be any claimant's ability to perform acts of gainful employment, and it is ruled that there are occupations which the

claimant would be able to do.

From the record it is clear that because of the claimant's industrial disability numerous occupations are, because of their very nature and the type of activity required, excluded from consideration by the claimant. Thus he is entitled to an award contemplated under Section 85.34(2)(u) which reads as follows:

> In all cases of permanent partial disability other than those hereinabove described or referred to in paragraphs "a" through "t" hereof, the compensation shall be paid during the number of weeks in relation to five hundred weeks as the disability bears to the body of the injured employee as a whole.

It is further clear that the claimant has sustained an industrial disability which is defined in *Diederich v. Tri-City Railway Co.*, 219 Iowa 587, 593, 258 N.W. 899, as follows:

> 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 noted in *Martin v. Skelly Oil,* 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 this issue, we quote from *Olson,* supra, at page 1021:

> Disability * * * as defined by the Compensation Act means industrial disability, although functional disability is an element to be considered [citing the Martin case, 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. * * *

The claimant testified that he had applied for employment at six different employers. All of these attempts at finding employment failed. The claimant also filed an application with the Iowa Employment Security Commission local office in Mason City and as of March 30, 1976, the date of this hearing, no information concerning employment has been forthcoming.

The claimant, age 52, is a man of limited work experience which consisted mainly of manual labor. Claimant uses a cane prescribed by Dr. Fisher when walking. The claimant will have an ongoing problem of standing because of the degree of residual disability and continuous pain in the right heel. A large percentage of employment possibilities are denied the claimant because of the physical and mental limitations present. It is concluded that the claimant has sustained an industrial disability of 80% of the body as a whole.

* * *

Signed and filed this 20th day of September, 1976.

HELMUT MUELLER
Deputy Industrial Commissioner

No appeal.

HEALING PERIOD

EDWARD WILSON,

Claimant,

vs.

JOHN DEERE WATERLOO TRACTOR WORKS,

Employer,
Self-Insured,
Defendant.

Review Decision

This is a proceeding brought by the defendant, John Deere Waterloo Tractor Works, a self-insured employer, against the claimant, Edward Wilson, for review of a review-reopening decision, pursuant to §86.24, Code of Iowa, wherein Claimant was awarded termporary disability benefits for an injury sustained on April 28, 1974.

* * *

At the time of the arbitration proceeding, Claimant was forty-four years old and married with four dependent children. The claimant commenced working for the defendant on March 25, 1974. On April 28, 1974 Claimant injured his right wrist while grinding castings with a portable air grinder. Claimant notified his foreman, who referred him to Defendant's medical unit. Claimant was examined by R. D. Acker, M.D.

During the next five weeks, Claimant performed a one-handed job for Defendant. Claimant's right wrist failed to improve during this period. As a result, Claimant was referred by Defendant's medical unit to John Walker, M.D., an orthopedic surgeon. Dr. Walker surgically removed a tendon on the outer side of Claimant's right wrist on July 16, 1974.

Claimant's condition failed to improve after this surgery. Claimant returned to Defendant and was referred to Donald Ahrenholz, M.D., a hand specialist. Dr. Ahrenholz, on November 7, 1974, surgically performed a right wrist arthrotomy with excision of the right navicular bone, insertion of a Silastic prosthesis and neurolysis of the dorsal branch of the radial nerve. Claimant underwent rehabilitation at the Oakdale Rehabilitation Center and remained under the care of Dr. Ahrenholz until discharge on April 28, 1975. On the same date, Claimant's employment for Defendant and compensation benefits were terminated.

On May 23, 1975 Claimant was examined by Bernard Diamond, M.D. It was the opinion of Dr. Diamond that Claimant's right wrist motion was 50% restricted for all ranges with some pain on radial and ulnar deviation and some pain on extension and flexion. Dr. Diamond assessed Claimant's disability to be 25% of the hand and wrist. He advised that wrist fusion would be necessary if Claimant experienced a great deal of pain.

On August 6, 1975, Dr. Ahrenholz again examined Claimant. Dr. Ahrenholz noted active flexion of the wrist joint to 30 degrees, active extension of the wrist joint to 20 degrees, active ulnar and radial deviation of approximately 15 degrees each and some tenderness along the extensor pollicus longus tendon. Dr. Ahrenholz causally connected

the injury of April 28, 1974 with the condition diagnosed and rated disability to be 30% of the hand and wrist. Dr. Ahrenholz indicated the probability of additional physical therapy in the future.

After moving to St. Joseph, Missouri, Claimant sought treatment from Gordon W. Eller, M.D., an orthopedic surgeon. In a report dated October 1, 1975, Dr. Eller stated:

> On examination when I saw him, it was felt that he had carpal tunnel syndromes secondary to the injury to his wrist and I released the carpal tunnels and as of his last visit he was improving somewhat. He still, however, has considerable pain in the area of the dorsum of his wrist and on the radial aspect of his wrist. I do not feel these were related to the carpal tunnel syndrome. However, the pains in his hand and the numbness developing in the thumb, first, and middle fingers, I feel were related to the carpal tunnel syndrome. These do seem to be subsiding.
>
> Sensation also seems to be improving in the distribution of the median nerve. The other pain, however, I feel is secondary to the fracture of the navicular and the resultant problems with insertion of a Silastic implant. I feel his prognosis in terms of that is that he either will have to have a complete carpal navicular implanted, or that he may need to have a fusion of the wrist.

Dr. Eller considered Claimant's wrist 100% disabled and suggested an evaluation by William F. Benson, M.D., a hand specialist in Kansas City, Missouri.

Dr. Benson examined Claimant on October 13, 1975. Due to Claimant's considerable disability and pain in the wrist, Dr. Benson advised a wrist fusion. It was the opinion of Dr. Benson that the utilization of the prosthetic implant was a failure and a decompression of the median nerve and release of the tendons of Claimant's thumb were necessitated.

Following this examination, Dr. Benson contacted Defendant requesting permission to perform the proposed wrist fusion. Defendant, however, exercised its right to have Claimant examined by its medical unit. Defendant's medical unit recommended surgery by a Dr. Swanson in Grand Rapids, Michigan. The surgery was scheduled to be performed February 20, 1976.

Claimant has not been employed since April 28, 1975. Claimant testified that he had attempted to locate one-handed jobs but to no avail. Further testimony reveals Claimant, a tailor, attempted to return to this profession but was unable to perform this work due to the condition of his hand.

With a memorandum of agreement on file, Claimant, in accordance with §86.34, Code of Iowa, petitioned for a review-reopening proceeding and was awarded temporary disability benefits. The review-reopening decision filed January 30, 1976, at page four, provided:

> WHEREFORE, it is found that Claimant on April 28, 1974 sustained an injury which arose out of and in the course of his employment and resulted in temporary disability from June 5, 1974 through January 20, 1976. It is further found that temporary disability benefits should be paid to Claimant in the future until such time as he returns to work or medical evidence indicates that recuperation from said injury has been accomplished, whichever comes first.

The sole issue on appeal is the propriety of the award of temporary disability benefits.

The claimant has the burden of proving by a preponderance of the evidence that the injury of April 28, 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 (1945). A possibility is insufficient; a probability is necessary. *Burt v. John Deere Waterloo Tractor Works,* 247 Iowa 691, 73 N.W.2d 732 (1956).

The question of causal connection is essentially within the domain of expert medical testimony. *Bradshaw v. Iowa Methodist Hospital,* 251 Iowa 375, 101 N.W.2d 167 (1960). 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 his burden of proof by a preponderance of the evidence that his disability was causally connected to the injury arising out of and in the course of his employment on April 28, 1974; hence, an award was appropriate. In order to assess the propriety of the review-reopening award, the distinction between temporary disability compensation and healing period compensation must be recognized.

Temporary disability compensation is provided in §85.33, Code of Iowa:

> The employer shall pay to the employee for injury producing temporary disability and beginning upon the eighth day thereof, weekly compensation benefit payments for the period of his disability, including the periodical increase in cases to which section 85.32 applies.

The original intention behind this provision was to provide benefits where an injury had been sustained but would not result in any degree of permanency (for example, a bruise or laceration). The payments compensate an employee for loss of wages during the period before an injury is sufficiently healed for the employee to be able to return to gainful employment.

Section 85.34(1), Code of Iowa, requires the payment of benefits during a healing period for permanent partial disabilities:

> 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 had returned to work or competent medical evidence indicates that recuperation from said injury has been accomplished, whichever comes first.

This statutory section requires the cessation of benefits if 1) Claimant has returned to work, or 2) 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 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. Section 85.34, Code of Iowa, first unnumbered paragraph. One with a permanent impairment can never "recuperate" completely, that is return to the exact same prior physical condition, from such an 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 may be described by the physicians as reaching a plateau or stablization 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.

An alternative test to that of medical stabilization in defining recuperation is whether or not the injured employee is capable of return to substantially similar employment as that in which the employee was engaged at the time he 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.

Presently, both statutory provisions are of unlimited duration, although the day from which compensation is payable differs. Section 85.33, Code of Iowa, provides that benefits are payable beginning upon the eighth day of temporary disability and §85.34(1), Code of Iowa, provides healing period benefits are payable beginning on the date of the injury. There is also provided an offset provision in §85.34, unnumbered paragraph one, requiring that whenever weekly compensation has been paid to any person under any provision of Chapter 85 or Chapter 85A for the same injury producing a permanent partial disability, any amounts so paid shall be deducted from the total amount of compensation payable for such permanent partial disability.

As previously noted, the record is quite sufficient to support a finding that Claimant sustained a personal injury arising out of and in the course of his employment. The record is also clear that the medical doctors consulted were of the belief that a degree of permanency would occur as the result of Claimant's injury: Dr. Eller rated Claimant's permanent disability to be 100%; Dr. Diamond and Dr. Ahrenholz estimated Claimant's disability to be 25% and 30%, respectively.

Section 85.34(1), Code of Iowa, provides for healing period benefits if an employee has suffered a personal injury causing permanent partial disability for which compensation "is payable", beginning on the date of the injury. In the matter sub judice, it is the position of this tribunal that because the medical doctors from the outset indicate some degree of permanency would occur as a result of Claimant's injury, Claimant has suffered a personal injury causing permanent partial disability for which compensation "is payable", in accordance with §85.34(1), Code of Iowa. This position is supported by the statutory requirement that healing period benefits are payable from the date of injury. Medical opinion that a degree of permanency would occur must satisfy §85.34(1), Code of Iowa, because to allow otherwise would prevent the award of benefits from the date of injury.

The previously quoted portion of the review-reopening decision was confusing and misleading. Temporary disability compensation was awarded, although the test applied for cessation of benefits was in fact the language of healing period, §85.34(1), Code of Iowa.

Claimant has suffered a personal injury causing permanent partial disability for which compensation is payable from the date of injury. In accordance with §85.34(1), Code of Iowa, Claimant is entitled to such benefits until 1) he has returned to work, or 2) competent medical evidence indicates that recuperation from said injury has been accomplished, whichever comes first. The record presented on review supports the finding that 1) Claimant has not returned to work, and 2) the medical evidence submitted on review does not show that maximum recuperation has been accomplished, as Claimant is under ongoing medical care. Hence, healing period benefits in accordance with §85.34(1) must be awarded.

* * *

Signed and filed this 2 day of July, 1976.

ROBERT C. LANDESS
Industrial Commissioner

No appeal.

HEARING LOSS

GALE B. SELLS,

Claimant,

vs.

TITUS MANUFACTURING, DIV. OF ENVIRONMENTAL ELEMENTS CORP.,

Employer,

and

AETNA CASUALTY AND SURETY CO.,

Insurance Carrier,
Defendants.

Decision on Appeal

This is a proceeding, pursuant to Rule 500-4.26, Iowa Administrative Code, and §86.24, Code of Iowa, appealing an arbitration decision wherein the claimant, Gale B. Sells, was awarded permanent partial disability benefits from the defendant employer, Titus Manufacturing Division of En-

vironmental Elements Corporation, and its insurance carrier, Aetna Casualty and Surety Company, based upon a 25% hearing loss to both ears arising out of and in the course of his employment.

* * *

Claimant's petition for arbitration was filed March 1, 1976 alleging an injury date of May 14, 1975.

Claimant was in his early forties and had been employed by the defendant employer approximately twenty-three years when he was laid off in October of 1975 when the plant closed. During his employment claimant worked in the press room, assembly, painting room, shipping room and over an extrusion. During most of the time he worked in the shipping room on a bander. Also used in the shipping room were saws and hammers, and the noise was continuous throughout the day.

Claimant was aware of no family history of hearing loss. His father, age sixty-two, still had good hearing. Claimant indicated his hearing loss was gradual and that he noticed difficulty in understanding conversations in a noisy environment. This he reported to his foreman, Dick Hendrickson, who was his immediate supervisor on October 10, 1974. Claimant had been working on the bander three to four months prior to this time.

Nothing was offered and the claimant continued to work under the same conditions until February, 1975 when he renewed his complaint. At this time he was sent to the superintendent. This also resulted in no satisfaction. Later, a pamphlet concerning hearing loss was found and the claimant renewed his claim with a representative in personnel who indicated the company didn't do anything about hearing loss. Claimant stated that he was not aware his hearing loss might be work-related until he read a booklet that indicated hearing loss could be compensable.

The claimant then called the Office of the Industrial Commissioner and was advised how to proceed. Claimant had in the meantime made an appointment to see Dr. Ross G. Randall, M.D., F.A.C.S. for a hearing examination. After returning to personnel with the information received from the Office of the Industrial Commissioner, the employer offered to make an appointment for an examination. After being advised that an appointment had already been made, the employer told claimant to keep the appointment and have Dr. Randall send them a report and the bill.

Dr. Randall reported to the employer's personnel department in a letter dated June 26, 1975:

> Mr. Gale Sells was seen in our office June 25, upon your referral because of his hearing loss. Mr. Sells has as indicated on the enclosed audiometric studies a severe sensorineural hearing loss bilateral and we have advised that he is provided with ear protectors as apparently his work is in a high noise level.
>
> I trust this is the information you desire.

Another letter was sent from Dr. Randall to the defendant insurance carrier dated July 30, 1975 which stated:

> In response to your questions regarding Mr. Gale Sells, he has a 30% loss of hearing in the right ear and a 43% loss of hearing in his left ear.
>
> This type of hearing loss is permanent. The loss could possibly be caused by high noises and a hearing aid would be of no benefit to him.
>
> I trust this is the information you desire.

In response to this letter, defendant insurance carrier sent to Dr. Randall the following letter:

> We have received your letter of July 30, 1975 wherein you give Mr. Sells a 30% hearing loss in the right ear and 43% hearing loss in the left ear. You indicate in your letter that this type of hearing loss is possibly caused by high noises.
>
> We would request specifically if this type of hearing loss could result from other than being around noises.
>
> Mr. Sells does work in an area of Titus Mfg. Corp. which is somewhat noisy. He has, however, not worked in this specific area for an extended period of time. Is it possible that this hearing loss is caused by something other than the noise level at Titus Mfg. Corp.?
>
> Your timely response to the above question would be greatly appreciated.

At the bottom of this letter was a notation purported to have been made by Dr. Randall:

This type of hearing loss may occur with no noise exposure.

This was objected to as not properly identified as a response by Dr. Randall. While the objection is proper, it is basically superfluous as it neither adds nor detracts from Dr. Randall's prior reports.

After receiving Dr. Randall's report, the defendant employer provided claimant with a protective hearing device on August 12, 1975.

Claimant was referred by defendants to Thomas R. Updegraff, M.D., F.A.C.S, F.I.C.S. Dr. Updegraff first examined claimant on May 24, 1976. Dr. Updegraff reported to the defendants in a letter dated May 26, 1976 as follows:

> In answer to your questions concerning Mr. Gale Sells, a former employee of Titus Manufacturing, I submit the following:
>
> This patient has had trouble with his hearing for several years but worse the last year or two. He particularly was made worse the last 6 months at work with Titus Mfg. when he was around an extrusion machine which caused a loud screeching noise continuously. The patient was not furnished ear muffs at Titus until later on in his employment and only then after the union put pressure on the company. In addition to hearing loss, the patient has tinnitus and definite noise intolerance. He has marked discrimination difficulties in a group of people or if there is any background noise during any conversation at all, he has trouble understanding what is being said. This is quite aggravating to the patient and has made him quite nervous. Examination revealed a sensori-neural loss of hearing, bilateral, worse left.
>
> The audiometric studies are enclosed with this letter. It shows a high frequency loss in both ears, worse

left, and involving more frequencies in the left, as you can see when you examine the audiogram. The percentage loss shows 1 1/2% right and 21% left, but in my opinion, this does not really show the true handicap here as far as his hearing problems are concerned. The real problem is his discrimination ability, and this is due to his high frequency involvements.

In reference to prognosis, this loss of hearing is permanent and will progress further if he exposes his ears to much noise of significance. Of course we all live in a noisy environment and this contributes to hearing loss through the years. In addition, the patient of course will become older as the years go by and this will also cause degeneration of the cochlear apparatus with further loss of hearing. I anticipate that this loss will be gradual (slowly progressive) only but will occur as time goes by.

I feel that Mr. Sells, as stated above, should avoid noise trauma of significance. I also feel that a hearing aid in the left ear should be tried and this can be done through several hearing aid centers here in Waterloo. I would suggest that he try an aid for at least a month and then if it performs satisfactorily for him, then he can purchase the said aid from the dealer.

Thank you very much, and if you desire any further information, kindly feel free to request same.

The deposition of Dr. Updegraff was introduced into evidence. Dr. Updegraff received the following initial history:

He stated that he had noticed it at least one or one and a half years or so. He could not set the exact date of onset. Which was typical, because these things don't come on suddenly, they are gradual. His problem was loss of hearing. Unable to hear people, conversation, satisfactory, particularly if there was any background noise. In other words, we call this discrimination difficulty. Problems in understanding what is being said, if there is any particular noise in the background that they have to compete with. This was considerably bothersome to him. He stated that he had been around loud machines for a long time, for at least twenty-three years. He had been around an extrusion machine which was very loud, high-pitched, a very irritating sound, and this had been for the past six months. He stated that in addition, incidently, to the discrimination problems mentioned, I have already mentioned, he also had definite noise intolerance. In other words, noise bothered him considerably. And this is typical of inner ear, cochlear we call it, cochlear type of damage. The noise irritates them. Okay. So he had trouble now, worse the past six months, since he had been exposed to this machine. He stated that he had asked for protective earmuffs, but that the foreman told him they did not furnish them. The patient then said that he went to the union and had a meeting and they forced the company to get earmuffs for their employees. The patient didn't complain too much of ringing or buzzing in the ears, but he had no dizziness. Sometimes inner ear deafness can be caused by other problems with associated vertigo, we call it, dizziness, which is vertigo. And he had none of that. This was just a strict hearing problem with discrimination difficulty. He was seen by another physician in June, Dr. Randall of this city. I don't know the results of that test. But at that time Dr. Randall told him a hearing aid would not help him. A hearing aid was discussed, apparently.

The patient is now having a lot of trouble with his hearing. For example, he went to a restaurant, ordered a steak and potatoes, and the waitress asked him if he wanted soup or salad, and he couldn't understand what the waitress meant. He had to ask his wife. And was quite embarrassed.

Well, naturally in a restaurant there is background noise, and a hearing loss of this type, you can hear what a waitress maybe is saying, but you can't understand exactly what she said. And, like he said, it is embarrassing.

* * *

And, incidently, part of his history, I think this is important, there is no family history of deafness -- let's see here -- that I think is contributing, would be contributory to this. He is on no medication. He's been using no drugs. He does not smoke. Cigarette smoking sometimes irritated the inner ear. And he's had no surgery. No illnesses of significance that might have contributed to this problem.

Physical examination by Dr. Updegraff revealed:

ear, nose and throat findings were negative, noncontributory, except for audiometric studies. And, in other words, the eardrum was normal. There is no evidence of infection or disease in the middle ear. The ear canals were normal. The eustachian tube functions normally. Audiometric studies done 5-24-76 revelaed a bilateral, what we call, sensory neural hearing loss.

* * *

Sensory neural hearing loss is inner ear as opposed to the middle ear loss of hearing. Middle ear deafness is usually caused from infection or otosclerosis or some other disease unrelated to noise. Inner ear deafness can be caused by many things, but noise trauma is a very common cause in our present noise-polluted environment. And this is a bilateral, both ears involved, as far as the inner ear or cochlear is concerned. Now, the left ear is the worst ear and the higher frequencies for the most part are involved, which is typical of noise trauma injury.

Based upon the audiometric studies which were conducted in a soundproof room, Dr. Updegraff testified:

The percent loss of hearing as a result of this in a quiet room is minimal in the right ear, one a half percent, and 21 percent in the left ear. Now, these figures in a way are misleading, because they are done in a quiet room. There is no background noise. And

this patient, obviously from past history and also from the appearance of this audiogram, has marked discrimination problems. In other words, ability to understand in a noisy place. And this is his main complaint. And if you take this right ear, for example, with a one and half percent loss of hearing in a quiet place, I would say that he would have a 25 percent loss, at least, if there was any background noise of significance. And extreme difficulty as far as the left ear is concerned. The two combined, let's say 25 percent loss of hearing in a noisy place. In an ordinary -- I'm not talking about a machine environment, where there is real loud noise, it would be greater there, but I'm talking about like in a restaurant or regular meeting, group of people, church party or cocktail party or something like that.

In further questioning regarding the amount of hearing loss and whether or not it was binaural, Dr. Updegraff testified:

Q. Is there any way you can express the extent of his loss in percentage terms and, if necessary, break it down into percentage loss for normal speech and pure tone?

A. I can only give you the percentage loss as done in a quiet place.

Q. Well, is that --

A. And that percentage loss is one and one half percent in the right ear and 21 percent in the left ear, as determined by the American Academy of Opthamology and Otolaryngology guidelines.

Q. Is that the customary guidelines used?

A. yah.

Q. And is there any way to express this as a total bilateral loss?

A. Well, the right ear is normal. The left ear is down 21 percent. I cannot give you a figure for bilateral loss. The reason for that is that this patient's problem is discriminatory in a noisy place. This is hard to evaluate because of the vairations in the noise environment that he is exposed to, and various patient's ability to interpret what's being said. There is many things involved except for the pure tone loss. The ability of the patient to comprehend if he hears half what's said. The ability of the patient to watch the patient or I mean the speaker's lips, we call this lip reading, and interpret what's being said from lip reading. All of this kind of thing could be tabulated under a term "lip reading". The patient has to be able to understand by applying all of these things together, in addition to what he actually hears, in order to overcome this discrimination difficulty, I mean disability, and understand exactly what is said. And everybody is different in this respect. This patient appears to be quite knowledgeable. He is intelligent. He is alert. He is young. He is not an old individual who would be less able to pay attention, if you understand what I mean. Less involved as far as the environment is concerned. He is able, quite well, to put all these things together, and yet he is still having problems. But because of this I can't give you a definite percentage loss as far as discrimination is concerned. I can only approximate. And I would say 25 percent, like I said before in my previous testimony.

Q. So what you're saying then is that this individual's hearing loss in normal conversation or in a normal noisy situation would be 25 percent less?

A. In a quiet place this individual will have minimal difficulty. Like you and I talking here in a room by ourselves. This patient will be able to enter into the conversation satisfactorily. I mean I have a hearing loss something like this, and I'm getting along well with it. But if we went into Friedl's Restaurant and they were having quite a good business that day, and I was trying to converse with friends of mine there while we are eating lunch, I have difficulty understanding them. And that's what I'm trying to say. This man has that type of problem.

and further:

Q. Okay. Now, I realize it's difficult to assess these things in percentages, but I'm not sure that I understood. I believe you indicated perhaps a 25 percent impairment. Was that in a quiet room?

A. I made an approximate evaluation there, based on my findings here. This is not as a result of an actual test in a noisy environment. Our tests were all done in a quiet environment. And it's difficult for us to test these patients under circumstances in which he is having trouble, like testing him at Friedl's or down at a bowling alley or some place like that. So my tests were based in a quiet room, in a soundproof room.

Q. Right.

A. The 25 percent.

Q. Because that's the way you have to test them, isn't it?

A. Yes. I'm guessing -- I'm guessing at his disability in a noisy place.

Q. Okay.

A. But it's an educated guess, in my opinion.

Q. It's based on your experience only?

A. It's based on my experience and what I see as far as the audiometry studies are concerned that I have presented.

and further:

Q. Now, the 25 percent figure you have been using is your opinion of what that loss would amount to in a normal noisy environment?

A. This in my opinion is what this patient would be able to get out of -- he would get a total maybe of 75 percent of the conversation in a restaurant when he is trying to talk to other people. And I am being conservative in my estimate.

It was Dr. Updegraff's opinion that claimant's hearing

loss was occasioned by his exposure to noise at work with the defendant employer and that it was irreversible.

As to the use of a hearing aid, Dr. Updegraff testified:

> Q. All right. Now, at the conclusion of your examination did you recommend a hearing aid for Mr. Sells?
>
> A. Yes, I recommended that he consider a hearing aid in the bad ear. That he should try this for a month to see how he got along with it before he purchased it. A trial period is usually indicated, particularly with this type of deafness. But I felt at the time of my examination that a hearing aid might be quite beneficial to him and enough so at least to warrant the expense. And, of course, he should avoid noise trauma as much as possible. But there is no other recommendations.
>
> Q. Okay. The type of loss evidenced by Mr. Sells, would that normally be lessened or aided by the use of a hearing aid?
>
> A. Well, like I said, I feel a hearing aid would be helpful to him. It would not bring him back normal hearing, but it would be helpful to him once he learned how to use it.
>
> * * *
>
> Q. Now, the use of a hearing aid will not bring him up to what you consider normal?
>
> A. No. If this was a middle ear deaf patient, a hearing aid will bring them up to normal, because --
>
> Q. Now, if he -- I'm sorry, go ahead.
>
> A. I maybe don't need to explain why, but with this type of deafness the problem is discrimination. And if you increase the volume to a poorly discriminating ear, they still have trouble. And even sometimes more, because they can't tolerate the noise. It irritates them. And they have to learn how to use a hearing aid. And sometimes they have to turn it up. Sometimes if there is a lot of noise in the background turn it down because that will bring them too much noise, so that they are more confused. A hearing aid with this type of deafness just doesn't work as well. But it helps enough so that it's worthwhile to buy one and learn how to use it.
>
> Q. Okay. This is why you recommended that he try one before purchasing it?
>
> A. Right. Rather than to just tell this patient there's nothing you can do, you have got to put up with it. I think this is wrong, because especially with out modern hearing aids and the technology that's developed and responsible for developing these so that they can take care of different frequency losses and have a different volume load, and so forth. The hearing aids are becoming quite a machine. And they are much more valuable than they used to be, than they were ten years ago. And if they are properly fitted and they learn how to use them, then they are valuable to a hearing loss such as this, in the majority of cases.

At the time of the arbitration proceeding in August of 1976, claimant testified that he had not been employed since October of 1975 and that his hearing was not getting any better.

Claimant purchased a binaural hearing aid on July 23, 1976 in Fargo, North Dakota and stated that he had noticed some improvement.

The practical problem of fixing a specific date for injuries which have been a gradual onset is by selecting the date on which disability manifests itself. *Larson, Workmen's Compensation,* (Desk Ed.) §39.50.

It is well established that notice to one's foreman who is his immediate supervisor is notice to his employer. *Littell v. Lagomarcino Grupe Co.,* 235 Iowa 523, 17 N.W.2d 120; *Hobbs v. Sioux City,* 231 Iowa 860, 2 N.W.2d 275; *Franks v. Carpenter,* 192 Iowa 1398, 186 N.W.647.

Questions of causal relation are essentially within the domain of expert testimony. *Bradshaw v. Iowa Methodist Hospital,* 251 Iowa 375, 101 N.W.2d 167. Dr. Updegraff's opinion establishes the causal relationship between claimant's employment and his hearing loss.

Whether the date of "injury" in the case sub judice was October 10, 1974 or May 14, 1975 is immaterial. The employer through its foreman received notice on October 10, 1975 of the suspected hearing loss and its suspected work relationship and the employer through its personnel department had notice on May 14, 1976 of the claimed hearing loss and its claimed work relationship. The rate at which compensation is payable for an injury on either October 10, 1974 or May 14, 1975 is the same. The original proceeding was commenced within two years of both dates.

Hearing loss in this state is not evaluated by any set guidelines or standards. It is evaluated as are other scheduled permanent partial disabilities solely on degree of functional impairment. Wage loss is not a consideration. It is the percentage of functional loss or loss of use as applied to the schedule that is the basis of compensation. *Soukup v. Shores Co.,* 222 Iowa 272, 268 N.W. 598.

Both doctors indicate that there was binaural loss of hearing. Dr. Randall rated the loss at 30% on the right and 43% on the left. It is not known what standards he used to arrive at his evaluation. Dr. Updegraff rated claimant's loss at 1 1/2% on the right and 21% on the left. He explained that his evaluation was based upon guidelines determined by the Academy of Opthamology and Otolaryngology. He further explained that this was based solely upon examination made in a quiet place and that claimant's hearing loss in a noisy environment was considerably greater. The difference between the two doctors' ratings may possibly be occasioned by the fact that Dr. Randall examined the claimant while he was still working in the noisy environment and Dr. Updegraff examined him several months after he had been removed from it. In any event both doctors found hearing loss in both ears and both doctors indicated it was permanent.

Although numerous attempts were made to make Dr. Updegraff recede from his opinion that claimant's hearing loss was 25%, they were unsuccessful. The record as a whole is clear that this was considered to be claimant's overall binaural hearing loss.

Dr. Randall did not think a hearing aid in claimant's

"bad ear" may be helpful. He apparently did not think a hearing aid would be helpful for both ears. Although Dr. Updegraff recommended claimant try one out before purchase, the claimant indicated he noticed some improvement with the hearing aid. Dr. Updegraff indicated that the price of such a hearing aid would be in the neighborhood of $400. Claimant, however, purchased a binaural eyeglass type hearing aid for a total price of $888. The defendants should not be required to stand the cost of claimant's purchase in excess of what was prescribed. Therefore, the defendants will only be required to pay half the cost of the hearing aid.

WHEREFORE, the arbitration decision is hereby affirmed with limited modification.

It is found and held that claimant received an injury arising out of and in the course of his employment resulting in hearing loss in both ears of twenty-five percent (25%).

* * *

Signed and filed this 3 day of February, 1977.

ROBERT C. LANDESS
Industrial Commissioner

No appeal.

HEARING LOSS

DOUGLAS VAN THORSON,

Claimant,

vs.

IOWA BEEF PROCESSORS, INC.,

Employer,

and

ARGONAUT INSURANCE COMPANY,

Insurance Carrier,
Defendants.

Review Decision

This is a proceeding brought by defendant employer, Iowa Beef Processors, Inc., and its insurance carrier, Argonaut Insurance Company, seeking review of a proposed decision in arbitration wherein claimant was awarded permanent partial disability as a result of an industrial disability occurring on August 21, 1972.

* * *

The sole issue to be reviewed here is the extent of disability.

Claimant worked in the kill floor of defendant employer. His job consisted of firing a gun at trapped cattle. On August 31, 1972, claimant's ears began to ring. In the next day or two claimant experienced an inability to hear his watch ticking and other familiar sounds. Geneva Sweeney, defendant employer's nurse referred claimant to the company doctor, Frank Larson, who in turn referred claimant to Richard Tripp, M.D.

Dr. Tripp is a board certified otolaryngologist. The doctor related claimant's hearing loss to noise. At the time of the doctor's first examination in January of 1973 he found "a sensori-neural deafness, or in other words a nerve deafness in the right ear involving the entire frequency range" and "a sensori-neural deafness in the left ear . . . limited to the high frequencies." Dr. Tripp assigned some specific percentages to the losses. He said:

> We have found that he had a loss of hearing in the right ear which ranges around 30 percent. This would flucuate [sic]. This would change from 20 to 40 percent depending on the type of tests that we would run.
>
> In the left ear his loss was much less severe and probably around 10 to 15 percent.

The doctor stated that combining these percentages would compute to a 20 percent loss in both ears. These percentages were in the 500-2,000 frequency range which is the normal speaking range. The doctor allowed that there would be an additional loss in the upper frequencies of 70 percent in the right ear and 50 percent in the left for a total loss of "around 60 percent." The doctor viewed these high frequency losses as significant because they "would impair his [claimant's] function in a working situation because it [loss of hearing] would make it more difficult for him to understand certain words in the presence of background noise." As an example, the doctor proposed:

> If we had a background noise of 50, 60 decibels, and he was speaking to his fellow workers, there would be certain types of words that he would have difficulty in understanding.
>
> This is one aspect of hearing that is called discrimination. He would have difficulty discriminating one word from another, any words that sound alike.

Dr. Tripp's ratings were based "on the patient's responses . . . in test situation.

Frank Kingston, defendant employer's corporate safety manager, conducted noise level tests in the fall of 1972. Kingston, apparently presenting Dr. Aram Glorig's opinion, said the noise level was sufficient to produce hearing loss. Kingston using the A.M.A. formula interpreted audiograms to arrive at a 15.5% binaural loss of hearing.

Aram Glorig, M.D. is a board certified otolaryngologist, a member of many professional organizations and committees, a recipient of many honors, and founder of the Collier Center for Communications Disorders, who has worked extensively with hearing loss cases. This work has included studying, researching, consulting, and teaching. Hearing, according to the doctor, is evaluated by an audiogram which he said:

> . . . is merely a graph of a test which is done by presenting tones to an individual at various levels through earphones and asking that individual to respond when he first hears the sound, in terms of lowest level at which he can hear the sound, and that's called his threshhold for that pure tone, or that frequency, and then it is presented at a half octave or octave intervals, and is depended [sic] on how the test is to proceed.

Its purpose "is to determine the man's ability to hear

certain frequencies as far as the human frequency range is concerned." Dr. Glorig testified that:

> Hertz is a designation of pitch in terms of a tone, and is determined by the number of times the air vibrates at a certain number of vibrations per second.
>
> The greater the number of vibrations per second, the higher the pitch, . . .
>
> Now obviously speech is not a tone; it's a very complex signal, and in general terms, it can be said that the frequencies that are involved with speech, in terms of its finer details, in terms of its single elements, run from about three hundred Hertz or cycles per second, . . . up to about three thousand Hertz, . . . which is said to be the area which speech frequencies occur about ninety-eight percent of the time, so if a man has hearing in this range, he will be able to understand all of the elements in speech, in single elements, but then we go to the fact that the man is not listening to single words or single speech elements; he is listening to conversation which is made up words and sentences and paragraphs, and so on, so speech itself, the way I am using it at the moment, has a lot of redundant information, a lot of information is repeated, so you can therefore do with a little smaller range as far as the pitch or frequency is concerned, and still do very well, if you hear from about five hundred Hertz to about two thousand Hertz.

The doctor stated that pure tones are used to test hearing, and that there is not "any satisfactory speech material with which to test the man's ability or inability to hear everyday speech, ..." While using pure tones was "the ideal way to look at an ear in terms of what it can do with specific frequencies," the doctor said, "It's not so ideal to determine how a man does out in the street and talking in a conversation. . . ."

Dr. Glorig pointed out that a man could lose a certain amount of hearing before an impairment would begin.

Emphasizing the difference between hearing and understanding, he proposed that speech has two principal elements:

> One is the vowel and the other the consonant, . . . the consonant carries the discrimination part of the speech, and these are high so-called fricative sounds -- some have no acoustic sound, a hissing sound, like an 's', or like a 'k' a 'd' a 'b', and a 'p', but when you look at those individual or consonants, their frequency runs somewhere in the neighborhood of from about fifteen-, eighteen hundred Hertz, up to about thirty-five hundred Hertz, and sometimes even as high as four thousand, but not very often, but when you are looking at speech, as I am using it, the information that is so redundant, that it doesn't matter if you miss the 'k' or 'b' or 'p' occasionally, because the context of the sentence, and syntax and so on gives you the information you are looking for, so you have no difficulty, though you miss some of the high-frequency sounds in speech. . . .

The doctor suggested the ear does two things with speech -- hears and understands. He said:

> Now, if it can't hear it, obviously, he can't understand it, but he may hear it without understanding it.
>
> Now, in that case, there would be poor discrimination, because a man can hear the person speaking, but he has no idea what they're saying, because he is not understanding it. It's almost like somebody speaking in a foreign language and hear the speech but can't understand it. It is the same with a man who has a discrimination problem; he hears the speech but doesn't understand what is being said.
>
> Now, that is what discrimination is said to be, a man's ability to discriminate speech, means that he can hear all the words well enough, to be able to come back with a proper and appropriate answer.

In describing the test for discrimination, the doctor said, "They use a set of words, phonetically balanced words, and these words are consonant-weighted words, like 'pick', 'thing' and particularly where you have to hear the first and the last consonant in order to tell what the word is."

The doctor traced the history of the development of formulas to measure hearing disabilities. He discussed the formulas devised by the American Medical Association (AMA), the Academy of Otology and Otolarynology (AAOO), the National Institute of Occupational Safety and Health (NIOSH), and the National Research Council. Dr. Glorig indicated that the AMA formula "is for hearing and understanding speech in everyday circumstances." This formula has been criticized because it does not take into account what happens in the noisy background such as might be found in an industrial situation. It appears from Dr. Glorig's testimony that there may be a growing recognition of the importance of the higher frequencies as the newer proposed formulas do use frequencies higher than two thousand. The doctor ranked the importance of the frequency levels thusly: "If you were to weight the importance of these frequencies, the weighting one would be one thousand as the most important, two thousand is second, three thousand is third and five hundred is fourth." Later the doctor stated, "This means if a man has a loss at three thousand, he may have some problem discriminating phonetically-balanced words, but he will not necessarily have any problem understanding speech in sentence form." The doctor believed based on his research and experience that claimant would score well when tested with phonetically balanced words. Dr. Glorig then applied the AMA, NIOSH, the AAOO and the National Research Council's formulas to the testing done by Dr. Tripp.

It should be noted that hearing loss in Iowa is a scheduled disability meaning that a set maximum amount is assigned to hearing loss in one ear (50 weeks) and another set maximum amount for hearing loss in both ears (175 weeks). This loss is not evaluated by any set guidelines or standards as Iowa has not adopted by statute or by rule any table or formula by which hearing loss is to be measured. Rather, it is evaluated as any other scheduled permanent partial disability solely of the amount of loss. Claimants, therefore, are compensated for loss of use, not merely hearing impairment. Wage loss is not a consideration.

The evidence here presented is not in a form which will

allow this commissioner to assign a percentage to claimant's binuaral loss. Dr. Tripp gives a percentage loss for both ears in the 500-2,000 range, but he also gave an additional rating for the upper frequencies. No "total loss" figure was given. Dr. Glorig's testimony was confined by limitations imposed by the various formulas; and, as a result, does not give a total binaural loss.

WHEREFORE, it is found and held as findings of fact:

That claimant sustained an industrial injury arising out of and in the course of his employment on August 21, 1972.

That the evidence as presented does not enable an assignment of percentage for binaural loss to be made.

THEREFORE, it is ordered:

That this matter is remanded to the deputy industrial commissioner to hear evidence confined to the sole issue of claimant's overall binaural loss of hearing as a result of the injury of August 21, 1972.

Signed and filed this 10 day of March, 1978.

ROBERT C. LANDESS
Industrial Commissioner

No appeal.

HEARING LOSS

LOUIS ROSALEZ,

Claimant,

vs.

IOWA BEEF PROCESSORS, INC.,

Employer,

and

ARGONAUT INSURANCE COMPANY,

Insurance Carrier,
Defendants.

Arbitration Decision

This is a proceeding in arbitration brought by the claimant, Louis Rosalez, against Iowa Beef Processors, Inc., his employer, and Argonaut Insurance Company, the insurance carrier, to recover benefits under the Iowa Workmen's Compensation Act by virtue of an alleged industrial injury which occurred on December 10, 1973.

* * *

There is substantial evidence contained in this record to support the following statement of facts, to wit:

Claimant, age 34, married, with six dependent minor children, began his career with the defendant employer in 1963, and on December 10, 1973, while removing cattle "innards" (transcript, page 6, line 4), the claimant experienced chest pain, shoulder pain and shortness of breath due to the exertion necessary to remove the animals' throats. About 10:30 A.M., the claimant made an unsuccessful attempt to see the plant nurse and saw his personal physician, M. E. Kraushaar, M.D., after working hours.

* * *

[Claimant was treated for chest and shoulder pain by several physicians. He was finally released to return to work.]

* * *

The claimant was offered his "bid job" of shackling, and since he felt he was physically unable to handle this assignment, the claimant resigned March 19, 1974. The claimant accepted part-time employment installing floor covering (transcript, page 30, line 12), and applied for a position as a school bus driver. This required the claimant to obtain an operator's license from the Department of Transportation and the Department of Public Instruction. In obtaining such permit, the claimant was given a hearing evaluation on May 8, 1974 by a hearing clinician employed by the Fort Dodge Community School District.

The results of this evaluation revealed that the claimant's hearing was abnormal. Thereupon, the claimant filed his application on June 12, 1974 before this department alleging a functional impairment for the loss of hearing as contemplated in §85.34(2)(r), Code of Iowa. . . .

* * *

The claimant has sustained his burden of proof as it relates to the injury of December 10, 1973, and accordingly it is found that the claimant was unable to perform acts of gainful employment from December 10, 1973 until March 19, 1974, or a total of 14 weeks and 1 day.

The claimant testified that he worked as the "knocking block" operator. (Transcript, page 36, line 7) He operated the bolt stunner, which is described as a blank operated gun which fires a steel bolt into the livestock's heads. The physical makeup of the cattle-holding chute is described as 6' x 2 1/2' x 5', being of cement and steel construction. (Transcript, page 39, line 6) The claimant worked at this station from 1968 through 1972, wearing earplugs as a protective device for some of the time. (Transcript, page 44, line 15) The claimant described the working conditions as follows (transcript, page 39, line 24):

> A. The sound up in the air is a sharp one. It's loud but it's sharp. The sound right in -- half-way in the box is about twice as loud. And if you climb right in the box with it, it's deafening. You hear nothing. You come out of that box and your head just rings and you hear nothing.

The defendants then referred the claimant to Maxwell Abramson, M.D., a certified member of the American Board of Otolaryngology, on September 5, 1974. Dr. Abramson had arranged an audiogram to be performed by Silverio, an audiologist at The University of Iowa Hospitals. (Deposition, page 20, line 12) Dr. Abramson indicated that the test so performed revealed that the claimant has a bilateral sensory type hearing loss above 1000 cycles. The hearing range below that is normal. The discrimination ability is somewhat decreased to 84%. (Deposition, page 6, line 22) Dr. Abramson, after reviewing the various formulae used in the computation of hearing loss, expressed the medical opinion that the formula used by the National Institute of Occupational Safety and Health (NIOSH) "most correctly reflects the true disability in the claimant's case" (deposition, page 11, line 10), or 25.83% binaural hearing loss, based upon the audiogram taken by Silverio. (Claimant's Exhibit B)

The defendant also produced Aram Glorig, M.D., a

board-certified member of the American Board of Oto laryngology, whose curriculum vitae appears in the transcript of *Douglas Van Thorson v. Iowa Beef Packers,* (File No. 13415, Iowa Industrial Commissioner, March 10, 1978), at pages 9-17 inclusive. Dr. Glorig also prefers the NIOSH formula (transcript, page 15, line 23) which, when applied to the Salmon audiogram (Employer's Exhibit No. 1), he testified, results in a binaural hearing loss of 18%.

Specifically, the doctor said:

> A. On the right, if we use the NIOSH formula, we would say the man has in his right ear -- well, the same frequencies we had in that other exhibit, I mean, the other figures, fifteen, zero at the thousand and at two thousand it would be fifty-five.
>
> Now using the NIOSH formula -- I'm sorry, I started out with the wrong frequency, and let's do that again, Judge -- start out at a thousand, which NIOSH starts out with, a zero, two thousand which is fifty-five, and three thousand which is sixty-five, and now we add these three, and we get a hundred and twelve, divide by three to get the average, and we have an average of forty.
>
> Now, subtracting twenty-five from that forty, gives us fifteen, multiply fifteen by one-half, and we get twenty-two and a half percent in the right ear. In the left ear, it would be fifteen at a thousand and fifty-five at two thousand and sixty at three thousand, so there we have one hundred and thirty, and divide that by three and we still get the forty, a bit over forty, about forty point three, and subtract twenty-five from that, and we get fifteen point three, and multiply that by one-half and we get about twenty-two, twenty-three percent.
>
> So, in round numbers, now we have got a good ear and a bad ear; one is twenty-two and a half and one is twenty-three, so we take five times the good hear [sic], which amounts to-- and we have got a hundred and twelve and a half, divided by six, because we have got five good hears [sic], one bad ear, and we have about a fifteen percent binaural impairment by the NIOSH formula.

The doctor miscalculated as evidenced by his testimony and by defendant employer's Exhibit 2 in the mathematical calculation regarding the right ear in that he added zero, fifty-five, and sixty-five and got one hundred and twelve. The left ear rating should have been five at a thousand rather than fifteen. In another step, the doctor neglected to include a value for the bad ear before dividing by six. Had the doctor proceeded correcfly,his rating would have been 22.5% binaural hearing loss.

The two physicians, using different audiograms, of course, reach different figures as to the percentage of hearing loss when applying the NIOSH formula. Since four audiograms (Claimant's Exhibit A, Defendants' Exhibits No. 1, No. 2 and No. 3) were introduced into evidence, it is appropriate to comment on the substantial difference that is present in the results. Dr. Abramson addresses himself to this problem on pages 18 and 19 of his evidentiary deposition. He alludes to the possibility of a difference in the testing machines, a deliberate attempt to falsify the results, or a temporary threshold shift in hearing. In reviewing the testimony of the two physicians, it is apparent that neither used two of the audiograms prepared and introduced by the defendants (Defendants' Exhibits No. 2 and No. 3 in expressing their opinions. In view of the lack of reliability of the audiograms in question, it is concluded that the information contained therein is given no weight in this decision. Accordingly, the appropriate computation can now be made as follows:

Right Ear = 0	Left Ear = X
1000	1000
0	15
0	15
	2) 30
	15
Right Ear	Left Ear
2000	2000
60	65
55	55
2) 115	2) 120
57.5	60
Right Ear	Left Ear
3000	3000
60	65
65	60
2) 125	2) 125
62.5	62.5

Right Ear	Left Ear
1000 = 0	1000 = 15
2000 = 57.5	2000 = 60.0
3000 = 62.5	3000 = 62.5
3) 120.0	3) 137.5
40.0	45.8
– 25.0	– 25.0
15.0	20.8
x 1.5	x 1.5
22.5	31.2
x 5	
112.5	

112.5 Right ear
\+ 31.2 Left ear
6) 143.7
23.95 Binaural hearing loss

As can be seen by the above, the average of the three readings was reduced by 25 "because 25 is the point at which impairment begins in any individual." (Transcript, page 10 line 5) To obtain the percentage impairment, the remainder is multiplied by one and one-half. (Transcript, page 10, line 18) To convert to binaural impairment, the value of the good ear times five is added to the value of the bad ear. The total is divided by six. (Transcript, page 10, line 23)

Therefore, after taking all of the credible evidence

contained in this record into acount, the following findings of fact are made, to wit:

* * *

5. That the claimant sustained a permanent partial binaural hearing loss of twenty-three point ninety-five percent (23.95%) by virtue of having operated a stun gun in the course of his employment for a period of three (3) years prior to his date of resignation.

6. That the hearing loss is causally connected to the claimant's employment activities for the defendant employer.

* * *

Signed and filed this 2 day of May, 1978.

HELMUT MUELLER
Deputy Industrial Commissioner

No appeal.

Additional Cases:

HEART ATTACK

HOSPITAL SERVICES

INDEPENDENT CONTRACTOR

WILMA OSBORNE,

Claimant,

vs.

KENTUCKY FRIED CHICKEN,

Employer,

and

TRAVELERS INSURANCE COMPANIES,

Insurance Carrier,
Defendants.

Appeal Decision

This is a proceeding brought by defendant employer, Kentucky Fried Chicken, and its insurance carrier, The Travelers Insurance Company, pursuant to Iowa Code §86.24 appealing a proposed decision in arbitration wherein it was held that claimant's injury occurred at a time when claimant was an employee of defendant employer and that the injury arose out of and in the course of her employment.

* * *

The issues here are whether or not claimant's injuries did occur at a time when an employee/employer relationship existed between claimant and defendant and if so, whether or not claimant sustained an injury which arose out of and in the course of employment.

The facts, briefly stated, are as follows: Claimant had worked for defendant employer for a period of nine years. Her duties primarily consisted of preparing food, waiting on customers, and assisting with catering. At some point during this employment, the date of which is in conflict, but over a period of several years, claimant entered into an oral agreement to repair and clean defendant's uniforms at her personal residence. Prior to this time, they had been cleaned at a commercial establishment. On October 18, 1976 claimant was struck by a motor vehicle while walking on the public street to her place of employment. At the time of the accident, claimant was carrying a number of defendant's uniforms which she had laundered and ironed over the weekend.

The arrangement between claimant and defendant employer as to the cleaning and repair of the uniforms was testified to by claimant. She stated that she was asked by Pattermus, the district manager at that time, if she would like to take care of the uniforms to which she responded affirmatively. Claimant took the uniforms to her home and furnished the necessary equipment and materials to complete the job. Her method of payment at that time was $1.50/uniform which was paid out of petty cash by Fife, the office manager. After Fife left, and with the arrival of Strickland as district manager, the method of payment changed. Because she could not get payment out of petty cash, claimant put hours on her time card in order to receive her compensation. Claimant made out her own time card. According to claimant, the change in procedure was made on her own volition. This practice continued up until the time of claimant's injury. Further testimony from Strickland established that the work would be done by claimant whenever necessary, depending upon the turnover of sales hostesses.

Defendants assert that claimant maintained the status of an independent contractor with respect to the cleaning and repair of the uniforms. If claimant has established a prima facie case, the burden is then upon the defendants to go forward with the evidence to overcome or rebut the case made out by claimant. Defendants must also establish any pleaded affirmative defense or bar to compensation by a preponderance of the evidence. *Nelson v. Cities Service Oil Co.*, 259 Iowa 1209, 146 N.W.2d 261 (1966). Assuming in this instance that claimant has established a prima facie case, the evidence supporting defendants' contention that claimant was an independent contractor as to the cleaning and repair of the uniforms must be considered.

The criteria for determing the existence of an independent contractor relationship are set out in *Nelson*, supra. They include:

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 or her business or of his or her distinct calling;

3. The employment of assistants with the right to supervise their activities;
4. The obligation to furnish necessary tools, supplies and materials;
5. His or her right to control the progress of the work except as to final results;
6. The time for which the worker 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; and
9. The intention of the parties as to the relationship created or existing.

The evidence indicates that claimant has been employed by the defendant for nine years. During that time, claimant's duties have been concerned primarily with preparing food, waiting on customers, and assisting with catering, with some time spent training new employees and doing bookwork. Claimant was offered the job of cleaning and repairing defendant's uniforms which she accepted, apart from her regular employment with defendant, at a stipulated price. The task was totally unrelated to any of the work activities in which the claimant had previously been engaged for defendant employer.

Claimant did not employ assistants to aid her in cleaning and repairing the uniforms as the amount of work involved did not require such. Claimant indicated her daughter helped her some when she was over. Claimant furnished all of her own supplies and equipment including a washing machine, dryer, soap, needle, and thread for which she was not reimbursed.

Claimant was free to control the progress of her work. There was no specified time during which she must complete the work. Claimant laundered and repaired the uniforms at her own convenience. There was also no regular basis on which the work would be performed. Claimant and Strickland, the district manager, both testified as to the irregularity of the work. Claimant took uniforms home when it appeared necessary for her to do so depending upon employee turnover and her own discretion.

The evidence indicates that claimant was initially paid $1.50/uniform when she submitted a bill and was paid out of petty cash. This arrangement was later changed under the new district manager when hours were then added to claimant's time card and payment was made out of the regular payroll. However, claimant testified that she instigated the change without discussion with Strickland because she was unable to obtain payment by any other means as the employer was short of petty cash. The intent of the initial arrangement was to contract with claimant for the performance of a specific kind of work at a fixed price.

The cleaning and repair of uniforms was not a part of the employer's regular business as a fast-food restaurant and was carried out under the complete control of claimant allowing her to determine the manner and the time in which the work would be accomplished.

The preponderance of the evidence supports the conclusion that claimant was an independent contractor with respect to the cleaning and repair of defendant's uniforms including the delivery of the completed product to the employer.

Claimant, at the time of her accident, was going from her home to her place of employment with defendant. This route was her usual path from home to employment which was about 2 1/2 blocks long. The accident occurred some 200 feet from her employer's premises.

The "going and coming" rule, as set out in *Otto v. Independent School District,* 237 Iowa 991, 23 N.W.2d 915 (1946), states that unless it can be fairly said the employee, while going to or from her regular place of work, is engaged in a place where her employer's business requires her presence, her injury en route is not compensable. Hazards encountered by the employee in going to or returning from work are not ordinarily incident to her employment. *Bulman v. Sanitary Farm Dairies,* 247 Iowa 488, 73 N.W.2d 27 (1955).

Claimant's injury occurred while en route from her home to her place of employment to begin performing her regular duties for defendant employer. Thus, claimant was not in the course of her employment at the time of her injury.

* * *

Signed and filed this 3 day of March, 1978.

ROBERT C. LANDESS
Industrial Commissioner

No appeal.

INDEPENDENT CONTRACTOR

RONALD E. CHRISTIANSON,

Claimant,

vs.

JOHN R. BAHR, d/b/a
BOB'S GRINDING,

Employer,
Defendant.

Arbitration Decision

This is a proceeding in arbitration brought by the claimant, Ronald E. Christianson, against his alleged employer, John R. Bahr, d/b/a Bob's Grinding Remanufacturer, uninsured, to recover compensation under the Iowa Workmen's Compensation Act by virtue of an alleged industrial accident which occurred on September 19, 1974.

* * *

The issue for determination is whether the claimant was in the status of an employee at the time he was injured.

Claimant, presently age 21, was engaged by the defendant in the fall of 1973 at a rate of $2.00 per hour on a part-time basis in order to remanufacture parts. The duties necessitated his working after school and on Saturdays. He was then moved to a ramp assembly and reconditioned them. His remuneration then went to $2.75 an hour and later to $3.00 an hour with a premium of $.25 for each

ramp so constructed. In the summer the claimant worked full-time.

The claimant received checks with a pay statement attached thereto.

At all times material to the aforementioned relationship, the defendant furnished the equipment, tools and situs of work. At various times the claimant would assist in unloading trucks which were carrying implements which needed reconditioning. The claimant had no prior training or experience in this type of work. All indications are that the "quality control" of the end result was specified by manuals which were owned by the defendant. The defendant did not withhold income tax or social security. He would order his minions to "Take a vacation," thus exhibiting additional control.

Other people were also engaged in a similar manner, either being on a strict hourly basis or a hybrid hourly-piece work basis.

On September 19, 1974, the defendant saw fit to have the house in which he was residing painted. The house was apparently owned by Defendant's wife but was the residence of the defendant.

* * *

The claimant proceeded to the house and had just started painting when he fell about ten feet from the ladder, landing on his buttocks. The materials at the time of painting were supplied by the defendant.

The claimant was apparently an active young man prior to September, 1974, having wrestled in high school in 1973.

The claimant also received an injury earlier relating to his neck. All indications with regard to this injury indicate that the injury received herein was confined to the lower back.

The claimant was treated by William L. Clegg, D.O., on that date and after a preliminary examination and care was referred to Franklin L. Tepner, D.O.

When he saw Dr. Tepner he was complaining of left leg pain and foot drop and tenderness in the lumbar region. He was referred to Robert W. Hayne, M.D., a neurosurgeon, for examination and treatment.

Dr. Hayne caused the claimant to be hospitalized at the Iowa Methodist Hospital in Des Moines on October 10, 1974. A myelogram taken on October 11, 1974 indicated that there was a large disc protrusion at the L5-S1 level on the left side. A laminectomy was performed on October 15, 1974 and the claimant was released from the hospital on October 20, 1974. Dr. Hayne opines that the claimant's present permanent partial impairment is 8% of the body as a whole.

The defendant has raised the defense that the claimant was an independent contractor within the meaning of the law and therefore precluded from recovery.

The Iowa Supreme Court has repeatedly held that the criteria used to determine the existence of an employer-employee relationship are: (1) the employer's right of selection or to employ at will; (2) responsibility for the payment of wages by the employer; (3) the right to discharge or terminate the relationship; (4) the right to control the work; and (5) is the party sought to be held as employer the responsible authority in charge of the work or for whose benefit the work is performed. *Hjerleid v. State,* 229 Iowa 818, 295 N.W. 139; *Sister M. Benedict v. St. Mary's Corp.,* 255 Iowa 846, 124 N.W.2d 548; *Nelson v. Cities Service Oil Co.,* 259 Iowa 1209, 146 N.W.2d 261.

The burden is upon the claimant to prove these factors by a preponderance of the evidence. *Nelson,* supra.

In the instant case we find that the defendant had the right to select and employ at will.

The defendant clearly bore the responsibility for the payment by wages in this case. The fact is borne out by the fact that checks were given to the claimant on a fairly regular basis. The fact that the remuneration paid was on a hybrid of piece work and hours expended does not make one an independent contractor. Such an incentive package is common in industry. The fact is that such a hybrid system of remuneration was had in the instant case. The checks shown in Claimant's exhibit 4 indicate that such a system existed.

The defendant could also terminate the relationship or the claimant could terminate the relationship.

The fourth and fifth criteria also predominate in the claimant's favor. Although the claimant had a "floating" schedule, it is still ascertainable that the defendant had the requisite control and the defendant was clearly the responsible authority in charge of the work or for whose benefit the work was performed.

The means of doing the work were controlled by the defendant who gave advice and dictated the means of accomplishment of the work. See *Pace v. Appanoose County,* 184 Iowa 498, 168 N.W. 916. Also, the claimant did not have the independent calling and the work he did was for the purpose of the employer's trade or business. See Section 85.61(a) and (b), Code of Iowa when he was engaged at the shop.

The claimant was injured while painting a private residence. This painting was clearly done at the direction of the defendant. An employee is not to be denied compensation unless his employment is both casual *and* not for the purpose of the employer's trade or business. Section 85.61(a), Code of Iowa. it is important that the word "and" with its conjunctive use is present here because the work being performed at the time of the injury was clearly not for the employer's trade and business.

The work which the claimant performed was continuous, although varied. His work environment seemed to go on and on and was not temporary or casual in nature. See *Bates v. Nelson,* 240 Iowa 926, 38 N.W.2d 631.

It can therefore be found that the claimant was an employee of Defendant at the time of the injury herein and that the injury which he received arose out of and in the course of this employment.

The claimant has the burden of proving by a preponderance of the evidence that the injury of September 10, 1974 is the cause of the disability on which he now bases his claim. *Lindahl v. Boggs,* 236 Iowa 296, 18 N.W.2d 607. The question of causal connection connection is essentially within the domain of expert medical testimony. *Bradshaw v. Iowa Methodist Hospital,* 251 Iowa 375, 101 N.W.2d 167.

Based on the foregoing principles it is clear that the claimant has established his claim by the requisite preponderance. It is clear that the cause of the disability is the fall from the ladder. This indicates that the result of that injury, i.e., healing period and permanent partial disability compensation should be allowed.

Since the injury here is to the body as a whole, the resultant injury must be evaluated industrially and not merely functionally. In determining industrial disability, consideration may be given to the injured employee's age, education, 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.

Claimant is a young man with much of his working life ahead of him. Upon his embarkation upon a career, he is saddled with a physical problem which will remain with him throughout his life. He will be restricted to a certain degree in his ability to engage in lifting. He has just graduated from high school and is rather limited in his activities.

The films presented by the defendant showing the activities were of little or no value to the defense. The main thing they showed was the ability of the claimant to bend his knees when repairing a headlight rather than bending at the waist. Perhaps the defendant would have done better if the moneys expended for a detective agency and for motion picture equipment had been used for the purchase of a valid policy of workmen's compensation insurance.

The claimant's industrial disability is fixed at 20%.

[Claimant was also awarded healing period and vocational rehabilitation benefits as well as medical expenses.]

* * *

Signed and filed this 28 day of June, 1977.

JOSEPH M. BAUER
Deputy Industrial Commissioner

RONALD E. CHRISTIANSON,

Claimant,

vs.

JOHN R. BAHR, d/b/a
BOB'S GRINDING,

Employer,
Defendant.

Decision on Appeal

This is a proceeding brought by defendant employer, John R. Bahr, d/b/a Bob's Grinding, appealing an arbitration decision wherein claimant, Ronald E. Christianson, was awarded payment of medical expenses, healing period benefits, permanent partial disability and vocational rehabilitation as the result of an injury arising out of and in the course of his employment on September 19, 1974.

* * *

Defendant raised two issues on appeal: first, that the deputy industrial commissioner erred in failing to find that claimant was a casual worker not covered by the workers' compensation act, and second, that the deputy industrial commissioner erred in finding an industrial disability of 20 percent.

On reviewing the record, it is found that the findings of fact, the conclusions of law and the award are proper. In affirming the deputy's finding that claimant was not a casual employee, this commissioner makes special note of the fact that no new contractual relationship was established by the defendant and claimant when claimant went to paint the Bahr house. The checks included in the record indicate claimant was paid on the same basis. Claimant was asked, "When you got your final pay check did that also include the payment for the work that you had done while you were painting and fell off the ladder?" He answered, "Yeah. I-- It was just listed in my hours like usual." He was again questioned, "Did you say that Mr. Bahr paid you for the painting that was done at home?" He responded, ". . . I got paid for it, yes."

Although the time of the injury may have been the first occasion on which claimant worked at the Bahr house, he had previously performed other tasks of a similar nature for defendant. This work was merely a continuation of the normal employment relationship between claimant and defendant.

* * *

Signed and filed this 4 day of November, 1977.

ROBERT C. LANDESS
Industrial Commissioner

Appeal to District Court; Affirmed.
Appeal to Supreme Court; Pending.

INDUSTRIAL DISABILITY

ANGELO F. CIPALE,

Claimant,

vs.

BLUE LINE STORAGE COMPANY,

Employer,

and

CNA INSURANCE COMPANY,

Insurance Carrier,
Defendants.

Decision on Appeal

This is a proceeding brought by defendants, Blue Line Storage Company, employer, and CNA Insurance Company, its insurance carrier, seeking review of a review-reopening decision wherein claimant, Angelo F. Cipale, was awarded healing period benefits, medical expenses, and payments for industrial disability for an injury he sustained arising out of and in the course of his employment on October 14, 1974.

* * *

On October 14, 1974, claimant was sent to get a stove from a warehouse. As he was writing down the serial number of the stove, a driver who had been sent to pick up the merchandise backed a jeep into claimant's back knocking him against a pile of stoves. Claimant did not seek medical treatment. He continued to work until October 23 or 24 and then on October 26 saw Darrell Brown, D.O. who gave him heat treatments and did manipulation. He was hospitalized for tests in November. He returned to work in June, 1975. His back pained him on his first day back. On the second day he was unable to work a full eight hours. He did not return to work the third day. In July he received an injection from Donald W. Blair, M.D. He again tried to return to work August 4, 1974, but he was unable to complete a day's work. In December, 1975, CNA attempted to arrange rehabilitation through International Rehabilitation Associates; however, claimant had only one meeting with one representative from the agency.

Claimant, who was taking pain medication, testified that his current complaints were trouble sleeping; problems with his back, legs, hands and neck; and difficulty in standing and walking. Although a back brace had been ordered, claimant stated that he was unable to wear it because it caused pressure. Prescribed back exercises, according to claimant, had been ineffective, too. Medication for pain relief was being used.

Claimant's testimony revealed an incident of twisting a muscle in his upper back while exercising on a trampoline some twelve to fourteen years ago. He also reported spraining his middle back in an industrial injury in 1969 which resulted in eight weeks' treatment by Dr. Brown.

Darrell Dean Brown, D.O. first saw claimant for this injury on October 26, 1974. The doctor's examination at that time evidenced the following:

> [e]licited pain or produced pain by straight leg raising at about 40 to 45 degrees which I felt was positive. I aggravated the pain in the low back by flexing the leg onto the abdomen and into the inguinal area, inguinal canal. It was the impression that the patient had suffered acute traumatic contusion possibly to the kidney or possibly a bruise in the kidney. He had a strain in the right inguinal canal area and also lumbosacral spine sprain. And possibly he may have suffered at that time -- I felt he may have suffered a herniated disk syndrome.

X-ray examination of the lumbar spine on this date showed a normal spine and pelvis with mild spondylosis. Claimant, hospitalized in November, 1974, was treated with manipulation, heat, ultrasound, and medications. Electromyography was normal. Dr. Brown's rating of the claimant's functional disability at the time of his deposition was 15 to 20 percent. While the record indicates Dr. Brown was aware as of February 17, 1976, of the bilateral ulnar neuropathy referred to by Dr. Weir, it is not possible to tell from the record whether or not he included that disability in his rating.

James E. Laughlin, D. O. saw claimant on March 4, 1975. His impression was "[l]umbar sprain with instability of the lumbar spine." He referred the claimant back to Dr. Brown for treatment.

Donald W. Blair, M.D. first saw claimant on May 22, 1975 and found "[n]o tenderness . . . present over the spine itself. Muscle spasm is not present today. There is no list. He is able to rise on the toes and heels and do a deep knee bend satisfactorily." His x-ray examination was "[n]egative for evidence of recent or old bony injury. In the lumbar area, some spurring is noted at the D-12, L-1 level anteriorly." Subsequent reports indicate continuing localized symptoms without neurological complications. Dr. Blair's rating of claimant's functional impairment was 10 percent as of September 4, 1975.

Claimant was examined at the St. Luke's Methodist Hospital Rehabilitation Center headed by Donald D. Weir, M.D. Dr. Weir initiated his evaluation of claimant on March 3, 1976. X-ray findings were negative. Electromyography diagnosis made by Darrell M. Paul, M.D. was "[n]o abnormalities, consistent with anterior horn cell, axon, or muscle disease." Dr. Weir's impression was:

1) Chronic and recurrent lumbar and right buttock muscular strain with myofascial pain syndrome.
2) Myofascial pain syndrome in the trapezius muscle area associated with tension headaches.
3) Possible ulnar compression neuropathy bilaterally.
4) Possibility of sacroiliac joint involvement – needs to be further evaluated.

His rating was "5% disability for chronic low back strain and 5% each for bilateral ulnar neuropathy, total 15%".

John T. Bakody, M.D. saw claimant on August 19, 1976. His relevant findings were:

> The back curvatures are usual; he is able to walk about the examining room well; to bend well and to walk on his heels and toes. There is no limitation of straight leg raising and the Patrick's sign for his disease negative. He moves his head and neck well; there is no limitation of glenohumeral or scapulothoracic movements and the neurologic findings are essentially normal. There are no motor, reflex or sensory changes in the extremities and no abnormal reflexes. Tests for balance and coordination are well carried out.

Dr. Bakody believed claimant "has a lumbar disc syndrome with a [sic] L5 segmental neuralgia assuming that the x-ray examinations made to date are normal."

The deputy industrial commissioner found a functional disability of 20 percent. He did not indicate in his decision what evidence he was relying upon and what evidence he was rejecting. This commissioner sees no reason to exclude the evaluation of any of the physicians. The deputy's finding of 20 percent functional impairment due to this injury is not supported by substantial evidence. However, an award of 10 percent functional disability can be supported.

This rating of functional disability is based on the claimant's having reached a point of stabilization. Dr. Brown was asked if his estimation of functional disability was likely to change. He responded:

> . . . it's hard to give a hundred per cent definite answer in this profession. I think, as you know, you don't know what miracle is going to happen or

> so-called miracle, but based on a reasonable -- having seen a few cases and so forth, I doubt that it's going to change to any degree.

Reports in June, July, August and November of 1975 also indicate stability. Jeanne Stanton, occupational therapist, found "[n]o further treatment appears indicated." Healing period benefits of forty seven weeks and two days are supported by the record.

When an injury is to the body as a whole, the claimant's disability must be evaluated industrially and not just functionally. *Martin v. Skelly Oil Co.*, 252 Iowa 128, 196 N.W.2d 95 (1961). 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 Services 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. *Barton v. Nevada Poultry Co.*, 253 Iowa 285, 110 N.W.2d 660 (1961).

Thirty-six year old claimant who is married and the father of two children is a high-school graduate. His work experience has been primarily as a laborer, warehouseman, and delivery person. He began working for defendant in 1968 packing and moving furniture, making deliveries, and unloading boxcars. Claimant's attempts to return to work for defendant have been set out above. He further testified that he had tried to get work in January, 1976 by applying at gas stations, but no job resulted.

Dr. Brown testified concerning claimant's ability to work.

> My understanding is that this man lifts, handles freight of all sizes, shapes, forms; heavy work, the usual kind of work that you would find in this type of employment. If this is the case, I would say that he would not be able to continue in that type of work but would have to seek lighter employment. Now, he could return to work as far as I'm concerned to Blue Line Transfer and Storage or any other employer of this type providing he did not have to day in and day out do the routine working eight hours a day handling heavy merchandise. I don't think he will be able to do it.

Dr. Blair's report of August 13, 1975 stated that "[t]his man does not appear to be able to resume his heavy work activities and it is doubtful that lighter work will be available in his prior line of employment." He further believed that claimant "could make a satisfactory adjustment to lighter work."

St. Luke's Hospital in Cedar Rapids advised going to Iowa Lutheran for exercises, but claimant had not followed this advise. Specifically, "[i]t was felt the patient would benefit from some reconditioning exercises and from Williams type flexion exercises with gradually increased numbers of repetitions per day."

Dr. Weir's report makes the following occupational therapy evaluation:

> the patient had excellent strength in the upper extremities, some reduction of pin prick perception of the fingertips. He experienced some cramping on muscle testing in the upper extremities. He had no difficulty with various functional and self care activities and was able to tolerate two hours of moderate to heavy physical activity included [sic] prolonged standing without apparent difficulty. When lifting a maximum of ten pounds he reported some pain in the lumbar area. He showed good body mechanics while lifting. The patient seemed to be significantly de-conditioned.

Jeanne Stanton reported that claimant "was fairly unreceptive to possible vocational assessment for career placement." She believed "[r]eturn to employment as soon as possible was indicated." Diane Rattner, rehabilitation medical social worker, noted that "though laid off for a period of 15 months since the time of the accident, Mr. Cipale has not actively investigated alternative things to do either working or interests." Her interview with claimant indicates that he viewed the time he was spending at home because of his injury as providing a benefit for his children.

Based upon all the factors Iowa's highest court has said must be considered, the finding of 10 percent functional disability, the report from St. Luke's, and testimony by Dr. Brown, claimant is found to be 30 percent industrially disabled.

* * *

Signed and filed this 25th day of October, 1977.

ROBERT C. LANDESS
Industrial Commissioner

No appeal.

INDUSTRIAL DISABILITY

JAMES L. SCHELLE,

Claimant,

vs.

HYGRADE FOOD PRODUCTS,

Employer,

AND

LIBERTY MUTUAL INSURANCE CO.,

Insurance Carrier,
Defendants.

Review—Reopening Decision

This is a proceeding in review-reopening brought by James L. Schelle, claimant, against Hygrade Food Products, employer, and Liberty Mutual Insurance Company, insurance carrier, for the recovery of benefits on account of an injury on October 15, 1975.

* * *

The issues to be determined are (1) the extent of permanent partial disability and (2) whether Claimant is entitled to healing period or temporary disability compensation during the period from September 11, 1976 to

January 10, 1977.

On October 15, 1975, Claimant injured his back while removing a conveyor for Defendant Employer. He was examined by Arthur Ames, M.D. on October 20, 1975. Dr. Ames diagnosed Claimant's difficulty to be a lumbosacral strain.

Claimant was referred by Dr. Ames to Alan Pechacek, M.D., an orthopedic surgeon. Dr. Pechacek examined Claimant on December 19, 1975. His impression was muscular strain and spasm with no evidence of nerve root impairment or disc disease. Follow-up examinations were conducted by Dr. Pechacek on January 19, March 19, May 17, July 19, August 9, and September 10, 1976. Following the examination on September 10, 1976, Dr. Pechacek made the following note:

> The patient remains much the same, various and isolated muscle spasm through the back. Examination — really unchanged. He has mild restriction of motion in all planes due to tightness of the muscles of the back, diffuse muscle tenderness. Brought in a whole stack of x-rays, the most recent ones 1975. He does have a small scoliotic curve through the mid-thoracic region, also cervical spine shows fusions of C4 and 6-7. Some degeneration but really doesn't have much in the way of neck complaints. Remainder of the spine does not really show much in the way of degenerative changes, however, he does have multiple Schmorl's nodes through the thoracic and lumbar spine with generally narrowed disc spaces. Recommend — have tried all measures of conservative management that I am aware of, none of which have been particularly successful. May return to work and return in three to four months.

On September 15, 1976, Claimant returned to Dr. Ames. Dr. Ames asked for an orthopedic consultation from F. G. Alvine, M.D. Dr. Ames wrote the following note on this date for Claimant:

> Has back trouble and is too painful to work. He will miss work from July 19th till after he sees Dr. Alvine in S.F. on Oct. 1st.

Claimant was examined by Dr. Alvine on October 1, 1976. Physical examination revealed:

> . . .an alert male appearing his stated age. On exam of his back his spine is straight. Flexion is possible down to 6" fingertip to floor. He has virtually no spine extension. When he attempts to extend he does complain of some low back discomfort. Right and left lateral bend are 50% of normal. SLR is negative. Neurologically he is intact.
>
> X-rays were interpreted by Dr. Alvine as follows:
>
> X-rays shows multilevel disc disease. Actually, every one of his lumbar discs are involved with the degenerative process. It appears to be a bit more advanced up in the upper part of the lumbar spine than lower although the 5-1 level appears he is even settled down enough that the facet joints may be starting to be a problem.

His impression of Claimant's condition was multilevel chronic disc disease without demonstrable radiculopathy. Dr. Alvine did not think Claimant was a surgical candidate. He assessed Claimant's permanent partial disability to be 5% of the whole body secondary to an aggravation of preexisting disc disease and believed Claimant would have difficulty in doing jobs that would necessitate repeated bending and lifting or prolonged standing flat footed.

On January 10, 1977, Claimant was once again examined by Dr. Pechacek. Dr. Pechacek noted that Claimant remains essentially the same with tightness and spasm through the muscles of the back. The following disposition was made by Dr. Pechacek:

> Patient was advised that impairment rating could be submitted based on the motion of the back but not based particularly on diagnosis or the amount of pain. Advised that evaluation board should be obtained. This might lead to some sort of retraining for another type of work. Was advised not to try to return to work at this time. . . .

In a deposition taken on April 4, 1977, Dr. Pechacek rated Claimant's functional impairment to be 2% of the body as a whole. He explained his rating as follows:

> Right. It has nothing to do with how much pain he has or how he came about having the pain. It's just that he moves two per cent less than normal. This was mainly in bending sideways as opposed to bending forward and backwards."

Dr. Pechacek described Claimant's present limitations. He testified:

> Q. Do you have an opinion, doctor, based upon reasonable medical certainty as to whether or not the patient, James Schelle, is capable of performing his usual work as a maintenance man at Hygrade Food Products Corporation?
>
> Mr. Trevino: As of what date?
>
> Mr. Redenbaugh: As of the present time.
>
> A. It does not appear that he can, because of his pain and complaint. That doesn't mean that physically he couldn't do it.
>
> Q. Do you have an opinion, doctor, based upon reasonable medical certainty as to whether or not a person in Mr. Schelle's condition, and as a result of trauma sustained to the back on October 15, 1975, is capable at the present time of doing jobs that require repeated bending, lifting, and prolonged standing flat-footed?
>
> A. I would say it would be difficult for him based on the fact that these things tend to produce pain in his back.
>
> Q. Doctor, do you have an opinion based upon reasonable medical certainty as to how long the condition which you found to exist in Mr. Schelle's back on the 19th day of December, 1975, and observed through repeated examinations as late as January 10th of 1977, do you have an opinion based upon reasonable medical certainty as to how long this condition is likely to persist and whether or not such injury is permanent?

A. Well, there is no way of saying for certain how long it's going to be or whether it's going to be permanent. The fact that it's gone on for over a year, getting a little better and a little worse, but essentially staying present, would indicate that it's probably going to probably not go away completely. It might go away and then come back periodically to bother him, but there is just no way to predict accurately what it's going to do.

On cross examination, Dr. Pechacek indicated that the physical complaints of Claimant were in excess of the physical findings noted by him in his examination of Claimant. Additionally, he testified about his last examination as follows:

Q. At that time did you have any idea as to how long the muscle pain in his back would continue?

A. Not really, There is no way to predict that. He had been going over a year with it. It wasn't apparent that it was suddenly going to let up.

Q. So as far as a healing period is concerned, there wouldn't be any way to say exactly how long it's going to take those muscles to get back in shape?

A. No.

Dr. Ames continued to see Claimant approximately once a month after he was examined by Dr. Alvine on October 1, 1976. In a report dated March 29, 1977, Dr. Alvine stated:

> He continues to have pain in the right side of his back radiating into the back of the right leg, pain with flexion and extension of the back and lateral bending, and a positive right straight leg raising test. He doesn't seem to be getting any better.

Dr. Ames attributed 50% of his rating of 20% to the body as a whole to the injury of October, 1975. He believed Claimant was permanently disabled as far as work that required much bending or lifting.

Claimant has the burden of establishing by a preponderance of the evidence that the injury on October 15, 1975 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 not to exist, he is entitled to compensation to the entent of the injury. *Yeager v. Firestone Tire & Rubber Co.,* 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 medical testimony. *Bradshaw v. Iowa Methodist Hospital,* 251 Iowa 375, 101 N.W.2d 167.

Claimant sustained his burden of proof of a causal connection between the injury on October 15, 1975 and a permanent partial disability to the body as a whole. However, a determination of the amount of permanent partial disability at this time is premature. The testimony of Claimant and Dr. Pechacek and the reports of Dr. Pechacek and Dr. Ames revealed little improvement in Claimant's condition since the injury on October 15, 1975. The last examination of Dr. Ames on March 29, 1977 suggested that Claimant's condition may be deteriorating. Dr. Ames noted a positive right straight leg raising test and pain radiating into the back of the right leg. These findings are not consistent with the finding of Dr. Alvine on October 1, 1976 of no demonstrable radiculopathy. With the present medical evidence, Claimant is entitled to healing period compensation until he has returned to work or competent medical evidence indicates that recuperation from said injury has been accomplished.

The medical bills of Dr. Alvine in the amount of $96.00 and Dr. Pechacek in the amount of $140.00 were offered by Claimant. The above bills were fair, reasonable, and necessary for the treatment of Claimant's injury.

The exposure of Defendants for the permanent partial disability sustained by Claimant to the body as a whole as a result of the injury is potentially large. With a disability to the body as a whole, it must be evaluated industrially and not merely functionally. In determining the 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.

What is the reduction of earning capacity of Claimant as a result of the aggravation of the preexisting disc disease? The evidence revealed that Claimant, prior to the injury, was able to perform the duties required of him by Defendant Employer and to earn $20,000.00 per year. When Claimant contacted vocational rehabilitation concerning a job suitable with his physical limitations, he was advised that the salaries for these jobs were in the area of $8,000.00. Using comparable salaries, Claimant sustained a 60% reduction in earning capacity. If this percentage was used as the industrial disability for Claimant, he would be entitled to 300 weeks of compensation at the rate of $147.00 per week, or $44,100.00.

What can Defendants do to reduce their exposure? The first thing Defendant Insurance Carrier and Defendant Employer can do is recognize the fact that they have a problem. Nothing in the record of this case suggested a recognition by either Defendant of a problem in this case. The next step to be taken is a discussion between Defendant Employer and Defendant Insurance Carrier of a job for Claimant within the plant of Defendant Employer that is compatible with his physical limitations. If a job is not available, Defendants should consider sending Claimant for evaluation to either the Industrial Injury Clinic in Neenah, Wisconsin or Rehabilitation Medicine Associates, P.C. in Omaha, Nebraska. After the evaluation, Defendants should once again consider employment for Claimant within the plant of Defendant Employer that is compatible with his physical limitations. If this is not feasible at this time, then Defendants are encouraged to take an active role in the vocational rehabilitation of Claimant. Upon request, assistance will be given by the rehabilitation counselor in the Industrial Commissioner's office in implementing the

above suggestions.

* * *

Signed and filed this 26th day of May, 1977.

DENNIS L. HANSSEN
Deputy Industrial Commissioner

No appeal.

INDUSTRIAL DISABILITY

FLORIAN F. LUKOWSKI,

Claimant,

vs.

SWIFT AND COMPANY,

Employer,

and

ROYAL-GLOBE INSURANCE COMPANY,

Insurance Carrier,
Defendants.

Arbitration Decision

INTRODUCTION

This is a proceeding in Arbitration by Florian F. Lukowski, claimant, against Swift & Co., employer, and Royal Globe Insurance Company, insurance carrier, for the recovery of benefits as a result of an injury on October 11, 1976.

* * *

ISSUE

The issue to be determined is whether Claimant sustained an injury arising out of and in the course of his employment with Defendant Employer.

STATEMENT OF FACTS

On January 20, 1971 Claimant began work for Defendant Employer. He was examined on this date by Robert K. Fryzek, M.D., the plant physician. A history of a right broken leg in 1968 was noted by Dr. Fryzek. Dr. Fryzek found Claimant to be "Medically acceptable without restrictions." Until Claimant was assigned to chitterlings during the fall of 1971, he performed a variety of jobs for Defendant Employer. Since the fall of 1971, Claimant has worked either with chitterlings or the sawing of briskets.

On December 1, 1972, Claimant experienced problems with his right leg. Dr. Fryzek diagnosed Claimant's condition to be "tenosynovitis lower right leg and heel." He referred Claimant to H. F. Trafton, M.D. Dr. Trafton released Claimant to return to work on January 12, 1973 and advised "...he should not do the brisket sawing requiring constant pivoting on the rt. leg site of old severe leg fracture." Defendants paid Claimant temporary disability compensation from December 4, 1972 to January 15, 1973.

On January 29, 1973 Claimant attempted to operate the brisket saw. Dr. Fryzek noted he was worse on February 1, 1973 but markedly improved on February 3, 1973.

The next problem experienced by Claimant which required medical attention was during September, 1974. He was hospitalized at Mercy Hospital from September 13, 1974 to September 19, 1974. Dr. Trafton's principal diagnosis was duodenal ulcer. He reported in his physical examination of Claimant that:

> BACK & EXTREMITIES: Spinal column normal, good mobility. No clubbing or varicosities though he has some bruising on the toes of both feet which he claims is due to tight boots. No ankle edema. Both knees seem swollen, right greater than the left. There is fluid in both knee joints and some cracking and popping noted especially in the right knee.
>
> NEUROLOGICAL: Cranial nerves 1 through 12 intact. Sensory status intact. Cerebellar coordination intact. Posterior column function intact.
>
> REFLEXES: Triceps and biceps +2 out of +4 bilaterally. Knee jerk +2 out of +4 bilaterally. Ankle jerk +2 on the right side, could not be elicited on the left.

Claimant was released to return to work on September 30, 1974.

On October 11, 1976 Claimant injured his back. He was examined by Dr. Fryzek on October 12 and 14, 1976. Dr. Fryzek recorded a history of "lifting while working for Swift & Co.--Back pain." Butazolidine Alka was prescribed by him. Dr. Fryzek released Claimant to return to work on October 18, 1976.

Claimant returned to Dr. Fryzek on November 5, 1976 with complaints about his right knee and leg. A history of "Started using saw again and began bothering rt. knee and leg" was recorded by Dr. Fryzek. He described his findings to be "Tenderness in Rt leg. (Rule out disc disease of the back)."

On December 21, 1976 Claimant returned to Dr. Fryzek with complaints of numbness in right knee, leg, and hip. He referred Claimant to Behrouz Rassekh, M.D., a neurosurgeon.

Dr. Rassekh examined Claimant on December 21, 1976 and recorded the following history:

> . . . Mr. Lukowski said he worked as a – used to work as a sow brisket and he stated the first time was two years ago when he was doing the same, cutting briskets, he started having back pain and some right leg pain and was treated by Doctor Fryzek with heat and physical therapy and the pain got better, and he returned to a different type of work and he continued on that new job until September 1976, and when he returned again to sow brisket job and the pain started again in his back and radiating down to his leg and the pain had been getting worse by his standing, sitting and changing positions, coughing and sneezing would aggravate the pain, and he had some chiropractor treatment with some relief of his back pain, but not of his right leg pain and that is what his history he gave us.

His impression was a herniated disc at L-4, L-5 or L-5, S-1. Dr. Rassekh advised Claimant to be admitted to a hospital for a myelogram.

On December 26, 1976 Claimant was hospitalized at Mercy Hospital. A myelogram demonstrated:

> . . . a herniated intervertebral disc a L-4, 5, mainly on the right, with some spondylotic changes with a partial block, what we mean by partial block, it means contrast, the pantopaque would not flow easily over that level, there was a big defect, there was a big defect, a larger defect than usual and the spinal fluid protein, the spinal fluid protein was ninety-one milligrams, and normal being up to forty.

Dr. Rassekh performed a bilateral hemilaminectomy at L-4, L-5 on December 29, 1976. He was discharged from the hospital January 5, 1977.

Claimant was rehospitalized on January 11, 1977 for acute urinary retention. A transurethral resection of the prostate was performed on January 14, 1977. Claimant was discharged from the hospital on January 20, 1977.

Dr. Rassekh last examined Claimant on March 10, 1977. He released Claimant to return to "t rimming work as of March 21, 1977." A permanent partial disability rating of 10% was given by Dr. Rassekh.

Dr. Rassekh testified about causal connection as follows:

> Q. Well, Doctor, then in this particular case, from the information that he had given you, what do you feel with a medical certainty as to the cause?
>
> A. I think he probably had deterioration of the disc, with a repeated trauma. He had produced more hypertrophic changes and finally he had, the last episode he had a herniation of his disc and compression of the nerve.
>
> Q. Doctor, when you first saw Mr. Loukowski (sic), did he describe to you any events or any occurrence which caused him to come to see you last fall?
>
> A. He said he was changing his job from lighter job, which I don't know the description of that job, to sow brisket, just in September. And I think he worked one day or two days on that sow brisket and he started having pain, but he did not describe any specific incident, a twist or lift or anything he could pin-point, the relationship to the on-set of the pain.

APPLICABLE LAW

The 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. *Lindhal v. L. O. Boggs Co.,* 236 Iowa 296, 18 N.W.2d 607; *Bodish v. Fisher, 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 supreme court of Iowa 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 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. * * * 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. * * * *

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 that 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 medical testimony. *Bradshaw v. Iowa Methodist,* 251 Iowa 375, 101 N.W.2d 167.

ANALYSIS

Claimant sustained his burden of proof that the employment incident or activity on October 11, 1976 brought about the cause of the health impairment on which Claimant based his claim. Causal connection between the employment incident on October 11, 1976 and Claimant's herniated disc was established by the testimony of Claimant and Dr. Rassekh. Additionally, the reports of Dr. Fryzek corroborated the occurrence of an incident to Claimant on October 11, 1976 and the pursuit by Claimant of treatment following this incident.

Since Claimant sustained a disability to the body as a whole, he is entitled to have his disability 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 58 years old and married. His education consists of "3 months shy of grade school." At the age of 16, Claimant began working in the meat packing industry. He worked exclusively in the meat packing industry except for his military service in World War II and during a short period of time in 1966 when he worked in a laundry. Dr. Rassekh estimated Claimant's disability to be 10% of the body as a whole and advised him to avoid heavy lifting. Claimant returned to work on March 21, 1977.

Applying the evidence offered in respect to Claimant's industrial disability to the considerations outlined in *Olson* and *Barton,* supra, Claimant proved a permanent partial disability to the body as a whole of 18%. As a result of the physical restrictions placed on Claimant by Dr. Rassekh,

Claimant's primary industrial asset of performing physical labor in the meat packing industry is reduced. The significance of the physical restriction is enhanced by Claimant's age and education.

The willingness of Defendant Employer to return Claimant to gainful employment within the physical restrictions placed on him by Dr. Rassekh is commendable. Without this willingness, Claimant, with his education, skills, age, and medical history, is essentially unemployable. Equally commendable is the motivation of Claimant. The combination of (1) an employer willing to return a physically handicapped employee to work and (2) a motivated employee results in the ultimate goal of workers' compensation being accomplished, i.e., the return of the occupationally disabled employee to gainful employment at a place in his or her community. Side benefits of this combination are the reduced exposure of Defendants on this claim and the retention by Claimant of his dignity as a member of the labor force.

Claimant also sustained his burden of proof of a healing period.

* * *

Signed and filed this 28th day of October, 1977.

DENNIS L. HANSSEN
Deputy Industrial Commissioner

No appeal.

INDUSTRIAL DISABILITY—BACK INJURY

CARL JR. SAMUELS,

Claimant,

vs.

CLOW CORPORATION,

Employer,
Self-insured,
Defendant.

Review—Reopening Decision

This is a proceeding in review-reopening brought by the claimant, Carl Jr. Samuels, against Clow Corporation, his employer and authorized self-insurer under Chapter 87 of the Code of Iowa, to recover additional benefits under the Iowa Workmen's Compensation Act by Reason of an industrial injury which occurred on September 30, 1974.

* * *

The issue for determination is whether the Claimant is entitled to compensation in addition to that which has previously been paid.

The record supports the following findings of fact, to wit:

Claimant, presently age 27, received an injury arising out of and in the course of his employment on September 30, 1974.

The Claimant was working on a swing-grinder and picked up a cast, twisting his back.

The Claimant testified that he injured his back in August, 1974 at work, resulting in a week's disability.

After the September 30, 1974 injury, the Claimant testified that he missed work for two days, returned to work for two or three days and either injured or reinjured his back. He noted pain and was seen by Robert M. Collison, M.D. He was later seen by Stephan Fox, M.D., John R. Scheibe, M.D. and Dale Engel, D.C.

The Claimant returned to work later for only one day in 1974, noticed pain across his low back, sought medical attention and has not been gainfully employed since that time.

The Claimant has the burden of proving by a preponderance of the evidence that the injury of September 30, 1974 is the cause of the disability upon which he 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. However, the opinion of experts need not be couched in definite, positive or equivocal language. *Dickinson v. Mailliard,* 175 N.W.2d 588. 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.

The case, by its nature, must definitely turn on medical evidence.

In this case, the medical evidence leads us to the possibility of the existence of a preexisting condition and its consequences from trauma. 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 more than slightly aggravated, this resultant condition is a personal injury within the Iowa law. The claimant is entitled to compensation to the extent of that injury. *Ziegler v. U.S. Gypsum Co.,* 252 Iowa 613, 106 N.W.2d 591.

The evidence in the case sub judice is replete with indications of at least some prior involvement. (see employer's exhibit No. 4) The nature of these injuries is unknown, but the prior injuries noted in this exhibit were oftentimes not back-related even by the wildest stretch of thought. The testimony offered sheds little light on the subject.

In order to integrate the facts in a chronological order, we must go through the evidence on a detailed basis.

Ellis Duncan, M.D., of Fremont, Iowa, treated the Claimant in 1973 and 1974. Some of the 12 documents penned by Dr. Ellis indicate that the Claimant was being treated for a fracture of the little finger of the right hand in late May, 1973. The Claimant had previously sprained his left thumb (early May, 1973). Several other injuries had occurred which were unrelated to the back.

Evidence was introduced at the hearing which indicated that the Claimant may have injured his back some nine years prior to 1974 when he fell off a machine at a brickyard.

On August 19, 1974 the Claimant apparently reported to work, then went to see a Dr. Peterson, an associate of Dr. Collison. The Claimant reported that about a week prior to August 19, 1974 he had felt something snap in his back and had had left-sided back pains. He also reported a similar incident some six months prior to August, but the

particulars were not specified. The diagnosis was that the Claimant had left paravertebral muscle strain.

The Claimant was seen by Dr. Collison on September 30, 1974. The complaint at that time was of pain in the left lower side. The Claimant stated that he had been lifting castings and had experienced lumbar pain. The diagnosis of mild lumbar strain was made. He reported to Dr. Collison again on October 3, 1974 when he related a history of a back injury some nine years prior to the visit. During this time the Claimant was engaged in light duty at work. His symptoms were diagnosed as indicating a muscular strain. A lumbosacral corset was prescribed.

On October 30, 1974 the Claimant again saw Dr. Collison with essentially the same symptoms, and he referred the Claimant to Dr. Fox, an orthopedic surgeon in Ottumwa, Iowa. No report was made of this visit. At some time between October 30, 1974 and January 3, 1975 the Claimant reported that his back had tightened as a result of changing a tire on his car.

Dr. Fox recommended on a "Disability Certificate" that the Claimant return to work on December 23, 1974. Another slip reveals that the Claimant could return to work on January 3, 1975.

On January 3, 1975 the Claimant was seen by Dr. Collison's father, also a physician, who told the Claimant to return to work on January 6, 1975. On January 5, 1975 the Claimant saw Dr. Collison and was relieved from his duties until the condition was relieved. Dr. Collison also gave tacit approval to chiropractic treatment of the Claimant's condition.

The Claimant was then seen by Dr. Engel, who recommended treatment and a possible resumption of light duty about March 12, 1975. In a report dated March 25, 1975 Dr. Engel apparently reported that a limited work load could be resumed.

On March 26, 1975 the Claimant again saw Dr. Collison. The Claimant was to return to work on April 4, 1975 with the suspicion of Dr. Collison that the Claimant could expect recurrent strain.

Dr. Collison states that he cannot say that the injury was caused by the employment but that it was aggravated by his employment.

The Claimant was seen by Dr. Scheibe, who performed an examination on behalf of the Claimant. His testimony was admitted by deposition and report.

Dr. Scheibe saw the Claimant solely for the purpose of examination on June 10, 1976. His diagnosis of chronic lumbosacral strain was based on this physical examination. The only test which resulted in remarkable results was that the straight leg raising test was positive at 110 degrees bilaterally, resulting in pain without spasm in the lower back.

The Defendant made a point of bringing the failure of the Claimant to relate the earlier injury about nine years prior to 1974. Dr. Scheibe had indicated that the injury of September 30, 1974 was the cause of the Claimant's difficulties. When asked about the existence of prior back pain, Dr. Scheibe indicated that the accident would have aggravated the previously existent chronic strain of the low back. He fixes the Claimant's functional impairment of 10% of the body as a whole. He would recommend that the Claimant be confined to light work which he defined as lifting twenty pounds maximum with frequent lifting or carrying objects weighing up to ten pounds. He recommended that a regular series of exercises would strengthen the back and opines that the Claimant would have had fewer difficulties if he had been through a regular physical conditioning program. The witness testified that the moderate obesity of the Claimant is an indication of the lack of conditioning. He rates the probability of success of the conditioning program as low because of the Claimant's lack of education, basic cerebral activity and willful cooperation.

There is a definite conflict of the medical evidence in this case which must be resolved.

Dr. Collison's testimony will be followed to the extent that it gives us a sound historical basis for the origin of the Claimant's problems and subsequent treatment thereof. However, the Claimant was last seen by Dr. Collison on April 10, 1975. The only contact he had subsequent to that time is by narrative reports written by other physicians. Dr. Scheibe's testimony will be followed to the extent that his examination revealed some permanency in the Claimant's condition. The evidence adduced from Dr. Scheibe is the most recent, and the inference is that the Claimant's condition will be permanent since the examination took place some 18 months following the accident. The prior injuries took place a significant period of time before this accident and the Claimant worked for a significant period of time after the prior injury without apparent difficulty.

It is therefore found that the disability here is directly traceable to the accident in question within the meaning of *Langford,* supra.

Since the injury here is to the body as a whole, the resultant injury must be evaluated industrially and not merely functionally. In determining industrial disability, consideration may be given to the injured employee's age, education, 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 660.

Claimant, age 27, has been employed in laboring capacity for his entire work life, albeit short. He dropped out of school in the eighth grade. He has difficulty in reading and writing. In short, he is an educationally disadvantaged young man whose means of making a living was predicated upon brawn rather than brains. The Claimant is apparently involved in a rudimentary horse-raising operation and auto salvage operation. These activities also require some physical dexterity. Dr. Scheibe states that the Claimant's physical impairment is 10%. The Claimant's industrial disability is hereby found to be 25%. The possibility of the Claimant's pursuing an exercise program to strengthen his injured back exists, but the Claimant's lack of cerebral activity would probably result in a slim chance of success. (see Scheibe deposition).

* * *

[Claimant was also given healing period benefits.]

* * *

Signed and filed this 8th day of March, 1977

JOSEPH M. BAUER
Deputy Industrial Commissioner

Appealed to Commissioner; Affirmed
Appeal to District Court; Pending.

INDUSTRIAL DISABILITY – TWO SCHEDULED MEMBERS

KENNETH EITTREIM,

Claimant,

vs.

FARMERS COOPERATIVE ELEVATOR CO.,

Employer,

and

FARMERS ELEVATOR MUTUAL INS. CO.

Insurance Carrier,
Defendants.

Review—Reopening Decision

This is a proceeding in review-reopening brought by the claimant, Kenneth Eittreim, against his employer, Farmers Cooperative Elevator Company, and its insurance carrier, Farmers Elevator Mutual Insurance Company, to recover benefits under the Iowa Workmen's Compensation Law, on account of an injury sustained March 1, 1973.

* * *

The issue to be determined in this matter is whether or not the claimant sustained compensable disability and medical expenses in addition to benefits previously paid. An issue raised by defendants is whether or not an injury resulting in impairment to two scheduled members, and not extending beyond those members, permits an evaluation of claimant's industrial disability, or is limited to the separate scheduled values of the injured extremities.

The last noted issue in the above paragraph must be approached as it is not found by this deputy commissioner that the resultant injury to the two scheduled members extends beyond the schedule, at least at the present. Some testimony was elicited from Dr. Robert W. Dunlay, M.D., that the shortened left leg would have a mechanical effect upon the function of claimant's pelvis and supporting structures. There is no definitive evidence that any permanent condition in this area has resulted at this time. Accordingly, claimant's impairment to the left lower extremity is limited to the extremity. Claimant's impairment is limited to his right upper extremity.

Claimant is entitled to have his disability determined from an industrial point of view. The parties are referred to §85.34(2)(s) of the Code of 1971, in effect at the time of this injury. That section reads:

> The loss of both arms, or both hands, or both feet, or both legs, or both eyes, or any two thereof, caused by a single accident, shall equal a permanent total disability, and shall be compensated as such.

The parties are also referred to the second unnumbered paragraph of §85.34(2)(u), Code of Iowa of 1971, in effect at the time of the instant injury, which read as follows:

> If it is determined that an injury has produced a disability less than that specifically described in said schedule, compensation shall be paid during the lesser number of weeks of disability determined as will not exceed a total amount equal to the same percentage proportion of said scheduled maximum compensation.

The parties are also referred to §85.34(3), the first unnumbered paragraph which refers to "permanent total disability".

All three of the above quoted paragraphs must be read together. Note should be made that §85.34(2)(s), Code of 1971, speaks of the loss of "any two" of the listed members. Case law too well settled to repeat here holds that "loss of" in §85.34(2) of the Code, refers to "loss of use of". An arm and a leg would appear to qualify. The loss of "any two" listed members, according to the statute, "shall equal a permanent total disability". The referenced section in §85.34(2)(u), Code of 1971, quoted above, indicates that if the disability is less than the total in the scheduled paragraph of the Code, it can be proportionately diminished. This would be true, as well, with respect to §85.34(2)(s), Code of Iowa. Thus a proportionate share of "total disability" can be determined where appropriate.

When an injury results in impairment outside of a scheduled member, the facts to be considered are those factors bearing on an injured employee's ability to earn wages, *Olson v. Goodyear Services Stores,* 255 Iowa 1112, 125 N.W.2d 251, *Dailey v. Pooley Lumber Co.,* 233 Iowa 758, 10 N.W.2d 569. One who is totally disabled under the Iowa Workmen's Compensation Law is determined to be in such a status after an inquiry into his "industrial" disability, *Dailey v. Pooley Lumber Co.* supra. The definition of permanent total disability of §85.34(3), Code of Iowa 1971, would seem the same as the permanent total disability of §85.34(2)(u) of 1971. A lesser degree of disability under subparagraph (s) of §85.34(2), Code of 1971, than total disability would be a percentage of total disability. As total disability is total "industrial disability", a "lesser" percentage of total disability provided for in subparagraph (u) of §85.34(2), Code of 1971. Accordingly, when an injury results in disability to two scheduled members so as to qualify subparagraph (s) of §85.34(2), Code of 1971, a claimant is entitled to have his "industrial disability" determined by examining the factors relevant to his earning capacity.

Claimant has been evaluated by three physicians, Dr. Donald Blair, M.D., orthopedic surgeon, Dr. John A. Grant, M.D., orthopedic surgeon, and Dr. R. W. Dunlay, M.D.

Dr. Blair feels claimant's impairment to the left lower extremity is 24%. Claimant has a 10% impairment to the right wrist. These ratings convert to a 12% disability of the whole man. Removal of the remnants of an internal fixation device in the left lower extremity may help remove some symptoms but would not change the disability rating. Dr. Blair does not feel claimant's upper extremity is significantly impaired except when claimant attempts "forceful" activities.

Dr. Grant's opinion in March, 1977, is that the impairment to the left lower extremity is 40%. Claimant has a 20% impairment of the wrist or 18% impairment of the upper extremity. The two extremity ratings convert to a whole body impairment of 25%. He does not feel that the removal of the hardware would change the impairment rating.

Dr. Dunlay's impairment ratings appear to be the same as those as those of Dr. Grant.

Both Dr. Grant and Dr. Dunlay feel claimant will have considerable restriction in moving over various uneven surfaces because of the lower extremity difficulties. Dr. Blair feels that with the removal of the remnants of the internal fixation device, claimant should be able to resume normal activities. No physician finds any significant impairment in claimant's right wrist. No matter what ratings are given to the bodily impairment, the proper inquiry in the instant matter, as previously indicated, is into the effect of the two resultant injured portions of claimant's body upon claimant's ability to earn wages.

Both Dr. Grant and Dr. Dunlay do not paint a promising picture for this claimant, an individual of lower education and intelligence, whose work in heavy labor has required considerable walking throughout his whole life. The inquiry, however, does not stop with such a simple explanation. It is the opinion of this deputy commissioner that claimant does have a substantial industrial disability as a result of the instant injury and that he will not be able to perform much of the heavy labor claimant's work history indicates he has performed. It may well be that removal of the remaining position of the internal fixation device will solve many of claimant's problems. In spite of valiant attempts on the part of claimant's counsel to refute the opinion of Dr. Blair through Dr. Dunlay's testimony, this deputy commissioner elects to accept the opinion of Dr. Blair as to the necessity of the removal of the internal fixation device. Dr. Blair is an orthopedic surgeon and Dr. Dunlay is not. Dr. Blair's opinion is accepted over Dr. Dunlay's opinion although Dr. Dunlay has seen claimant over a number of years. Dr. Grant does not express an opinion on the internal fixation device, except to indicate puzzlement as to the lack of its removal at the time of the removal of other portions of the device. Dr. Dunlay's explanation of a conversation with Dr. Grant reveals only the comments one might expect from Dr. Grant in similar circumstances. It thus appears that a readily available and simple surgical procedure, not withstanding claimant's counsel's further valiant attempts to show the details of such surgery as being difficult, would remove a potential source of claimant's ongoing pain. Such an effect on claimant's disability appears to be a factor that can be considered, *Stufflebean v. City of Fort Dodge,* 233 Ia. 438, 9 N.W.2d 281.

Other factors also bear on the total disability picture of this claimant. As previously noted, a substantial industrial disability has resulted. Claimant's disability, however, is compounded by an extreme lack of motivation and a definite attitude of "I can't". The basis for this conclusion appears in page after page of the transcript. Claimant's primary complaints are one of "I get tired" and not necessarily one of pain. Claimant's "tiredness" is also indicated by claimant's wife. It is the observation of this deputy commissioner that this claimant has not, and is not motivated to make any attempt to undertake a job in any area where he might be able to perform. There is also the indication that the claimant's wife exerts great influence in discouraging him from employment. The parties are referred to pages 114 and 115 of the transcript where claimant's wife indicates by her testimony, her observed demeanor and tone of voice, a certain resentfulness that claimant's work caused his absence from the home prior to the instant injury. Claimant thus is not personally motivated and is influenced by his spouse to remain away from work and to stay in the home. Dr. Dunlay does not exhibit a great deal of encouragement to claimant to return to work. In spite of his comments of "pushing" claimant to mow his lawn at one period of time, Dr. Dunlay does not appear to have undertaken any sort of a program of rehabilitation and therapy to return this unfortunate individual to his peak capacity. It would appear that no one has worked with the claimant in an attempt to help his motivation, to decrease the lack of ability to use the members involved, or to alter the claimant's home environment so that an attitude encouraging a desire to return to work exists. It is both the physical injuries and the attitude problem which result in this man's disability. The external influences in the claimant's home and the claimant's own lack of motivation for whatever the reason are not established as related to this injury. Claimant's industrial disability, as a result of the instant injury, is found to be 40% of the whole man.

As in the case of *Jamison v. Wilson & Co., Inc.,* Appeal Decision of the Commissioner, filed August 17, 1977, a "caveat seems appropriate". Below find several pargaraphs quoted from that decision.

> A caveat seems appropriate. It may be interesting to note that only four days after the claimant suffered the initial injury, the words "physical rehabilitation" became part of the wording in §85.27 of the Iowa Code. We may presume that the intent of the legislature, in adding these words to the Code, was to call attention to the fact that the use of physical rehabilitation was being overlooked and that it was not being recognized as an integral part of the restoration process. Many physicians were not taking advantage of their medical prerogative to prescribe physical rehabilitation.
>
> During recent years the "return to work" objective of workers' compensation has placed greater emphasis on physical rehabilitation. It is axiomatic in workers' compensation that the return-to-work objective, returning the injured employee to work as soon as possible consistent with good medical judgment, is inherent in quality medical care and rehabilitation.
>
> When planned medical care which includes a rehabilitation return-to-work program is not implemented, very frequently the evil sequelae of enforced idleness, as demonstrated in this case, appear. The longer the delay between recognition of the need for physical rehabilitation and its implementation, the less optimistic can be the prognosis for success. The false notion exists among many laymen and some

physicians, that the routine application of local heat and moderate exercise constitutes a rehabilitation program. It is completely inconsistent with the return-to-work objective in workers' compensation cases. If an injured person is to be returned to gainful employment, there is an implication of a need for physical reconditioning, commensurate with the physical requirements of his job, treating the whole person, rather than just the instant injury. Rehabilitation implies prevention perhaps even more strongly than it does the restoration. Physical rehabilitation needs to be prescribed, implemented and its effectiveness evaluated early in the course of treatment and not instituted *after* all other care has not achieved the anticipated results.

Many noted items in the above quote are inappropriate to the instant claimant. However, as no effort has been expended by any party in the instant case, in an attempt to salvage the industrial potential of this individual, the caveat is appropriate. It is incumbent upon someone to initiate such efforts. One would think that an insurance carrier faced with a relatively minor injury with such drastic consequences of injuries of a relatively minor impairment value would have undertaken some program. It does not readily appear in the record that the defendants even referred claimant to any orthopedic surgeon until almost a year after the injury. It is not clear that the referral was for any more than an evaluation. Although perhaps inappropriate in the instant case, one wonders why a heel lift on claimant's shoe for the shortened leg was not attempted. In any event, none of these questions were approached nor answered in any manner on the record.

Although at this late date, almost five years after the injury, any attempts may be futile, the parties are directed to consult with Mr. Leonard Ewald of the Iowa Industrial Commissioner's Office to see if an appropriate program might be initiated to help this claimant become a more productive individual in the industrial world. It would appear that claimant's wife might well be made an active participant in any program. Although not all the components of claimant's disability are compensable, treatment for those components and the results of the instant injury are so intertwined that payment for such a program by defendants would be appropriate.

Claimant appears to have reached the point where his capabilities are the same as they are today about January, 1974. At that point, he would not be totally incapacitated from all gainful employment as a result of this injury. Accordingly, claimant's healing period would run from the date of injury up to February 1, 1974. This is a period of 47 6/7 weeks. However, claimant had exacerbations in December of 1975, resulting in what Dr. Dunlay called "minimal procedure" under local anesthetic to remove a screw from the internal fixation device. This deputy commissioner allots a week of healing period for this difficulty. In the summer of 1976, a further exacerbation occurred requiring treatment. A week of healing period disability is allotted for prior time.

* * *

Signed and filed this 20th day of January, 1978

ALAN R. GARDNER
Deputy Industrial Commissioner

Appealed to Commissioner; Modified-Defendants not required to provide rehabilitation.

Appealed to District Court; Pending.

INJURY – ARISING OUT OF AND IN THE COURSE OF

INJURY – DEPRESSION

ELMER BROUCHOUS,

Claimant,

vs.

CITY OF LAKE VIEW,

Employer,

and

EMPLOYERS MUTUAL CAS. CO.,

Insurance Carrier,
Defendants.

Arbitration Decision

This is a proceeding in Arbitration brought by the claimant, Elmer Brochous, against his employer, City of Lake View, Iowa, and its insurance carrier, Employers Mutual Casualty Company, for the recovery of benefits on account of an injury on September 17, 1974.

* * *

There is support in the record for the following statement of facts:

On September 17, 1974 Claimant was struck by a tile while putting in a junction box in a sewer line for Defendant Employer. The occurrence of the incident was corroborated by Lonnie Brown, a fellow employee and Wilmer Koessel, a councilman for Defendant Employer.

Claimant was examined at Miller & Youberg Medical Associates, P.C., on September 18, 1974. Follow-up examinations were performed on September 20, 21, and 24, 1974. Crutches were prescribed on September 20, 1974 by Dr. Youberg. Claimant continued to work for Defendant Employer until January 11, 1975. Brown, Koessel, and Tom Meister, a fellow employee corroborated Claimant's testimony that his work performance decreased after the injury until he was no longer able to perform his job.

On January 13, 1975, Claimant was hospitalized at Loring Hospital in Sac City, Iowa. He was discharged from the hospital on January 20, 1975. Dr. Youberg's final diagnosis was "herniated lumbar disc". Claimant was hospitalized again at Loring Hospital from January 31, 1975 to February 12, 1975. Following this hospitalization, Dr. Youberg's final diagnosis was "Low back sprain with sciatica, left calf. Depression, mild."

On February 19, 1975, Claimant was examined by David G. Paulsrud, M.D., an orthopedic surgeon. Dr. Youberg referred Claimant to Dr. Paulsrud. Dr. Paulsrud hospitalized Claimant at St. Luke's Hospital in Sioux City, from February 19, 1975 to March 4, 1975. He diagnosed Claimant's problem to be a herniated disc at the L 4-5 interspace. Surgery was discussed by Dr. Paulsrud with Claimant but was not recommended by him.

Due to an increase in Claimant's nervousness and depression, Dr. Youberg referred Claimant to L. K. Berryhill, M.D., a psychiatrist. Dr. Berryhill hospitalized Claimant at Trinity Regional Hospital in Fort Dodge, Iowa from March 9, 1975 to March 22, 1975. Treatment for Claimant consisted of medication and group and individual psychotherapy.

On April 5, 1975, Claimant was admitted again to Trinity Regional Hospital by Dr. Berryhill. He was discharged from the hospital on April 28, 1975. Claimant has continued under the care of Dr. Berryhill since that date and through the date of the hearing on February 23, 1976. Dr. Berryhill treated Claimant on May 10, May 17, May 31, June 14, July 15, July 29, August 7, August 19, September 23, October 21, November 3, and November 18, of 1975 and January 6, 1976.

Dr. Youberg examined Claimant on May 16, June 3, and November 3, 1975. Claimant was also examined by Dr. Paulsrud on August 21, 1975 and October 15, 1975.

The 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. 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 supreme court of Iowa 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 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.***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.****

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 Company,* 254 Iowa 130, 115 N.W.2d 812.

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. The opinion of experts need not be couched in definite, positive or unequivocal language. *Dickinson v. Mailliard,* 175 N.W.2d 588.

Claimant sustained his burden of proof that the injury on September 17, 1974 caused the health impairment on which he bases his claim. Drs. Youberg, Paulsrud, and Berryhill causally connected their treatment of Claimant with the injury of September 17, 1974. They testified about the causal connection between their treatment of Claimant and the injury of September 17, 1974 as follows.

Dr. Berryhill testified:

> Q. Doctor, do you have an opinion based upon reasonable medical certainty -- I'll withdraw that for a moment. What causes attribute to this depression and anxiety, Doctor?
>
> A. Well, this man does have a predisposition in his personality to depression. He has a fairly rigid personality, self-demanding and always expects rather rigid perfectionistic performance from others, and had shown a previous depression of psychotic degree following an injury in about 1969. I believe that --
>
> Q. The cause?
>
> A. Well, his predisposition and his personality along with the pain and disability and trauma of his back problems in the fall of 1974 contributed materially to the depression that he showed up with in March of '75.
>
> Q. Doctor, you've related that Mr. Brouchous had had an earlier depression. What significance do you

attach that earlier depression as far as treatment that you gave him in the winter and spring of 1975? Are they interrelated?

A. Well, both are related to trauma and injuries, and I believe that the two together show a pattern of difficulty adjusting to and reacting to trauma, physical injury, disability, with his own fairly rigid, demanding attitude towards himself.

Q. Doctor, based upon a reasonable medical certainty, do you have an opinion as to what brought on this second occurrence of depression?

A. Yes.

Q. Would you tell me that opinion, please?

A. Again, it's not one thing. But, I believe, certainly, that his interaction of his back trouble, injuring in the fall and the rather lengthy period of pain and difficulty in disability through the winter of '74-'75, interrelating with his depressive type of personality, produced the depression in March.

Q. I take it from what you've told me, that pain or the problems that he had with his back is a--has a causal effect to his depression. Would you expound on that?

A. Yes. Pain is a stress. Most people have some difficulty tolerating pain and some in a variety of ways.

Now, this man tends to react to stress with depression. Particularly, a chronic or long-term stress is likely in this man to result in depression, and did, I feel, materially contribute to the depression.

Dr. Youberg testified:

Q. Doctor, I am going to try to make this brief and short. I know you have a busy day ahead of you. Based upon knowledge that you have gained from your examinations of Mr. Brouchous, do you have, based upon reasonable medical certainity, an opinion as to whether or not Mr. Brouchous has sustained a disabling injury?

A. Yes.

Q. What is that opinion?

A. He has sustained a disabling injury.

Q. Would you tell me whether or not that disabling injury is permanent in nature, doctor, with reasonable medical certainty?

A. Well, he has a herniated disk, and I think he may improve from that. Boy, I think I might just have a hard time telling you that that disk is absolutely permanent.

Q. I don't mean just the disk, and that's my next question then. Has Mr. Brouchous incurred, as a result of this injury, a depression, doctor, that he has been treated for?

A. Yes.

Q. Now given the combination of this depression which he has been treated for, did that depression arise out of and was it because of his injury on September 17, 1974, in your opinion, or the recurrence of it?

A. You bet! You bet!

Dr. Paulsrud testified:

Q. Doctor, based on your examination and treatment of Mr. Brouchous, your expertise in orthopedics, particularly with this kind of orthopedic problem, do you have an opinion within a reasonable medical certainty as to whether or not Mr. Brouchous experiences any permanent impairment --

A. Yes.

Q. -- as a result of that injury?

A. Yes, I determined that he has a ten percent permanent-partial impairment of the body.

Both Dr. Youberg and Dr. Berryhill indicated that Claimant was still receiving treatment from them. Since January 11, 1975 Claimant has not worked except for four weeks during May of 1975 when he worked 35, 32, 32, and 20 hours respectively for each week.

The above evidence is determinative that Claimant has suffered an injury causing permanent partial disability and has neither returned to work nor accomplished recuperation from the injury. Therefor, Claimant is entitled to healing period compensation pursuant to §85.34(1), Code of Iowa, from January 11, 1975 to May 1, 1975 and from June 1, 1975 until the conditions under §85.34(1), are met. Until these conditions are met, a determination of permanent partial disability is premature.

* * *

Signed and filed this 24th day of August, 1976.

DENNIS L. HANSSEN
Deputy Industrial Commissioner

No appeal.

INJURY – EMOTIONAL AND PSYCHOLOGICAL

DONNA M. BENTLEY,

Claimant,

vs.

GLOBE UNION, INC.,

Employer,

and

EMPLOYERS INSURANCE OF WAUSAU,

Insurance Carrier,
Defendants.

Review – Reopening Decision

This is a proceeding in review-reopening brought by the claimant, Donna Bentley (now Urban), against Globe Union, Inc., her employer, and Employers Insurance of Wausau, the insurance carrier, to recover benefits under the

Iowa Workmen's Compensation Act as a result of an industrial injury that occurred on September 10, 1971.

* * *

The issue in this case is whether the claimant has had a change in condition since the award of November 26, 1973.

The record supports the following findings of fact:

Claimant has worked only briefly since the decision rendered in 1973. She testified that she worked in 1974 as a waitress. She stated that she was so employed for about a week. She stated that she left this employment because her arm "went dead" and she almost burned a customer with a hot beverage. She also was employed as a fry cook, but quit because of the pain she was experiencing.

The claimant presently complains of pains in the lower back and an apparent emotional overlay.

Since the date of the review-reopening decision herein, the claimant has been hospitalized and has received medical treatment. Horst Blume, M.D., and Thomas Summers, M.D., testified in this case and the record of the previous case was incorporated herein..

Claimant has the burden of establishing by a preponderance of the evidence that she suffered an increased impairment as the result of the injury on September 10, 1971, and subsequent to the review-reopening decision filed on November 26, 1973, which entitled her to additional compensation. *Wagner v. Otis Radio and Electric Co.,* 254 Iowa 990, 119 N.W.2d 751; *Olson v. Goodyear Service Stores,* 255 Iowa 1112, 125 N.W.2d 251; *Giere v. Aase Huagen Homes, Inc.,* 259 Iowa 1065, 146 N.W.2d 911; *Gosek v. Garmer Stiles Co.,* 158 N.W.2d 731; and *Deaver v. Armstrong Rubber Co.,* 170 N.W.2d 455.

Dr. Blume, a neurosurgeon, testified by way of deposition in this case. A portion of this testimony follows:

> Q. You have examined and treated Mrs. Urban, yourself, and as you've testified to, and also you've now told us about the examination and findings of Dr. Golden, a neuropsychologist.
>
> Now, Doctor, do you have an opinion, first of all, as to whether the pain that Mrs. Urban talks about in her arm, in her neck, in the occipital area, in the cervical area, the lower back, L4/5 and S1, whether the pain is or is not real?
>
> A. I do have an opinion.
>
> Q. What is your opinion?
>
> A. I do have an opinion with reasonable and medical certainty that the pain the patient is experiencing is real.
>
> Q. Now, do you have an opinion as to whether or not this condition which is of her arm you testified she had real pain going back to 1971, therefore, five years of long standing, whether or not there has been some resultant emotional disturbances or some resultant functional overlay or acceleration, taking into consideration the woman was a woman who raised a family and was working regularly in industry prior to this injury in 1971?
>
> A. I do have an opinion.
>
> Q. Doctor, what is your opinion?

* * *

THE WITNESS: I will be very glad to give you my own opinion. It is my own opinion with reasonable medical certainty that the pains that the patient is suffering, especially in regard to the pain in the right elbow, that this is an organic pain, and that she has developed over the years ever since this accident on September 9, 1971, a considerable amount of emotional problems that I do think are over 80 percent related to the injuries sustained to the right elbow, and that she is not suffering from any psychosis.

* * *

Dr. Blume fixes the claimant's disability at 100% of the right arm or 20% of the body as a whole.

Dr. Summers, a neurologist, examined the claimant at the behest of the defendant employer on July 23, 1976, and testified via deposition. He testified that the claimant exhibited a severe weakness in her right hand grip but that he was impressed by the variance or inconsistency between the claimant's assertion that it was impossible for the claimant to operate a zipper on her blouse and the fact that the claimant was able to undress from her street clothes, put on an examination gown with a knot, take off the gown and put on her street clothes.

His diagnosis of the claimant's condition was epicondylitis humeri (tennis elbow). He categorizes the headaches as "tension headaches." He states that the claimant has a 50% functional disability of the right upper extremity. The back shoulder and neck pains are not related to the elbow condition.

Donald Blair, M.D., an orthopedic surgeon, states in a report that a lumbar myelogram performed on March 26, 1976, showed normal results. He apparently attributes her back pains to a potential "emotional overlay."

Jesse J. Landhuis, M.D., a family practitioner of the Kersten Clinic in Fort Dodge, Iowa, states that there is no connection between the claimant's back pain and elbow pain.

In short, the claimant requests the undersigned to follow the testimony of Dr. Blume and his associates and discredit the testimony of Dr. Summers along with the reports offered condensing the reports of Dr. Blair and other practitioners.

While on first glimpse the deposition of Dr. Blume makes the necessary causal connections, it can fairly be said that the same reason for the claimant's objection to Dr. Summers' testimony, i.e., the "hired gun" objection, can also be applied on behalf of the defendants as to Dr. Blume's testimony, since the referral to Dr. Blume was apparently issued on the claimant's behalf. Dr. Blair has treated the claimant also. He tooka myelogram which had a normal result. He made mention of emotional problems but gives us nothing in regard to causation. The report of Dr. Landhuis states that causation is not present. Charles J. Golden, Ph.D., a clinical neuropsychologist associated with Dr. Blume, indicates, in a report dated May 12, 1976, that the claimant and her husband are both suffering from emotional problems.

The offshoot of all of this is the finding of fact by the undersigned that the claimant's emotional problems are

familial in causation rather than being based on trauma and its consequences.

The back pains, which apparently result from the emotional problems, cannot therefore be said to have arisen out of and in the course of the employment.

Certain medical bills have been presented for payment which should bear closer scrutiny. Dr. Blume's services are essentially the same as those offered by Dr. Blair. The examination of the claimant fits within the parameters of Section 85.27 and will be allowed, with limitations. Dr. Blume's charges will be allowed to the extent of $1190 for treatment.

Dr. Blume's charge of $500 for deposition preparation and testimony will be allowed to the extent of $75 in accordance with Section 622.72, Code of Iowa. Dr. Adrian Flatt's examination costs will be allowed in the amount of $60. The various bills for the duplication and transmittal of medical expenses will not be allowed, since this expense is not contemplated by the law.

The record indicates that the claimant has received the maximum healing period benefit available for her disability.

WHEREFORE, claimant has failed to show by a preponderance of the evidence a change in condition warranting an additional payment of weekly compensation. However, certain additional medical expenses are permitted.

* * *

Signed and filed this 30 day of December, 1976.

JOSEPH M. BAUER
Deputy Industrial Commissioner

Petition for Judicial Review; Dismissed.

INJURY – INTRINSIC ASTHMA AND DRUG DEPENDENCY

GLADYS A. STEVENS,

Claimant,

vs.

GLOBE UNION, INC., CENTRALAB ELECTRONICS DIVISION,

Employer,

and

EMPLOYERS INSURANCE OF WAUSAU,

Insurance Carrier,
Defendants.

Review Decision

This is a proceeding brought by the defendant employer, Globe Union, Inc., Centralab Electronics Division, and its insurance carrier, Employers Insurance of Wausau, pursuant to Iowa Code §86.24 seeking a review of an arbitration decision filed December 7, 1976 wherein the claimant, Gladys A. Stevens, was awarded travel and medical expenses, healing period benefits and permanent partial disability for an injury first manifested in January of 1972 which became fully disabling on September 30, 1974.

* * *

The issue here presented is whether or not the aggravation of preexisting or intrinsic asthma caused by exposure to tobacco smoke necessitating treatment by cortisone therapy is a compensable injury and whether or not the results of that treatment contribute to an industrial disability.

Claimant began working for defendant in January, 1963 and last worked for defendant in September, 1974. In 1963 and prior to 1971 the policy at Globe was to allow smoking only on breaks, at lunch or before work. When the policy changed, workers were allowed to smoke at their work stations. Claimant testified that although the plant had an exhaust fan, it was seldom used because it was noisy. Willis A. Miers, personnel manager, a non-smoker, who had been at Globe since May, 1973, said that he had not noticed a haze of smoke in the work area, that he did not think the smoke in the plant was any worse than in any other public facility, and that there had been changes in the ventilation system. He did not specify what those changes were. Betty Brown, a nurse at Globe, who also handled insurance and workers' compensation claims, found in reviewing her records that claimant, who had complained to her about smoke, had missed little work prior to 1972. In 1969 claimant received a commendation for her outstanding attendance record in the previous year.

Claimant's history included an onset of shortness of breath at age twelve. It was not, however, until she was twenty-three that she began taking medication for her condition. In February of 1972 claimant was hospitalized with influenza which exacerbated her asthma. The discharge summary following the hospitalization indicated "marked anxiety and almost paranoid tendencies" toward the end of claimant's hospitalization. After skin testing revealed reactions to dust, mold and ragweed, claimant started densensitization. Cortisone therapy was also initiated.

Dr. Landhuis, who had toured the Globe Union plant and had found no place free of dust and smoke, first saw claimant on May 15, 1973. He restarted claimant on prednisone which he testified was a common form of cortisone which is used to reduce "swelling around the air ways, the air tubes, for the bronchia." A known side effect of prednisone according to Dr. Landuis is psychosis. Claimant was admitted to the hospital in October, 1973 on an initial impression of gastrointestinal bleeding, probable psychosis and Cushing's syndrome, all incident to prednisone ingestion. On January 21, 1974, she was readmitted to the hospital for treatment of the prednisone precipitated paranoid psychosis. She returned to the hospital on October 10, 1974 after a brief attempt to go back to Globe Union at the end of September. Dr. Landhuis felt that the company's change in smoking policy had aggravated claimant's asthma.

In March of 1973 claimant was seen in the Allergy Clinic of the University of Iowa Hospitals. The impression of the examining physicians was bronchial asthma which had become steriod dependent. The history was suggestive of an intrinsic variety of asthma. The reports from the clinic through March 27, 1974 uniformly advised that claimant continue to take prednisone. The clinic report of August 23, 1974 indicated claimant had voluntarily ceased taking

prednisone "because of numbness in the occipital area and memory lapses. These symptoms cleared after discontinuing her steriod." Approximately one month later she returned to the clinic having taken cromolyn sodium in the interim. She wished to return to her job and the allergy clinic's doctor believed she should try working. When claimant visited the clinic on December 9, 1974 the physicians "tried to explain to the patient [claimant], that when she is excited, she tends to hyperventilate and exhale her CO2. This is why her head is numb and she cannot remember." Both the July 15, 1975 and the March 2, 1976 visits by claimant to the clinic resulted in recommendations to increase prednisone.

Dr. Berryhill initially examined claimant on October 11, 1973 when she was hospitalized by Dr. Landhuis. He testified that her psychotic problems were a side effect of prednisone which was necessary for the treatment of her asthma. He stated that

> in every case, psychiatric illness results from a combination of factors or interaction of various factors, and specifically in her case, the effect of the medication would be the major effect, acting upon her previous personality and along with the stress of her asthma. She did in the course of several visits talk about depressive feelings that she had had at times over the years, but there was no psychotic element or disabling element in that.
>
> She was, of course, a single woman, somewhat tending to loneliness and to being somewhat withdrawn rather than an outgoing-type that went out and partied a lot, and the effect of the cortisone would be an interacting thing with her personality, and the stress of the asthma, but I believe that without the cortisone effect, although she would have certainly been still somewhat depressed about the asthma and the difficulty it caused her, and I believe she would not have become paranoid.

He further hypothesized that "[i]f she became, or were to become able to be treated for her asthma without cortisone, my expectation would be that she would in a period of six months improve in her psychiatric state, to be unimpaired from a psychiatric standpoint." The doctor used a phenothiazine and a non-phenothiazine to treat her depression as well as psychotherapy. The doctor expected her to have continuing psychiatric problems as long as she continued the prednisone.

Dr. Bedell, Professor of Medicine and Director of the Pulmonary Disease Division at the University of Iowa Medical School, at the request of defendants, examined claimant on October 29, 1975. The doctor explained his diagnosis of intrinsic bronchial asthma.

> Intrinsic bronchial asthma is the type of asthma which occurs in people usually over the age of twenty-five, in which we do not have a clear causal factor. Bronchial asthma is a condition in which, in response to various stimuli, the airways in the lung go into spasm, squeeze down, make it difficult for the patient to breath. In addition, bronchial asthma is associated with an excessive secretion from the living cells of the lung.

He went on to differentiate extrinsic asthma from the intrinsic kind:

> Well, basically there are two types of asthma that we commonly recognize, the extrinsic asthma, of which the most clear-cut prototype is perhaps ragweed pollen asthma in which a patient who is sensitive to ragweed pollen has asthma sometimes during the ragweed season. We can demonstrate in those patients that they have sensitivity to the pollen by doing suitable skin testing and so forth.
>
> Now, Gladys Stevens has another type of asthma called intrinsic asthma. It appears usually in adults. There is no clear-cut agent on the outside that produces the asthma. We don't know why the asthma is produced, but we do know there are certain external factors, such as road -- or dust from a gravel road, cigarette smoking, and a number of other external irritants which aggravate the asthma.

Dr. Bedell testified that:

> Well, most asthma patients are capable of pursuing a normal lifestyle most of the time, and this might be people who are bankers, attorneys, doctors, and including people who work in factories. There are certain environments in which a patient with asthma is likely to have problems, and I have seen this with people who work in factories, where there are fumes present, that it will aggravate the asthma to the extent that the patient is so symptomatic that they are unable to work in that specific environment but withdrawn from that environment they are capable of performing in a fairly normal way.

Pointing out the difficulty in assessing the effect of aggravation, the doctor stated that his

> general feeling is that when people are removed from these aggravations they go back to their basic disease state and that the aggravation hasn't, in fact, made the disease worse. But I think there is a possibility that the aggravating factors may make the disease worse if the patient persistently puts themselves in a very bad environment or puts themselves or is put into a very bad environment, but that's always a difficult thing to judge, how much is the original disease and how much is the aggravation.

In addition to the expert medical testimony claimant presented testimony by her first cousin, Elma Cormack, who observed that claimant's asthma had become more serious in the last four years during which time claimant had undergone personality changes. Cormack believed claimant was more easily emotionally upset.

Claimant's medications at the time of the hearing included Choledyl, Marax, Tedral S.A., four prednisone every other day, Actified, and antibiotics as they were needed for infection. She testified to having some problem breathing every day; however, she said, "I get along better on the day when I take the prednisone in the morning. That is better for me than on the morning without the prednisone, as a rule."

The claimant must prove by a preponderance of the evidence that the disability on which she bases her claim

was one arising out of and in the course of employment. *Lindahl v. L. O. Boggs,* 236 Iowa 296, 18 N.W.2d 607 (1945). A possibility is insufficient; a probability is necessary. *Anderson v. Oscar Mayer & Co.,* 217 N.W.2d 531 (Iowa 1974). Establishing causal connection is within the domain of expert testimony. *Bradshaw v. Iowa Methodist Hospital,* 251 Iowa 375, 101 N.W.2d 167 (1960). Claimant need not prove that an employment injury be the sole proximate cause of her disability, but only that it is directly traceable to an employment incident or activity. *Langford v. Kellar Excavating & Grading, Inc.,* 101 N.W.2d 667 (Iowa 1971). Personal injury has been defined by the Iowa Supreme Court to be *any* impairment to the employee's health which results from the employment. *Almquist v. Shenandoah Nurseries,* 218 Iowa 724, 254 N.W. 35 (1934). An employer hires an employee subject to any active or dormant health impairments existing prior to employment. *Ziegler v. U.S. Gypsum Co.,* 252 Iowa 613, 106 N.W.2d 167 (1961). While claimant is not entitled to compensation for the results of a preexisting injury or disease, the claimant is entitled to compensation to the extent of the injury if the preexisting injury or disease is aggravated, accelerated, worsened or "lighted up". *Yeager v. Firestone Tire & Rubber Company,* 253 Iowa 369, 112, N.W.2d 299 (1961).

Aggravation of the primary injury by medical or surgical treatment is compensable. 1 Larson, *The Law of Workmen's Compensation,* §13.21; *Cross v. Hermanson Bros.,* 235 Iowa 739, 16 N.W.2d 616; *Yount v. United Fire & Casualty Co.,* 256 Iowa 813, 129 N.W.2d 75.

The evidence here shows that claimant's work record prior to the employer's change inthe smoking policy was good. The evidence further supports the conclusion that the change in claimant's work environment aggravated her intrinsic asthma. Healing period benefits have been changed from the period found by the deputy to more accurately reflect the record.

When an injury is to the body as a whole, the claimant's disability must be evaluated industrially and not just functionally. *Martin v. Skelly Oil Co.,* 252 Iowa 128, 196 N.W.2d 95 (1961). 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 she is fitted. *Olson 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. *Barton v. Nevada Poultry Co.,* 253 Iowa 285, 110 N.W.2d 660 (1961).

Claimant is a single, forty-seven year old who has only an eighth grade education. Prior to working at Globe Union, where she was earning $2.54 an hour plus incentive, claimant had counted eggs, worked in a bakery, clerked in a store and performed various tasks including checking for Super Valu. At the time of the arbitration proceeding, claimant, having tried to find other work and having worked briefly at a library, was employed four hours a week at a hobby shop.

Claimant's dependency on prednisone to control her asthma and the resulting paranoid state which is produced by the drug contribute to an industrial disability. The side effects produced by her current perpetual need for twenty milligrams of perdnisone every other day and up to sixty milligrams daily for controlling acute attacks of asthma, make claimant an undesirable employee. Her necessity of a smoke-free atmosphere to prevent exacerbating her condition limits her employment opportunities. As a caveat, it might be noted that because this award is based on claimant's prednisone dependency, if, in the future, claimant's condition is found to be controllable by medication without adverse side effects, defendants may seek a review-reopening.

* * *

Signed and filed this 19th day of August, 1977.

ROBERT C. LANDESS
Industrial Commissioner

Appealed to District Court, remanded for settlement.

INJURY – SUBSEQUENT

ROSALIE T. FLOOD,

Claimant,

vs.

WESTERN DUBUQUE COUNTY
COMMUNITY SCHOOL DISTRICT,

Employer,

and

EMPLOYERS MUTUAL CASUALTY CO.,

Insurance Carrier,
Defendant.

Review – Reopening Decision

This is a proceeding in review-reopening brought by the claimant, Rosalie T. Flood, against her employer, Western Dubuque County Community School District, and Employers Mutual Casualty Company, the insurance carrier, to recover additional benefits under the Iowa Workmen's Compensation Law by virtue of an industrial injury which occurred on February 6, 1975.

* * *

The issue for determination in this matter is whether the claimant is entitled to further compensation for temporary total disability or healing period after March 17, 1975. The parties have indicated that there is no issue at this time as to permanent partial disability.

On February 6, 1975 the claimant was employed by the West Dubuque School District as a secretary to a counselor. At about 12:40 p.m. on that date she was asked to go to a portable classroom area from the main building and while walking on the sidewalk between the two buildings, fell on the ice hitting her head on the cement. After a short meeting with the school nurse, she was sent to J. R. Gilloon, M.D., an internist who immediately caused the

claimant to be admitted to Finley Hospital in Dubuque. The claimant's complaints at that time were centered on her inability to see straight and a severe headache. The physical examination at the time showed a tenderness over the posterior scalp. X-rays of the skull, cervical spine, dorsal lumbar spine were taken. These showed no evidence of recent injury. The claimant continued to complain of severe headaches and was treated symptomatically. She was released from the hospital on February 12, 1975. Dr. Gilloon's impression was that the claimant had suffered a brain concussion and a contusion to the scalp. After the discharge the claimant continued to complain of severe headaches and was later readmitted to the hospital on February 14, 1975 and remained so hospitalized until February 23, 1975. During this hospitalization, a neurological examination showed a normal result. A brain scan was done and this indicated an abnormality. A cerebral angiogram was done which indicated normal cerebral vascular flow and no evidence of subdural hematoma. The claimant continued to be off work and returned to work on a trial basis on March 17, 1975. She continued to work until April 10, 1975 when she underwent a test at Xavier Hospital in Dubuque, Iowa. The claimant resumed work through May 5, 1975 claiming that in the intervening period between March and May that she was experiencing dizziness and nausea all the time.

On May 5, 1975 the claimant struck her head on a leg of a table while getting out of bed. She went to work that day and became somewhat nauseated early in the day and that evening had a severe bout of vertigo and was admitted to Finley Hospital on May 6, 1975, remaining hospitalized until May 19, 1975. She was referred to the University of Iowa Hospitals and Clinics Department of Neurology on May 25, 1975 for examination. At that time Dennis Blaha, M.D. and Lynn W. Lyon, M.D., both of the Department of Neurology at the University of Iowa, thought that the claimant had right end organ vestibular disease because of right canal paresis that was found on a previous ear, nose, throat examination and the positive hanging head on the right. They recommended that the claimant return for an ENT appointment on June 9, 1975. On June 9, 1975 the claimant returned for an ENT exam and the impression at that time was that the claimant had post concussive right labyrinthine dysfunction.

The claimant was released to return to work on June 23, 1975.

The claimant apparently still has headaches and dizziness but continued in her occupation.

The parties stipulated that the claimant missed work because of her condition or because of tests being run pursuant to her condition on September 8 and 9, 1975; September 30 through October 2, 1975; October 22 and 23, 1975; January 27, 1976 through January 30, 1976, (Mayo Clinic); May 24 through May 28, 1976 (Finley Hospital), August 18, 1976; September 2, 1976; September 7, 1976; January 20, 1977 and June 20, 1977.

In April, 1976 the claimant changed employment and commenced employment for the University of Dubuque in the registrar's office apparently receiving a higher rate of pay in the form of increased fringe benefits.

The claimant now complains of daily headaches which last about an hour. She testified that the medication she takes is sometimes helpful and that she spends about $10 a month on drugs.

The claimant has the burden of proving by a preponderance of the evidence that the injury of February 6, 1975 is the cause of the disability upon which she now 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.

Based on the foregoing principles, it is found that the claimant has established her claim by the requisite preponderance of the evidence. The problem for discussion here is whether the periods of disability which occurred after this fall at home on May 5, 1975 are compensable.

In *Larson's Workmen's Compensation,* Desk Ed. (1973), page 3-87 it states:

> The basic rule is that subsequent injury, whether an aggravation of the original injury or a new and distinct injury, is compensable if it is the direct and natural result of a compensable primary injury.

The Supreme Court of Iowa, in the case of *DeShaw v. Energy Manufacturing Co.,* 192 N.W.2d 777, stated that when a workman sustains an injury, later sustains another 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) was proximately caused by the first injury. In order to find whether the criteria mentioned in *DeShaw* are met, it is necessary to turn to medical evidence. Dr. Gilloon's opinion was stated in a letter dated September 12, 1975 when he said "I feel that the incidents are related and she continues to be disabled". In another letter dated December 23, 1975 Dr. Gilloon makes the following statement: "It is my opinion that the initial fall dating from February 6, 1975 in which she struck her head and the subsequent disability, dizziness, headaches, and fall from bed occurring May 6, 1975 are related." The reports furnished by the University of Iowa with regard to the causation of the fall on May 6, 1975 are inconclusive at best. The report of Samuel M. Young, M.D., dated June 13, 1975, indicates that the claimant had post-traumatic right labyrinthine dysfunction. No note is made of the etiology of this condition. The Mayo Clinic report of February 4, 1976 indicated that Bruce R. Krueger, M.D., is "unable to explain the mechanisms responsible" for the claimant's symptoms. Dr. Gilloon has been the treating physician since the first injury and his opinion regarding the fall of May 5, 1975 will therefore be followed. It is therefore found that the injury of May 5, 1975 and the ensuing disability was proximately caused by the injury of February 6, 1975. The defendants herein made a motion to strike the Memorandum of Agreement filed herein on April 7, 1975, apparently on the basis that the claimant refused to accept workmen's compensation benefits during the period of disability which the defendant insurer has paid. A fair reading of the evidence indicates that the claimant's refusal was based on the fact that she thought that acceptance of the checks would either foreclose further action or that she was under the impres-

sion that full wages were to be paid when an injury that was compensable occurred. For these reasons the defendants' motion to strike is overruled.

* * *

Signed and filed this 26th day of October, 1977.

JOSEPH M. BAUER
Deputy Industrial Commissioner

No appeal.

INSURANCE – POLICY IN EXISTENCE

JAMES R. WESTON,

Claimant,

vs.

JAMES T. CAMERON,

Defendant and
Cross Petitioner,

vs.

FRANK STOUT, d/b/a FRANK STOUT INSURANCE COMPANY, and THE OHIO CASUALTY COMPANY,

Defendants to
Cross Petition.

Arbitration Decision

This is a proceeding in arbitration brought by the claimant, James R. Weston, against his employer, James T. Cameron, to recover benefits under the Iowa Workmen's Compensation Act by virtue of an alleged industrial injury which occurred in October 1974. Defendant-employer, by way of cross-petition, caused Frank Stout, d/b/a Frank Stout Insurance Company, and The Ohio Casualty Company, to be joined as parties because of an alleged contract of insurance which existed between Cameron and The Ohio Casualty Company on the date of the alleged injury. A hearing was held on March 16, 1976 before Helmut Mueller, Deputy Industrial Commissioner, at which time it was determined that defendant Ohio Casualty Company was an indispensable party to this action.

* * *

Because of the nature of the dispute here, it would be wise to separate this decision into two divisions in order to determine the rights and liabilities of the parties herein. The first division will deal with the issue of compensability of the alleged injury and the second division will discuss whether or not a valid policy of workers' compensation insurance was in existence at the time of the alleged injury.

DIVISION I

Claimant was an employee of James T. Cameron in October of 1974. At the time of his alleged injury the claimant went to work at the usual time and was setting rails in preparation for pouring concrete. Claimant testified that about ten o'clock in the morning he started having a pain which felt like a pulled muscle in his groin area. He informed his foreman of this fact and continued to work even though he was experiencing pain. That evening he noticed a lump in his groin, and on the next day he informed the defendant James T. Cameron of this fact. He was told to seek medical attention and did so, obtaining the services of John C. Agnew, D.O. Dr. Agnew referred the claimant to Bryce E. Wilson, D.O., who recommended surgery. Dr. Wilson diagnosed the claimant's condition as right inguinal hernia. Inasmuch as the claimant's duties demanded much of his time, the claimant delayed corrective surgery until February of 1975.

There is some dispute in the record as to whether or not the events described above occurred as testified by the claimant. The claimant stated that in a short period of time before the injury -- that is on the day before or two days before the events described above -- he was lifting railroad ties and was hauling them for the defendant James T. Cameron. It is the contention of Mr. Cameron that this work precipitated the injury, if any, and that this work was personal in nature.

The issue for determination at this time is whether the claimant sustained an injury in October of 1974 which arose out of and in the course of his employment with James T. Cameron.

To be compensable an employee's injury must occur both in the course of and also arise out of his employment. The burden rests on the claimant to establish these factors by a preponderance of the evidence. *Musselman v. Central Telephone Co.*, 261 Iowa 352, 154 N.W.2d 128; *Almquist v. Shenandoah Nurseries*, 218 Iowa 724, 254 N.W. 35.

The claimant has the burden of proving by a preponderance of the evidence that the injuries of October, 1974 are the cause of the disability upon which he bases his claim. *Lindahl v. L. O. Boggs*, 236 Iowa 296, 18 N.W.2d 607. 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.

Based on the foregoing principles, it is found that the claimant has established his claim. The medical evidence, including the history, is uncontroverted that the right inguinal hernia was occasioned by his employment. Additionally, the factual situation indicates that the incident or activity precipitating the manifestation of the hernia was work connected. No non-work connected activity was

mentioned as the cause of the existence of the right inguinal hernia. Even had the claimant injured himself while moving the railroad ties, it is clear that he was moving the ties for someone other than himself, probably for his foreman. An employee is not to be denied compensation unless his employment is both casual *and* not for the purpose of the employer's trade or business. Section 85.61(3a), Code of Iowa. It is important that the word "and" with its conjunctive use is present here because if the injury did occur while lifting the railroad ties, it would not have been for the employer's trade or business.

The work here was not casual, since the claimant's employment was continuous. See *Bates v. Nelson,* 240 Iowa 926, 38 N.W.2d 631.

* * *

DIVISION II

The item to be discussed in this division is whether or not a workmen's compensation policy was in effect at the time of the injury in question.

The parties to whom this portion of the decision is applicable are James T. Cameron, defendant-employer, hereinafter referred to as Cameron, and Frank Stout, agent for the Ohio Casualty Company, hereinafter referred to as Stout. Cameron was the named insured on a workmen's compensation policy with The Ohio Casualty Company from a period of September 24, 1973, to September 24, 1974. The injury which is the subject matter of this litigation occurred in October of 1974 after the expiration of this policy.

On or about August 31, 1974 a statement was sent to Cameron from Stout indicating that the premium for the following year would be $1,118.00. The invoice contained the following words: "Please remit premium due on or before September 24." Cameron does not recall receiving this invoice, but the record fairly supports the fact that it was received because about that time Cameron called Stout and stated that he had contacted or been contacted by another insurance agent, Bill Bowers, who had indicated that Cameron could make substantial savings in premium paid if he insured with the company represented by Bowers. Stout said at this time that he would have to check with his company and then get back to Cameron. In the meantime the policy expired and the claimant was injured.

After the injury, Cameron called Stout concerning the injury. Stout presented himself at Cameron's house on October 11, 1974 and a First Report of Injury was completed at this time.

The perceptions of what occurred during the October 11, 1974 meeting are conflicting. Cameron states that his understanding of the conversation was that Stout would renew the policy if the full premium were paid at once or before October 24, 1974. Cameron wished to pay a quarterly premium at this time. Cameron's recollection of the events that followed indicated that Stout would get in touch with his division manager and "get back" to Cameron as to whether the quarterly premium would be acceptable to the company. Cameron indicates that his impression was that he was covered. The next contact between these individuals was made by Cameron on or about November 1, 1975 when Stout indicated that he did not wish to do business with Cameron any more.

Stout's recollection of the October 11, 1974 conversation was that he informed Cameron that insurance companies do not write policies for thirteen-month periods but that they sometimes extend coverage if the premium is paid within thirty days.

Stout returned to his office with the completed First Report and sent it to the insurance company, indicating that he "had, in essence, extended coverage to Cameron for the period, providing he paid the premium, and he has not paid the premium to this date." According to Stout there was no indication that the claimant wished to have partial payment but just wanted a decreased premium.

No new policy of insurance covering the time period of September 24, 1974 to September 24, 1975 was issued and no premium was ever tendered. A statement readjusting the premium for the expired policy was sent at a later date but there was a fair indication in the record that the payment of this additional premium for the previous workmen's compensation policy would be waived because of a loss covering another risk which had not been paid by the company on another policy.

A reading of the record indicates that Stout and Cameron had been doing business for several years, with Stout doing most, if not all, of the writing of insurance policies to protect Cameron's risks. Many times in this period of five or six years the premiums were paid on a sporadic basis, with payments coming in installments, apparently keyed to Cameron's cash flow. Stout indicates that the reason he did not automatically renew the policy was that he had information indicating that Cameron was seeking the services of another insurance agent and company to insure Cameron's risks.

The record also shows that after November 1, 1974 Cameron took his insurance business to the other insurance company and agent because of the events which occurred in late September and October of 1974.

The issue for determination in this division is whether there was a valid policy of workmen's compensation insurance between James T. Cameron and The Ohio Casualty Company in October of 1974.

The industrial commissioner has jurisdiction to hear disputes regarding the interpretation of workmen's compensation policies. *Travelers Ins. Co. v. Sneddon,* 249 Iowa 393, 86 N.W.2d 870 (1957). If an insurer customarily receives overdue premiums and thereby induces the insured to believe that forfeiture will not be incurred by delay in payment, it cannot insist upon a forfeiture for a delay induced by such custom, even where there is a policy provision that acceptance of overdue premiums shall not be deemed a waiver or an establishment of a custom. *Laverty v. Hawkeye Sec. Ins. Co.,* 258 Iowa 717, 140 N.W.2d 83 (1966). A binding contract of renewal of insurance must have all the essentials of a valid contract, including meeting of the minds of the parties on all the essentials of the contract. *Olson v. Norwegian Mut. Ins. Ass'n,*258 Iowa 731, 140 N.W.2d 91 (1966). When a policy is terminated by its own specific terms, statutory notice of termination of policy pursuant to Section 515.80, Code of Iowa, is not necessary. *Hensley v. Aetna Casualty Surety Co.,* 200 N.W.2d 552 (1972). When a policy of insurance provides

for a specific term, the insurer is not required to give notice of the premium due in order for the policy to expire at the end of that term. *Hoefler v. Farm & City Ins. Co.,* 193 N.W.2d 538 (1972).

There was a valid policy of workmen's compensation in force between Cameron and Ohio Casualty from September 24, 1973, until September 24, 1974. As was stated earlier, the injury herein occurred in October of 1974 after this policy had expired. The policy had expired because of its own terms. Much evidence was introduced at the hearing with regard to the expiration notices being sent and the customary billing of Stout, but the termination notice was not required to be sent because Section 515.80, Code of Iowa, provides that such a notice be sent only for forfeiture or suspension. See *Hoefler,* supra.

The record fairly indicates that the course of conduct of the parties over the years showed a chronic delay in the payment of premiums by Cameron to Stout. As can be seen in *Laverty,* supra, such custom can be important. However, the past custom and behavior of the parties herein indicates that what had happened in the past did not happen in the instant case. The course of conduct in past transactions can be relevant to a later case only if the events leading to that past conduct were the same or similar enough to obtain a reliance on that behavior by the other party. A significant factor, i.e., Cameron's "shopping around," changed the nature of the dealings in 1974 and made it a unique transaction and very much unlike the factual situation which had existed in prior years.

In order to prove that past conduct in prior dealings is relevant in a given case, the facts and conditions of the past dealings must be the same or similar as those had in the instance under scrutiny. A close consideration of the prior dealings would indicate that there is a significant difference in the transactions between Cameron and Stout in the prior dealings and those in 1974 in that there was a third party in the relationship.

Also in this case it would seem that we do not have a meeting of the minds of the parties which is essential to the formation of a contract of insurance. The evidence fairly shows that the parties had different interpretations of the conversation which took place on or about October 11, 1974. It is therefore found that a sufficient meeting of the minds was not present to effectuate a renewal of the insurance policy herein.

The probable meaning of Stout's visit to Cameron's house to fill out the First Report of Injury can be had when it is realized that Stout was probably trying to effectuate a sale and to maintain an account which he had had for many years. Further, there was never a tender of payment for premium in the instant case, which has direct bearing on the intent of the parties.

WHEREFORE, it is found that no policy of insurance existed between James T. Cameron and The Ohio Casualty Company in October of 1974.

* * *

Signed and filed this 9th day of September, 1977.

JOSEPH M. BAUER
Deputy Industrial Commissioner

No appeal

INTEREST

BERNARD E. BOONE,

Claimant,

vs.

WEILER PAINT COMPANY,

Employer,

and

ST. PAUL COMPANIES,

Insurance Carrier,
Defendants.

Review-Reopening Decision

This is a proceeding in review-reopening brought by the claimant, Bernard E. Boone, against his employer, Weiler Paint Company, and its insurance carrier, St. Paul Companies, to determine a single issue, i.e. whether or not the claimant is entitled to interest on 46 weeks of permanent partial disability which were paid on October 14, 1977 in a lump sum from April 25, 1976, the due date of the first week of compensation following April 18, 1976 and on the progressively due weeks.

* * *

The parties presented an excellent summary of the applicable arguments. Claimant pointed out that the strict statutory language of §85.30, Code of Iowa, does not allow for any exception from the obligation to pay interest. The defendants point out a doctrine announced in *Bousfield v. Sisters of Mercy,* 249 Iowa 64, 86 N.W.2d 109, in applying the then applicable §85.30, Code of Iowa. In that case the date when interest began to run was the date of a decision in review-reopening which allowed additional permanent compensation. Section 85.30 of the Code, as applicable to the *Bousfield* case is identical to §85.30 of the Code, as it is applicable to the instant injury. The undersigned holds that the claimant prevails in the instant action.

Section 85.30, Code of Iowa, as applicable to this injury, reads as follows:

> Maturity date and interest. Compensation payments shall be made each week beginning on the fifteenth day after the injury, and each week thereafter during the period for which compensation is payable, and if not paid when due, there shall be added to such weekly compensation payments, interest at six percent from date of maturity.

The section requires (1) that payments be made weekly, (2) beginning on a given day after the injury. Payments are (3) to continue weekly, (4) "during the period for which compensation is payable". If the payments are (5) "not paid when due" interest is (6) "added to" the weekly

compensation from the (7) "date of maturity".

Although earlier cases announce obvious and justifiable exceptions to what appears to be a clear statutory mandate that interest be added to compensation payments, *Pappas v. Iowa Northwest Brick & Tile Co.*, 201 Iowa 607, 206 N.W. 146 (claimant's refusal of tender by the employer), and *Bushing v. Iowa Railway & Light Co.*, 208 Iowa 1010, 226 N.W.719 (claimant's neglect caused ten year delay in payments being made), the most recent case dealing with interest, *Bousfield v. Sisters of Mercy*, supra, articulates what is found by this deputy commissioner not to be an exception. In *Bousfield*, the court indicated that interest was due on additional permanent partial disability from the date of the decision of the deputy commissioner. In an earlier context dealing with change of condition, the court stated that "no material" difference exists between the claimant's burden of proof of showing a change of condition when the change is from temporary disability to permanent disability, or from permanent disability to additional permanent disability. The difference, however, does become significant in the context of interest, because of the wording of §85.34(1), Code of Iowa, as will be discussed infra.

In the *Bousfield* case, the court focused on the date of "maturity" and said at page 72, "the date of maturity . . . could not be determined until claimant had applied for same, or a determination made thereof." The reference in the quoted section is to compensation. Further reference to the date of the decision is made as the date the deputy commissioner "found" the claimant entitled to "increased" compensation. The "date of maturity" is not defined in §85.30, Code of Iowa. However, the previous sentence of §85.30 requires benefits to be paid weekly "during the period for which compensation is payable." As no statutory dictate as to when additional permanent partial compensation is payable exists, an increase in permanent partial disability may not be "payable" during a "period" until it is determined or found to be payable. The same might be true with reference to an increase from permanent partial to permanent total benefits. When a clear statutory dictate as to when benefits are "payable" exists, *Bousfield* has no application and is not an "exception" to a statutory dictate, such as articulated in the *Pappas*, supra, and *Bushing*, supra, cases (note that in the *Pappas* case, supra, at page 614, reference was made to the fact that no interest was due after payments were tendered by the defendant where "liability was admitted". The sentence, however, continues on by saying "and there was no legal reason for the claimant to refuse the weekly payments and proper amounts." The concern for "liability" was not related to the responsibility of the employer to pay benefits, but the justification of a claimant's conduct in wrongfully refusing benefits. A claimant's wrongful act causing delay in payment of benefits is recognized as a basis for nonpayment of interest by a defendant, see the *Bushing* case, supra. Neither the *Pappas* nor *Bousfield* cases attempt to say that where the "period for which compensation is payable" is governed by statute, an exception to the payment of interest exists. Some authority exists for stating that even when liability is in issue, interest is due from a time earlier than the date of resolution of the liability, see the somewhat unclear language in *Nester v. Korn Baking Co.*, 194 Iowa 1270, 190 N.W.949.

When disability changes from admittedly healing period disability to permanent partial disability, clear statutory language governs. Section 85.34(2) mandates "compensation for permanent partial disability shall begin at the termination of the healing period". Nothing is said as to any "determination" as to "liability" being relevant. The parties have stipulated that the date of healing period cessation is April 18, 1976. Permanent partial disability compensation is payable from that date until the permanent partial disability agreed to was paid. That date was October 14, 1977. Each payment is to be made "weekly". It is not "payable" until each week's "due date" or "due week" arrives. This due date or due week would have to be the "date of maturity" referred in the last sentence of §85.30, Code of Iowa. Interest is therefore "due" on each of the 46 weeks commencing on April 18, 1976 as each week is "due" thereafter up to the date when the 46 weeks were in fact paid, October 14, 1977.

The attachment of interest to compensation payments, provided for in §85.30, would be harsh in the instant matter if that section is viewed as a "penalty" section. Although in appropriate cases where the employer delays payments of weekly compensation in an unreasonable manner any interest assessed would be better viewed as a "penalty", §85.30 is better viewed as additional compensation to be paid an injured employee who has to wait for benefits due to no fault of his own. This frame of reference is somewhat supported by the language that interest is to be "added" to weekly compensation payments. Whether or not the employer or insurance carrier is at fault is of no consequence. As between the insured employee and the employer or insurer, when no one is at fault for delayed payments, the statute allows interest to be paid the employee for the employer's use of the money in the interim.

An additional reason exists for commencing the interest on the permanent partial disability due using the April 18, 1976 date as the starting point. The parties have in fact agreed that the date that permanent partial disability compensation was to be paid was to refer back to April 18, 1976. No matter what the applicable theory as to "due date" or "maturity date" or "period for which compensation is payable" the parties have determined any issue by the agreement to use the April 18, 1976 starting date as the date when the permanent partial disability was to have been paid. Interest on the permanent partial disability payments is thus due from April 25, 1976, the due date of the first week of compensation after April 18, 1976.

* * *

Signed and filed this 18 day of April, 1978.

ALAN R. GARDNER
Deputy Industrial Commissioner

No appeal.

INTERROGATORIES

ROBERT G. McDOWELL, Deceased,
MABLE McDOWELL, Spouse,

Claimant,

vs.

TOWN OF CLARKSVILLE,

Employer,

and

HAWKEYE SECURITY INS. CO.,

Insurance Carrier,
Defendants.

Supplemental Review Decision

This is a supplemental decision pursuant to a supreme court decision remanding this matter to the industrial commissioner with instructions "to weigh and consider Dr. (R.A.) Caulkins' answers to written interrogatories, if the Commissioner did not so weigh and consider them originally and to render a supplemental decision." The supreme court noted that although the commissioner had set out various medical testimony regarding causation that he had not set out that testimony included in certain interrogatories, submitted to Dr. Caulkins which were subsequent and in addition to his evidentiary deposition and a part of the record.

The salient portions of the answers to interrogatories regarding causation are:

> In my opinion the rupture of Mr. Robert McDowell's aneurysm was directly related to the activities of the day, namely shoveling sand, filling sand bags and loading sand bags while hurried and under the stress of a natural disaster (flooding).
>
> * * *
>
> In my opinion it is most likely that the rupture of the aneurysm found on postmortem examination was directly related to the effort of shoveling and loading sand with haste and under duress.
>
> * * *
>
> In my opinion, it is probable that the patient would be alive today, had he not worked in the described way with the volunteer fire department.

In the hypothetical facts it was stated, "The presence of cardiomegaly and hyaline intimal thickening of the arterioles and small arteries in the kidney is strongly suggestive that he was hypertensive."

There may be a tendency on the part of some to assume that the aneurysm ruptured because the patient was hypertensive.

In my opinion this is an incidental finding, which, if related, probably only adds further likelihood that his activities were directly related to the aneurysmal rupture.

There is a reasonable support for this conclusion that the aneurysmal rupture was related to his activities in Chapter V *Intracranial Aneurysms and Subarachnoid Hemorrhage: A Cooperative Study,* Edited by Sahs, Perret, Locksley & Nishioka.

Chapter V is by Doctor Herbert B. Locksley.

Doctor Locksley writes: "From a physiological standpoint, the major long-term stress at a site of potention cerebral vascular weakness is the patient's blood pressure. Evidently these forces alone, even in sleep, eventually overcome the limits of elasticity of the lesion and result in hemorrhage; and by the same reasoning, environmental events which engender a chronic or acute elevation in blood pressure can be expected to hasten or precipitate this last critical step."

In his summary to his chapter Doctor Locksley writes: "The relationship of environmental events to the onset of SAH has been considered. In one-third of the cases, SAH occurred during sleep or repose, and in another one-third it occurred during random activity. Nonetheless, certain specified events showed a higher frequency of association than might be expected. Prominent among these were lifting and bending, emotional strain, coitus and elimination."

It should be pointed out that there is a slight omission in quoting from the writing of Dr. Locksley. The second quoted sentence should read: "Evidently these forces alone, even in sleep, *can* eventually overcome the limits of elasticity of the lesion and result in hemorrhage; . . . ."

These answers were in response to a hypothetical question similar to but somewhat more extensive than the hypothetical question to which the doctor responded in his deposition. In reviewing the answers to the interrogatories in conjunction with the other testimony, it should be noted wherein the answers to interrogatories differ or are similar to the testimony in Dr. Caulkins' deposition.

The report of Dr. Locksley was referred to by all of the doctors. The report itself was introduced into evidence. The report seems to be the primary study on which Dr. Caulkins bases his opinions. In this study as noted, there were three equal groupings as to the activity in which one was involved at the time a rupture of an aneurysm occurred. These were generally noted as while at sleep or repose, during random activity and during strenuous activity. Since the decedent was involved in strenuous activity, Dr. Caulkins placed him in the third category (Deposition, p. 14 11. 18-21). This seems logical and we assume that if the decedent would have been at sleep, that Dr. Caulkins would have placed him in the first category.

The interrogatories propounded to Dr. Caulkins are not substantially different than questions asked at his deposition. With regard to the causal relation between the rupture of the aneurysm and the activities in which decedent was involved, Dr. Caulkins testified in his deposition:

> Well, in my opinion, I believe that most physicians given that information would probably conclude that the aneurysm ruptured as a consequence of his stressful activity of the day.
>
> * * *
>
> Well, in my opinion, I think they are related.

In the interrogatories, he stated:

> In my opinion, the rupture of Mr. Robert McDowell's aneurysm was directly related to the activities of the day, namely shoveling sand, filling sand bags and loading sand bags while hurried and under the stress of a natural disaster (flooding).

In response to the question in the deposition regarding whether or not the activities would accelerate the rupture of the aneurysm, Dr. Caulkins testified:

> A. In my opinion, I think it is reasonable to record it as possible, if not likely, that the aneurysm ruptured as a consequence of his increased activity and stress of the day.
>
> Q. Would you say that was probable?
>
> A. Well ---
>
> MR. MOSIER: Objected to as a leading.
>
> A. In my opinion, it is probable.

In the interrogatories he responded:

> In my opinion it is most likely that the rupture of the aneurysm found on postmortem examination was directly related to the effort of shoveling and loading sand with haste and under duress.

As to whether or not the decedent would be alive today had he not been engaged in the activities of the day, Dr. Caulkins responded to his deposition:

> The actual cause of aneurysms is not known. The peak incidence of rupture of aneurysms resulting in subarachnoid hemorrhage is between 50 and 60 years of age and, while it is likely that the aneurysm was present before he engaged in this activity, it is also possible that it would not have otherwise ruptured for another decade.

In response to the interrogatories, he responded:

> In my opinion it is probable that the patient would be alive today had he not worked in the described way with the volunteer fire department.

The supreme court has indicated that they consider the answers to the interrogatories stronger than the testimony quoted in the prior decision which was noted as Dr. Caulkins' strongest testimony. While this may be so, the total testimony of Dr. Caulkins in his deposition is not greatly strengthened by his responses to the interrogatories. In his deposition Dr. Caulkins also testified:

> Well, yes, in my opinion, that stress and effort can contribute to an aneurysmal rupture. I just mean to say that isn't the only cause, but under some circumstances that's why is ruptured when it did and I think that's what happened in this case, but I imagine that I may be wrong.

There is no question that the testimony of Dr. Caulkins established a prima facie case in favor of the claimant. The question, however, is whether or not on the record as a whole the claimant has established her case by a preponderance of the evidence.

The testimony of William F. McCormick, M.D., a neuropathologist, and Norbert Enzer, M.D., a pathologist and clinical pathologist, are sufficiently set out in the original review decision and are incorporated herein by reference. *McDowell v. Town of Clarksville,* 31st Biennial Report Iowa Industrial Commissioner, p. 73. The transcript of the testimony of F. Miles Skultety, M.D., a neurosurgeon, was not available at the time of the prior decision. As it is now available, further reiteration of his testimony relating to his opinion regarding causation can be accomplished. In preparation for testifying, Dr. Skultety reviewed the depositions of Drs. Caulkins, Enzer and McCormick as well as the writings of Dr. Locksley which were a part of the record.

On the question regarding causal relationship between the employment activities and the subsequent death of the claimant, Dr. Skultety testified in response to a hypothetical question setting out the facts of the occurrence:

> A. I don't believe there was a relationship.
>
> Q. I will ask you to amplify your answer, Doctor.
>
> A. I think that the rupture of an aneurysm is as of the present moment, to the best of my knowledge, and the knowledge that I have gained from such readings as I do and observations of patients, that it is a random event that occurs or can occur at any time and that at the present moment there is no evidence to indicate that what the patient is doing at the time precipitates the rupture of the aneurysm.
>
> Q. Is there any medical certainty as to what causes the rupture of an aneurysm?
>
> A. Not as far as I am concerned, no.
>
> Q. In your opinion, Doctor, is there any relationship to strenuous physical activity or emotional stress and the rupture of an aneurysm?
>
> A. Not in my opinion.
>
> Q. And what is the basis again of your opinion?
>
> A. Like I said before, I believe this is a random activity--a random event, that can happen under any circumstances and I don't believe that there is any evidence to date at least to support the idea that stress or strain, whether it be physical or emotional, would precipitate the rupture.

In commenting upon the writing of Dr. Locksley, which was contained in an overall publication in which Dr. Skultety also had a part, Dr. Skultety testified:

> Q. Is there any statement or conclusion by Doctor Loxley [(sic) Locksley] that there is a relationship between strain and the rupture of an aneurysm?
>
> A. Used in the appropriate term, I would use conclusion. There is no conclusion. Doctor Loxley (sic) makes the statement in there that, again I cannot quote it, that environmental influence may play a part in the rupture of an aneurysm and he cites a number of statistics--a number of tables of the times of the activities when an aneurysm ruptured in a large series of cases. Approximately a third of them occurred in sleep, approximately a third occurred in what he called unspecified circumstances, and then the remaining third he has a list of things. He makes the statement in the chapter that it might be that stress and strain of lifting and bending, I think is what

he was referring to, played a part in the rupture of an aneurysm, and I am reasonably certain, although I can't quote what he said, that he did use the word "might" and the reason I bring this up is in drawing a conclusion from an article of medicine, as far as I am personally concerned, one might come up and say, "this is my conclusion based on my evidence," and make a rather firm statement. Doctor Loxley (sic) does not do that. He said it might be.

Q. Doctor, is there any showing in any of the reports, surveys, or whatever they may be termed, in the practice of medicine that shows that there is any greater incidence of ruptured aneurysms in jobs requiring a great physical exertion than those that are sedentary in nature?

A. Not that I am aware of.

Q. Does the paper by Doctor Loxley (sic) in any way cover that particular deviation between jobs with stress and strain and jobs that are sedentary?

A. No, it does not. -- not the chapter you say is introduced in evidence.

Dr. Skultety testified further:

Q. The question was asked of Doctor Coxen [(sic) Caulkins] as to whether he had an opinion, based upon a reasonable degree of medical certainity, that if the subject had not been engaged in that work activity with the volunteer fire department set forth in the facts as to whether he would be alive today. Do you have an opinion.

A. If he had not been engaged in that activity, would he be alive? You are asking a negative question. I want to be sure. I believe if he had been doing something else, it would have ruptured anyhow. He still wouldn't be alive.

Dr. Skultety testified further:

Q. Doctor, if it were to turn out there was a significant relationship to the subarachnoid hemorrage and to an aneurysm, under physical stress, would it prove that this was a precipitating factor in any individual case?

A. Well, no, not in any individual case.

Q. In this individual case?

A. Not in this case.

Q. Has it ever been proved, to your knowledge, within reasonable medical certainty that there is a relationship between stress and strain and the rupture of an aneurysm?

A. No.

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.*, 253 Iowa 369, 112 N.W.2d 812.

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. The evidence must be based on more than mere speculation, conjecture and surmise. *Burt v. John Deere Waterloo Tractor Works,* 247 Iowa 691, 73 N.W.2d 732. The opinion of experts need not be couched in definite, positive or unequivocal language. *Dickinson v. Mailliard,* 175 N.W.2d 588 (Iowa 1970). Greater deference is ordinarily given opinion involving medical expertise. *Merchant v. SMB Stage Lines,* 172 N.W.2d 804 (Iowa 1969). A fact is not proved by circumstantial evidence unless the conclusion sought to be drawn is more probable than any other theory. *Haverly v. Union Construction Company,* 236 Iowa 278, 18 N.W.2d 629. Opinion evidence does not need to have the quality of certainty. *Sondag v. Ferris Hardware,* 220 N.W.2d 903 (Iowa 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 of showing that a theory which sustains him is a possible one, if it also appears 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.

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. This burden is not discharged by creating an equipoise. It requires a preponderance. *Volk v. International Harvester,* 252 Iowa 298, 106 N.W.2d 649; *Griffith v. Cole Bros.,* 183 Iowa 415, 165 N.W. 577.

The supreme court indicated in this case that the claimant has the burden of persuasion on the issue of causation and that burden does not shift. *McDowell v. Town of Clarksville,* 241 N.W.2d 904, 908. It is recognized that the preponderance of the evidence does not, however, depend upon the number of witnesses on a given side. *Ramberg v. Morgan,* 209 Iowa 474, 218 N.W 492; *Wise v. Hoffman,* 249 Iowa 416, 86 N.W.2d 861.

The difficulty in this case is in determining if greater weight is to be given to the testimony of the one doctor who testified with definiteness as to his opinion regarding causation or to three doctors who testify with definiteness as to their opinions regarding no causation. All four doctors are eminently qualified.

To adopt the testimony of one as the most persuasive would be to reject the testimony of three as nonpersuasive. All doctors are testifying from the same set of facts.

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. No reason can be ascertained why this would not be so with theories of equal probability.

This agency is charged with the responsibility to state the evidence relied on and specify in detail the reasons for conclusions. *Sondag v. Ferris Hardware,* supra. No reason can be found to reject the testimony of any of the eminently qualified physicians. Has then the claimant carried the burden of persuasion? Not as viewed by this commissioner.

On the one hand we have one doctor's opinion that there was a direct causal relation between the stress of the employment and three doctors opining that it was a random coincidental event that would have happened anyhow. Merely because a condition reaches a point of disablement while work for an employer is being pursued does not make it a "personal injury". *Musselman v. Central Telephone Co.,* supra. 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, claimant should not prevail because her evidence did not preponderate.

* * *

Signed and filed this 9 day of June, 1977.

ROBERT C. LANDESS
Industrial Commissioner

No appeal.

IN THE COURSE OF – BUSINESS PURPOSE

MARY ANNE CHAPMAN,

Claimant,

vs.

PAUL WALKER d/b/a PASTIME LOUNGE,

Employer,

and

AETNA LIFE & CASUALTY,

Insurance Carrier,
Defendants.

Appeal Decision

This is a proceeding brought by Paul Walker, d/b/a Pastime Lounge, defendant employer, and Aetna Life & Casualty, its insurance carrier, pursuant to Iowa Code §86.24 appealing an arbitration decision wherein Mary Anne Chapman, claimant, was awarded medical expenses, weekly compensation benefits, speech therapy, and future medical care. * * *

The issue here is whether or not claimant's injury occurred in the course of her employment.

Claimant had been employed at the Pastime Lounge, a supper club-bar with go-go girls and musical entertainment, for seven years as a waitress, bartender and cook. Her salary varied depending on what tasks she was performing. On October 23, 1975 claimant was involved in an auto accident as she returned to Eagle Grove, Iowa with Helen and Deborah Walker from the SOP Club in Charles City where they had gone to watch a male go-go dancer.

The precise arrangement between Helen and Paul Walker, a married couple, regarding the ownership of the Pastime Lounge is not clear. Paul Walker testified that on October 23, 1975 he considered his spouse an employee; however, claimant's 1975 wage and tax statement listed Helen Walker d/b/a Pastime Lounge as employer. As Paul had pled guilty to violation of certain laws, Helen held the liquor license for the lounge. Helen worked as a bartender and waitress, but she also handled financial matters and managed the bar in her spouse's absence. Paul stated that he made employment decisions including who would be hired as entertainment, arranged work schedules, ordered supplies and kept order in the lounge. He specifically stated that his wife did not employ go-go dancers "unless she was instructed to do so." Helen testified that while the Walkers discussed who would be hired, the final decision on hiring was Paul's.

Although bands were booked directly through their leaders, Mike Ryan of the Pride Agency supplied the dancers. Ryan and the owner of the SOP Club stopped at Pastime Lounge during the week prior to October 23 and discussed with Helen a nude male go-go dancer's appearance at the SOP Club. Paul was not present at the time, but with reference to the hiring of a male go-go, Paul said, "Mike Ryan had -- I had conversed with him about hiring a female go-go and he had mentioned he had this male go-go, and I

am sure I mentioned it to my wife, about it, and I told her that I would not hire a male go-go." One factor against employing the dancer was that a cover charge would have to be used. Charging a cover was, according to Paul, something he preferred not to do. The witnesses here involved had differing views of the trip to Charles City to see the dancer's performance.

Claimant stated that the employees at the bar expressed their opinions as to the quality of the dancers' performances and relayed what the customers were saying to the Walkers. Claimant also expressed an awareness that it was Paul who hired and fired employees. Claimant testified to having been asked by Helen "[t]o go up and check out" the dancer. Claimant responded to questioning that she felt obligated to go in spite of being 'just not ready for that sort of thing. . .' because she "had turned her [Helen] down two other times before, once to Hampton, and once to I think it was Iowa Falls." While they were at the club, claimant said they discussed whether or not the dancer would be good for business and various details of how he might perform at the Pastime. On no other occasion, according to claimant, had she gone with either of the Walkers to preview entertainment. Other persons had been invited to accompany Helen on the trip to Charles City but with the exception of Deborah Walker, the Walkers' former daughter-in-law who occasionally worked as a waitress or bartender at Pastime, no other person had any connection with the bar. The witnesses' testimony is consistent that Mike Ryan and the owner of the SOP Club bought drinks for the group.

Paul Walker said that his spouse told him she was going to Charles City "for a night out."

Helen Walker testified that because her husband had been gone, she had been working harder. She viewed the evening as a night off and said she went to Charles City "because I was curious about this particular thing [the male dancer], is why we went up there." She claimed no intention of booking the dancer. In response to the question "did you feel that Mrs. Chapman was required as an employee to go on this trip," Helen answered, "I didn't feel that way, no." Although she did not remember having a social drink with claimant in the past, she did think that she had. However, she denied ever having asked claimant to go with her to see the dancer in Hampton or Iowa Falls. Helen stated that as they were leaving the lounge, claimant suggested they ask a mutual friend with no connection to Pastime to join them the next week and travel to Hampton to see the dancer again.

Deborah Walker, who drove the Walkers' car, to Charles City and on the return trip home, claimed that her purpose in going was pleasure and that while the dancer did talk to the group, she did not hear any discussion relating to arrangements that might be made if the Pastime were to hire him. Her testimony regarding who hired entertainment confirming that of the Walkers was as follows: "Well, as far as I know, Paul . . . he always tells us he's the boss, so well, he does."

In order to receive compensation, claimant must prove by a preponderance of the evidence that her injury arose out of and in the course of her employment. *Musselman v. Central Telephone Co.,* 261 Iowa 362, 154 N.W.2d 128 (1967). "In the course of" the employment refers to time, place and circumstances of the injury. *McClure v. Union County,* 188 N.W.2d 283 (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, while he is fulfilling those duties or engaged in doing something incidental thereto." *Bushing v. Iowa Railway & Light Co.,* 208 Iowa 1010, 1018, 226 N.W. 719, 723 (1929).

Professor Arthur Larson in 1 *Workmen's Compensation,* §22.00 (Desk ed. 1977) lists the following three instances in which recreational or social activities are within the course of employment:

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

The first situation is inapplicable as all activities here were outside the employee's premises. The third situation is also inapplicable.

The easy case in the second situation is when the employer explicitly directs the employee to take part in a recreational or social activity. The circumstances in the case sub judice are not those of explicit employer direction of an employee to engage in a social activity. Therefore, it becomes necessary to look for implicit employer direction.

While the precise business relationship between the Walkers at the time of the accident is difficult to discern from the record, it is clear that Paul Walker was in charge of entertainment and that if Helen Walker was entitled to exercise any discretion in that area, she chose not to do so. All parties appear to be aware that Paul employed and terminated the employment of the workers at Pastime. Although claimant testified that the employees gave their opinions regarding various entertainers at the lounge, there is no showing either that these opinions were solicited by the employer or that the opinions were given any weight. Additionally, these opinions were rendered on the employer's premises and dealt with actions of persons already employed by Pastime rather than with those of prospective entertainers. Claimant's perception of the trip to Charles City differs from that of the other witnesses. In light of her long-term relationship with her employers and her knowledge of the operation of the lounge, it seems she could not reasonably infer a business purpose for a trip taken on her night off with her employer who did not hire entertainers and who was also having a night off. Claimant fails to establish by a preponderance of the evidence that the accident on the trip home from Charles City happened in the course of her employment.

* * *

Signed and filed this 29 day of December, 1977.

ROBERT C. LANDESS
Industrial Commissioner

Appealed to District Court; Pending.

IN THE COURSE OF – EMPLOYER'S PARKING LOT

CATHERINE L. PARAS,

Claimant,

vs.

THE POWERS MFG. COMPANY,

Employer,

and

BITUMINOUS INSURANCE COMPANY,

Insurance Carrier,
Defendants.

Decision on Appeal

This is a proceeding brought by the defendants, Powers Manufacturing Company, employer, and Bituminous Insurance Company, insurance carrier, pursuant to Rule 500-4.26, Iowa Administrative Code, and Iowa Code §86.24 for appeal of an arbitration decision wherein Catherine L. Paras, claimant was held to have received an injury on February 26, 1975 which arose out of and in the course of her employment. * * *

Although claimant did not begin work until 7:00 a.m., it was her custom to go to her place of employment early so that she could have coffee in the lunchroom at the defendant employer's and relax before starting her shift. Between 5:45 and 6:15 on the morning of February 26, 1975 claimant arrived at work and parked her car in the parking lot owned by defendant employer. She got out of the car. As she was walking near the right front of her vehicle, she slipped on the ice, fell to the ground, and suffered a left Colles fracture.

The question here to be resolved is whether or not claimant's injury arose out of and in the course of her employment.

The burden of proof is upon claimant to establish that her injury arose out of and in the course of her employment. *McClure v. Union County,* 188 N.W.2d 283 (Iowa 1971). The Iowa Supreme Court in *McClure* stated at p. 287 that "in the course of" the employment refers to time, place and circumstances of the injury. "An injury occurs in the course of employment when it is within the period of employment, at a place where the employee reasonably may be performing his duties, while he is fulfilling those duties or engaged in doing something incidental thereto." *Bushing v. Iowa Railway & Light Co.,* 208 Iowa 1010, 1018, 226 N.W. 719, 723 (1929).

Section 85.61 (6) states:

> 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.

This has been previously interpreted by this tribunal to include employer-controlled parking lots. See *Smith v. A.R.A. Hospital Food Management, Inc.,* 28th Biennial Report Iowa Industrial Commissioner, p. 98 and *McGhghy v. Keokuk Electro-Metals Co.,* 27th Biennial Report Iowa Industrial Commissioner, p. 49.

The general rule stated in 1 Larson, *Workmen's Compensation,* §15 at 4-3 (Desk Ed. 1976) [hereinafter, Larson] is that "[a]s 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 lunch time are compensable . . . ." Claimant, here, had fixed hours and a fixed place of work. It is next essential to decide whether or not claimant's injury happened on defendant employer's premises.

The majority rule is that parking lots owned or maintained by the employer for its employees are found to be within the company premises whether they are contiguous with or separate from the plant. 1 Larson, §15.40, at 4-13. This rule is further extended with compensation awarded to employees who are injured "in a public street or other off-premises place between the plant and the parking lot" because the street or place is part of a "necessary route between the two portions of the premises." 1 Larson, §15.10, at 4-7. Claimant appeared to be certain that she had fallen within the confines of the parking lot owned by defendant employer. This was confirmed by Rose Holton who was the person who came to claimant's aid immediately after the fall. Defendant employer's witness, Norma Master, filed an accident report indicating that the fall took place on the sidewalk. However, Master further testified that she might not have seen a differentiation between the sidewalk and the parking lot, that she had no direct knowledge of the incident, and that she could not explain the discrepancy between her report and claimant's statements. Under the majority view it would make little difference whether claimant was on the sidewalk or in the parking lot as the sidewalk or street would form the "necessary route" between defendant employer's parking lot and its plant.

[Claimant was in the course of her employment.]

* * *

Signed and filed this 27 day of April, 1977.

ROBERT C. LANDESS
Industrial Commissioner

No appeal.

**IN THE COURSE OF –
FALL PRIOR TO PUNCHING IN**

KENNETH PIXLER,

Claimant,

vs.

SPENCER FOODS, INC.,

Employer,

and

TRAVELERS INSURANCE COMPANY,

Insurance Carrier,
Defendants.

Arbitration Decision

These are proceedings in Arbitration filed by Kenneth Pixler, the claimant, against Spencer Foods, Inc., his employer, and Travelers Insurance Company, the insurance carrier, to recover benefits under the Iowa Workmen's Compensation Act by virtue of an alleged industrial injury which occurred on January 29, 1974 and under the Iowa Worker's Compensation Act for alleged injury of July 23, 1976.

* * *

The claimant, age 65 and married, began his employment activities for the defendant employer in 1951. For the last ten years the claimant has been sawing beef carcasses in two. In 1973 a hydraulic bench some six feet above the floor level was installed to ease the physical burden placed on the carcass cutters. This bench starts on a gradual decline as the saw cuts through the beef. The operator stands on the platform and guides the saw. On January 29, 1974 one of the support pins holding the bench failed, throwing the claimant against a wall which was located immediately behind the bench. This mishap was witnessed by Bee Burrell, the claimant's foreman. The unrebutted testimony of Christ Lauritsen, another eyewitness, described Burrell as one of those men who assisted the claimant to his feet. The claimant was then allowed to call his wife, who came and transported the claimant to the hospital.

The claimant is illiterate.

The defendants in their answer set up as an affirmative defense that the claimant failed to notify them as required by Section 85.23 (Code), which reads in part as follows:

> Unless the employer or his *representative* shall have *actual knowledge* of the occurrence of an injury . . . no compensation shall be allowed. (Emphasis supplied)

The affirmative defense urged is totally without merit. The industrial accident occurred in the presence of the claimant's immediate superior. The terms of Section 85.23 are met under these circumstances. *Nicks v. Davenport Produce Co.*, 254 Iowa 130, 115 N.W.2d 812; *Jacques v. Farmers Lumber & Supply Co.*, 242 Iowa 548, 47 N.W.2d 236. This record contains no justification for the lack of notice defense urged by the defendants and the shallowness of their position borders on vexatious conduct.

Unfortunately, neither the hospital records nor the diagnosis made by Dr. Frink was introduced as part of this record. The claimant had difficulty in obtaining treatment for what he considered to have been caused by the episode of January 29, 1974. After numerous requests, permission was finally granted on May 12, 1974 allowing the claimant to seek assistance from Dennis J. Zylstra, D.C. Dr. Zylstra's bill for services (Claimant's Exhibit 4) discloses that the claimant was seen for the first time on June 7, 1974. Defendants' Exhibit B, a copy of the defendants' "Report of Injury" form dated June 28, 1974 extended to the claimant the authority to seek assistance from Dr. Zylstra for a "shoulder-strain," describing the injury as occurring when the claimant "jammed shoulder on wall."

To allow this attempt by the defendants to defer the requested medical treatment beyond the 90-day notice requirement of Section 85.23, Code, would be contrary to the intent and purpose of the act.

Dr. Zylstra's reports confirm the first day of treatment as being June 7, 1976. Dr. Zylstra found objectively that the claimant's sixth cervical and tenth thoracic vertebrae had slipped on May 10, 1976, reporting in part as follows:

> At the present time, it looks as though he will need one every week or two on a continuous basis. In my opinion, it is within the realm of reasonable chiropractic certainty that the patients problem is the result of the injury while working at Spencer Foods Inc.
>
> Patient has been almost totally unable to work since the injury, although he has been working some the last few months.
>
> It is my opinion he will be about 50 percent disabled for at least another year.

On September 13, 1974 the defendant insurance carrier paid $192, which was a portion of Dr. Zylstra's total bill of $594.

The claimant missed 78 days from gainful employment between January 29, 1974 and September 6, 1974. A major portion of this missed employment is a 60-day period beginning on June 17, 1974. The defendants' records describe the reasons for these absences as emphysema, bronchitis, high blood pressure, edema of legs and respiratory infection. No supportive evidence for these medical diagnoses was introduced. Dr. Zylstra's report also failed to be sufficiently determinative to assist this deputy in the resolution of the amount of time the claimant lost from work by reason of the January 29, 1974 episode.

This record is confusing as regards the claimant's work activities for 1975. No credible evidence was offered by either party in that regard.

It is clear, however, that the claimant began his normal duties in January 1976 after having begun to consult with Frank D. Edington, M.D., on December 30, 1975. Dr. Edington reported his findings in part as follows:

> This man gives a history of falling from a bench at Spencer Foods while sawing beef on January 29, 1974, and he has not worked since. I did not see this patient at this time and I did not see him until December 30, 1975 at which time I took an x-ray of his neck and found flattening of the fifth cervical vertebrae, and he was bothered with neuritis of his intercervical nerves of this area. This was helped by

diathermy and Butazolidine Alka.

It is my opinion that this cervical injury could have been caused by the fall in 1974, however, I have no way of knowing if this is the case.

I feel that this man has about 25 percent disability from this trouble.

I saw this man first on December 30, 1975 complaining of pain in his right arm, right shoulder and neck, and a history of having them injured on December 29, 1974 (sic) at your plant.

X-ray of the neck showed a flattening of the 5th cervical vertebra which could account for the pain he has complained of. I gave him physiotherapy to the shoulder and neck with improvement.

On January 22, 1976 I gave this man a complete physical examination including a chest x-ray and found him to have a normal heart, blood pressure, prostate, rectum, and blood and urine. Because of his old history of being in intensive care unit at the Spencer Municipal Hospital over a year ago, I had a treadmill exercise test run and his heart is within normal limits for a man of his age.

This man has two difficulties (sic). (1) mild emphysema and (2) recurrent pain in the neck and shoulder from the above described old injury to his 5th cervical vertebra. It is my opinion that this man could do light work at your plant, but because of the above should not be on a regular production line work. You will receive a report from Doctor Van Hofwegen who does the treadmill tests, which was normal.

From the above it will have to be the company's decision of whether this man is taken back on work of a light nature.

The report of H. A. Van Hofwegen, M.D., reads in part as follows:

> During the exercise, Mr. Pixler demonstrated no cardiac arrhythmias or ischemic ST changes. He exercised for a total of nine minutes to a maximum of 8% grade which is the equivalent of approximately four mets of work load. His heart rate increased to a maximum of 147 per minute, and blood pressure increased to a maximum of 216/110.
>
> Mr. Pixler demonstrated only fair cardiorespiratory physical fitness but did not demonstrate any ischemic heart disease.
>
> Being limited to a four met work load, Mr. Pixler is able to do jobs of the following type: He could do any type of work sitting at a desk, any driving type of work. He could use hand tools. He could work as a janitor. He could stand at an assembly line type of job. He could scrub, wax, polish. He could work on the assembling and repairing of machinery. He could do light welding, stock shelves. He could sand floors, could kneel or squat doing light work, could do cranking, hitching of trailers, masonry, painting, paper hanging and do any occupational labor requiring activity such as walking up to three miles an hour. I understand his job at Spencer Foods might consist of standing and cutting the tails off of animals. This should be well within his capabilities.

Armed with the foregoing medical findings, the claimant resumed employment for the defendant employer at $5 per hour.

On July 26, 1976 the claimant fell while on the defendant employer's premises. He described the circumstances of his fall as follows (Transcript, page 28, lines 3-15):

> Well, they was having a little difficulty up there with their second shift. They'd laid off some guys or something on the second shift.
>
> They had the clean-up gang in there that was cleaning up late in the morning. Well, when they went up there, some clean-up guys were there on the stairway. It was slick and wet and stuff and when I went up to change my clothing, I thought about it being wet. But when I came back down I forgot about it being slick.
>
> They were steel steps with nothing on them. When I stepped on them with my rubber boots on, my feet went out from under and I fell down the stairway, all the way down to the floor.

From the questions asked by the defendant employer, it is apparent that they hold the view that they are not responsible for the episode of July 23, 1976 since the claimant fell prior to "punching in."

For the purpose of edification of the parties, it is appropriate to repeat the language of Section 85.61(6), Code, which reads as follows:

> 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.

It is well settled under Iowa law that an injury which occurred on the employer's premises, if not otherwise precluded, is compensible. *Crowe v. De Soto Consolidated School District,* 246 Iowa 402, 68 N.W.2d 63. This rule of law is so well entrenched and basic so as to require comment on the conduct of the defendant employer in resisting that portion of the claimant's case.

The attempted defense seems nothing more than a thinly-veiled effort to make the claimant's attempt in requesting a determination of his disability as difficult as possible. It is this type of conduct which lends credence to requests that this department be granted statutory authority to permit an assessment of attorneys' fees in cases involving vexatious delay, such as occurred in this case.

The claimant has not been gainfully employed since July 23, 1976, which now requires the resolution of the final issue in this case, namely the nature and extent of the claimant's industrial disability, if any.

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.

In applying the foregoing principles to this case, it is held that the injuries of January 29, 1974 and July 23, 1976 did aggravate the preexisting condition described by Dr. Edington. (Deposition, pages 10 and 11)

This claimant handled work assignments successfully for the period preceding the episode in question, and it is apparent that he has an industrial disability, which is defined in *Diederich v. Tri-City Railway Co.,* 219 Iowa 587, 593, 258 N.W.2d 899, as follows:

> It is, therefore, plain that the legislature intended the term "disability" to mean "industrial disability" or 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 noted in *Martin v. Skelly Oil,* 252 Iowa 128, 106 N.W.2d 95, and again in *Olson v. Goodyear Service Stores,* supra. This department is charged with the statutory duty of determining a claimant's industrial disability. In an attempt to further clarify this issue, we quote from *Olson,* supra, at page 1021:

> Disability * * * as defined by the Compensation Act means industrial disability, although functional disability is an element to be considered (citing the Martin case, 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. * * * *

The doctrine was further noted in the case of *Barton v. Nevada Poultry Co.,* 253 Iowa 285, 110 N.W.2d 660, where the reduction of a claimant's earning capacity must be determined.

This 65-year-old claimant will find future employment of any kind difficult to obtain. A contributing factor to the claimant's condition was the industrial injury in question, and in applying the foregoing principles it is held that the claimant sustained an industrial disability of 20% of the body as a whole.

The claimant worked during 1974 and ceased his employment activities in July, 1976. It is held that the claimant is not entitled to a healing period, since the provisions of Section 85.34(1) appear to have been complied with.

Dr. Edington expressed the medical opinion that the claimant has sustained a 25% functional disability of the body as a whole by reason of the aggravation of the preexisting osteoarthritic condition. As a treating physician, his opinion is given the greater weight in this decision.

Dean H. Pingel, D.C., testified as a treating physician, having begun this relationship on July 24, 1976. Dr. Pingel's opinion supports Dr. Edington as to the objective findings and confirms the causal connection of the findings with the industrial injury of July 23, 1976. Dr. Pingel was of the opinion that the claimant has a 35% functional disability of the body as a whole, and again, as a treating practitioner, the doctor's opinion is given the greater weight.

Dr. J. E. Kelly examined the claimant on behalf of the defendants on November 10, 1975, and January 11, 1977 Dr. Kelly expressed the opinion that the preexisting condition was not aggravated by the two episodes in question. Dr. Kelly's judgment of the claimant's condition is given little weight in this decision.

[Claimant's industrial disability was set at twenty percent.]

* * *

Signed and filed this 13th day of April, 1977.

HELMUT MUELLER
Deputy Industrial Commissioner

No Appeal.

IN THE COURSE OF – HORSEPLAY

TERRY SWANSON,

Claimant,

vs.

LYNCH ROOFING & SIDING,

Employer,

and

BITUMINOUS INSURANCE COMPANY,

Insurance Carrier,
Defendants.

Decision on Appeal

This proceeding is an appeal of an arbitration decision brought by Lynch Roofing and Siding, defendant employer, and Bituminous Insurance Company, its insurance carrier, pursuant to Rule 500-4.26 of the Industrial Commissioner's Rules and §86.24, Code of Iowa. The deputy industrial commissioner found that Terry Swanson, claimant, suffered an injury arising out of and in the course of his employment with defendant employer and awarded temporary total disability benefits and related medical expenses.

* * *

This case presents two issues on appeal. Defendants contend that claimant's injury resulted from horseplay, making it non-compensable, and that claimant was not in the course of his employment at the time of the injury.

Claimant testified that on August 7, 1974 he was working for defendant employer at the Strawberry Elementary School in Strawberry Point, Iowa as a roofer applying hot asphalt to the roof of the school building. At about 12:00 noon on the day in question, claimant and several fellow employees took their lunch break on the steps of the school building. The course of travel to and from the work on the roof of the building was through the hallways and stairs of the school. At the end of the lunch period, the

foreman called the employees back to work on the roof and they began the trip through the building to work. As the employees traversed the stairs and hallways, they joked back and forth with one another and at one point, claimant and another employee were pushed into a closet and the door was closed behind them. Claimant testified that the same employee who pushed him into the closet had pushed him briefly on the stairs immediately prior to the closet incident but that he, claimant, had not pushed back, had not provoked or instigated the pushing, and had done nothing more than attempt to avoid the other employee. There was no light in the closet and, with the door closed, he and his fellow employee were left in total darkness. Claimant testified that there was no horseplay between the men in the closet but there was some physical contact as both men attempted to free themselves. While they were in the closet, a bottle of acid overturned and spilled onto claimant's scalp, neck, ear and arm resulting in second degree chemical burns. The parties have stipulated to the fairness, reasonableness and necessity of the bills for services rendered in treatment of the burns.

Under cross-examination, claimant testified that the closet in which the injury occurred was not directly in the route to the roof but was adjacent to and located along a hallway through which the employees traveled on the way to the roof. Claimant admitted having given prior inconsistent statements as to the events surrounding his accident.

Ken Rave was a fellow employee of claimant on August 7, 1974 and had taken his lunch with claimant and the other employees on the schoolhouse steps that day. Rave testified that on the trip back to the roof after lunch there was some joking and kidding between the employees but there was no pushing, no physical contact between any of the employees prior to reaching the closet. On reaching the closet, Rave was pushed with claimant into the closet. He testified they were in the closet for about fifteen seconds and that they probably pushed each other and wrestled a little in the closet before they were released.

The burden of proof is upon the claimant to establish by a preponderance of the evidence that his injury arose out of and in the course of his employment. *Musselman v. Central Telephone Co.,* 261 Iowa 352, 154 N.W.2d 128 (1967). Horseplay which an employee voluntarily instigates and in which he aggressively participates does not arise out of and in the course of his employment and therefore is not compensable. *Ford v. Barcus,* 155 N.W.2d 507 (Iowa 1968). Claimant's uncontroverted testimony shows he neither voluntarily instigated nor aggressively participated in the horseplay which preceded his injury. While claimant admitted having given prior inconsistent statements as to the relevant facts of the case, his sworn testimony is substantiated by that of Ken Rave, his fellow employee. No other testimony was presented that conflicted with their version of what happened.

Defendants contend that claimant was not in the course of his employment as the injury occurred during an unpaid lunch break. The Iowa supreme Court in *Griffith v. Cole Brothers,* 183 Iowa 415, 165 N.W. 577 (1918), noted that courts have found that "One is in the 'course of his employment' though he was not yet actually entered upon his task; while returning to work; while going to meals; while on way to cook his meals; while eating his meals; where he leaves his work and is on the roof for the purpose of taking fresh air . . ." (citations omitted). The court went on to say, "The general rule in construing compensation laws is that the responsibility of the employer begins when his employee enters his premises to perform the services required of him, and terminates when the employee leaves such premises, provided that he does not loiter needlessly, or arrive at an unreasonable hour in advance of the beginning of his duties. The supreme court has also said, "The rule is that an injury is one arising in the course of the employment which occurs while the employee is doing what a man so employed may reasonably do within the time during which he is employed, and at a place where he may reasonably be during that time." *Sachleben v. Gjellefald Construction Co.,* 228 Iowa 152, 154, 290 N.W. 48, 49 (1940). Here, claimant was in the building, returning from his lunch break, traveling with his fellow employees through the halls necessarily traveled in the return to the roof and work when he was pushed into a closet by an act of horseplay in which he neither instigated nor involved himself as an active aggressive participant. His acts were not unreasonable nor was it unreasonable for him to be in that hallway at that time.

* * *

WHEREFORE, claimant has sustained his burden of proving that his injuries arose out of and in the course of his employment.

* * *

Signed and filed this 23rd day of February, 1977.

ROBERT C. LANDESS
Industrial Commissioner

No appeal.

IN THE COURSE OF – MOTORCYLE RACING

RICKY WILLIAM LEWIS,

Claimant,

vs.

LEWIS SUZUKI VILLA,

Employer,

and

AMERICAN INTERINSURANCE EXCHANGE,

Insurance Carrier,
Defendants.

Arbitration Decision

This is a proceeding in arbitration brought by Ricky William Lewis, claimant, against Lewis Suzuki Villa, employer, and American Interinsurance Exchange, insurance carrier, for the recovery of benefits on account of an injury on June 4, 1975.

* * *

On June 4, 1975 Claimant was injured while riding a motorcycle at a vacant dirt lot in Newton, Iowa. The issue to be determined is whether the injury to Claimant on June 4, 1975 arose out of and in the course of his employment with Defendant Employer (hereafter referred to as Lewis Suzuki).

There is support in the record for the following statement of facts:

Lewis Suzuki is a franchise dealership for Suzuki and Bultaco motorcycles and specializes in building and modifying competition motorcycles for moto cross racing. The parents of Claimant, Gary William Lewis and Patty Ann Lewis, own Lewis Suzuki.

Claimant began working for Lewis Suzuki in 1974. Gary Lewis described the duties performed by Claimant as follows:

> His duties, first of all. I did respect him and think I've trained him well. He was responsible to set up bikes quickly. What set up means is like he said earlier. They ship them to us from Japan. They come in a crate and they are assembled. The front wheels are put on, the handlebars and so forth. Then you have a motorcycle. Then you have what they call a set-up procedure, which he was trained to do. He was left solely to do competition bikes. They are the most critical. They have to be done right, in other words, because of the danger involved. He was left with this and was trained to do this. He was trained to change shocks, anything to do with engines. He pulled engines on race bikes. I also made him go up front and work parts sometimes when he was needed. I asked him to go up and work behind the parts counter. I've asked him to talk to customers, especially if a kid comes in that he knows. Why does a kid want to listen to me? I would have Rickey (sic) go try to sell bikes for us. He didn't do all the paperwork, but he did try to sell bikes, parts. Most of his time, I think, was spent in service. I would load him up on many, many evenings, many times in the middle of Saturday afternoon. I can recall we used to run to Boone, Iowa, on Saturday night and many Saturday afternoons we'd get caught in a pinch and I would have to take him out in the country somewhere I could have him just run up and down to test it. He did all the oil changes, air cleaners. I have a negative aspect there. Probably the No. 1 enemy of motocross engines is the air cleaner. I don't think that I have to clean them. These things were taught to Rickey to maintain himself because I don't feel I had the time or would take the time to clean air cleaners and change the oil of transmissions which had to be done consistently, especially with competition. I had two or three bikes that he rode for me on weekends.

Claimant was paid at the rate of $2.00 per hour for work performed by him around the shop of Lewis Suzuki. Gary Lewis considered the opportunity provided by him to Claimant to ride expensive motorcycles as further payment of wages. Claimant raced the motorcycles built by Gary Lewis for Lewis Suzuki in competitive moto cross races. During 1974 Claimant won the 125cc championship of the Iowa Moto-X Association by accumulating the most points for the season. In 1975 Claimant competed in races at the following places:

Date	City	Class	Finish
January 26, 1975	Lake Whitney, Texas	125cc	6th
March 2, 1975	Tabor, Iowa	100cc	1st
March 23, 1975	Ft. Dodge, Iowa	125cc	1st
March 30, 1975	Desoto, Missouri	125cc	4th
April 6, 1975	Van Meter, Iowa	125cc	DNF*
April 13, 1975	Tipton, Iowa	125cc	DNF
April 20, 1975	Marshalltown, Iowa	125cc	DNF
April 27, 1975	New Hartford, Iowa	125cc	DNF
May 11, 1975	Newton, Iowa	125cc	1st
		200cc	1st
		Overall	1st
May 18 or 25, 1975	Marshalltown, Iowa	125cc	1st

*(did not finish)

For the above races, Lewis Suzuki provided Claimant transportation to and from the races and all expenses incidental thereto, i.e., fees, foods, lodging and gasoline. Lewis Suzuki also provided these same items to Frank Hashman for the races at Lake Whitney, Texas; Tabor, Iowa; Ft. Dodge, Iowa; Desoto, Missouri; Van Meter, Iowa; and New Hartford, Iowa and to Richie Chance for the races at Ft. Dodge, Iowa; Tipton, Iowa; Van Meter, Iowa; and Newton, Iowa.

Although Claimant owned a motorcycle in 1975, he primarily raced floor models owned by Lewis Suzuki. Both Hashman and Chance owned and raced motorcycles built and modified by Lewis Suzuki. However, the motorcycle owned by Chance contained additional modifications owned by Lewis Suzuki. Chance also worked for Lewis Suzuki in its shop.

The success of Claimant, Chance and Hashman was utilized by Lewis Suzuki in its advertising. Photographs of Claimant, Chance and Hashman appeared in the Newton Daily News during February and March, 1975 in advertisements of Lewis Suzuki. The finish of each of the riders during the 1974 season was included in the advertisements. Lewis Suzuki also received free advertising from the racing activities of Claimant. A newspaper clipping dated September 14, 1974 stated:

> . . . Ricky Lewis continues to be unstoppable on his Lewis Suzuki Villa yellow zonkers. His firsts in the 100 and 125 classes netted him almost $75.00 . . .

Claimant, Chance and Nashman also wore apparel at the races which advertised for Lewis Suzuki.

Gary Lewis attributed the success of Lewis Suzuki to the success of the motorcycles built by him at the races. He testified about the importance of moto cross racing to the financial well-being of Lewis Suzuki as follows:

> . . . In Newton, Iowa, I've spent maybe a lifetime trying to win competition, but as a business, you have to be highly specialized. You have to show your results or you can't sell nothing. Why would they come to me, Newton, Iowa? Moyer Suzuki owns half of Des Moines, so I have to consistently blow his ass off every weekend to get them in my shop or he's always going to sell them cheaper.

The contribution of Claimant to the racing experience of Lewis Suzuki was described by Gary Lewis as follows:

Q. Did you consider Rickey as an expert motocross operator or rider?

A. Definitely.

Q. Did you value his opinion relative to particular parts of a motocross motorcycle?

A. I had to, Jim.

Q. Tell us more about that, if you would, please.

A. I can build the engines and I have a dynamometer. I can measure horsepowers and I can put them down on pieces of paper, but I can't take them to a race and go around the track. At one time, I can recall taking him and trying to teach him some tricks and then it got to where I would not even go because it was humiliating to me to ride with him. They rode so fast, so there was no way, Jim, that I could compete with his type of caliber racing. I was not qualified to do it. I had to rely on somebody who could go that fast.

Q. So his opinion as to the qualities of particular modifications were quite important then to you?

A. Definitely, and with the measurements, you know, along with results and his opinion, you could duplicate what you had done for him for the public.

Q. How important was this, his winning, to your business?

A. The success we have had in our dealership is solely from the results of our participation and Rickey's participation in competition.

On June 4, 1975 Claimant and Chance while at the shop of Lewis Suzuki placed Belstein shocks furnished by Lewis Suzuki on the 125cc motorcycle owned by Claimant. Gary Lewis had earlier in the week changed the rear suspension and pipe on the motorcycle. Both Claimant and Gary Lewis considered the motorcycle owned by Claimant to be a test motorcycle since Lewis Suzuki at this time was providing Claimant a RM 125 motorcycle with no modifications from its floor plan to race. However, Gary Lewis and Claimant were considering modifications at this time of the RM 125 for a race in Desoto, Missouri on June 7 or 8, 1975. Prior to modifying the RM 125, they decided to test the modifications on the motorcycle owned by Claimant.

At approximately 5:30 p.m. on June 4, 1975 Gary Lewis transported Claimant and Chance and their motorcycles in a van owned by Lewis Suzuki to a vacant lot to ride their motorcycles. The purpose of Claimant in riding the motorcycle owned by him this evening was to test the modifications and to practice. Gary Lewis observed Claimant and Chance riding their motorcycles for approximately fifteen minutes and then left to go home. About one and a half hours later, Gary Lewis was advised by Chance that Claimant was injured as a result of a motorcycle accident at the vacant lot.

Claimant has the burden to prove by a preponderance of the evidence that he sustained an injury which arose out of and in the course of his employment. Section 85.61(6), Code of Iowa, provides:

> 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 phrase "injury arising out of and in the course of the employment" should be given a broad and liberal interpretation. *Alm v. Barick Cattle Co.,* 240 Iowa 1174, 38 N.W.2d 161: *Pohler v. Snow Construction Co.,* 239 Iowa 1018, 33 N.W.2d 416.

The test for determining whether the injury arose out of the employment is whether a causal connection exists between the conditions under which the work was performed and the resulting injury. *Musselman v. Central Telephone Co.,* 261 Iowa 352, 154 N.W.2d 128.

"In the course of" relates to time, place and circumstances under which the accident takes place. The phrase means within the period of the employment, at a place where the employee may be in the performance of his duties, and while he is fulfilling those duties or engaged in doing something incidental thereto. *Bushing v. Iowa Ry. & Light Co.,* 208 Iowa 1010, 226 N.W. 719.

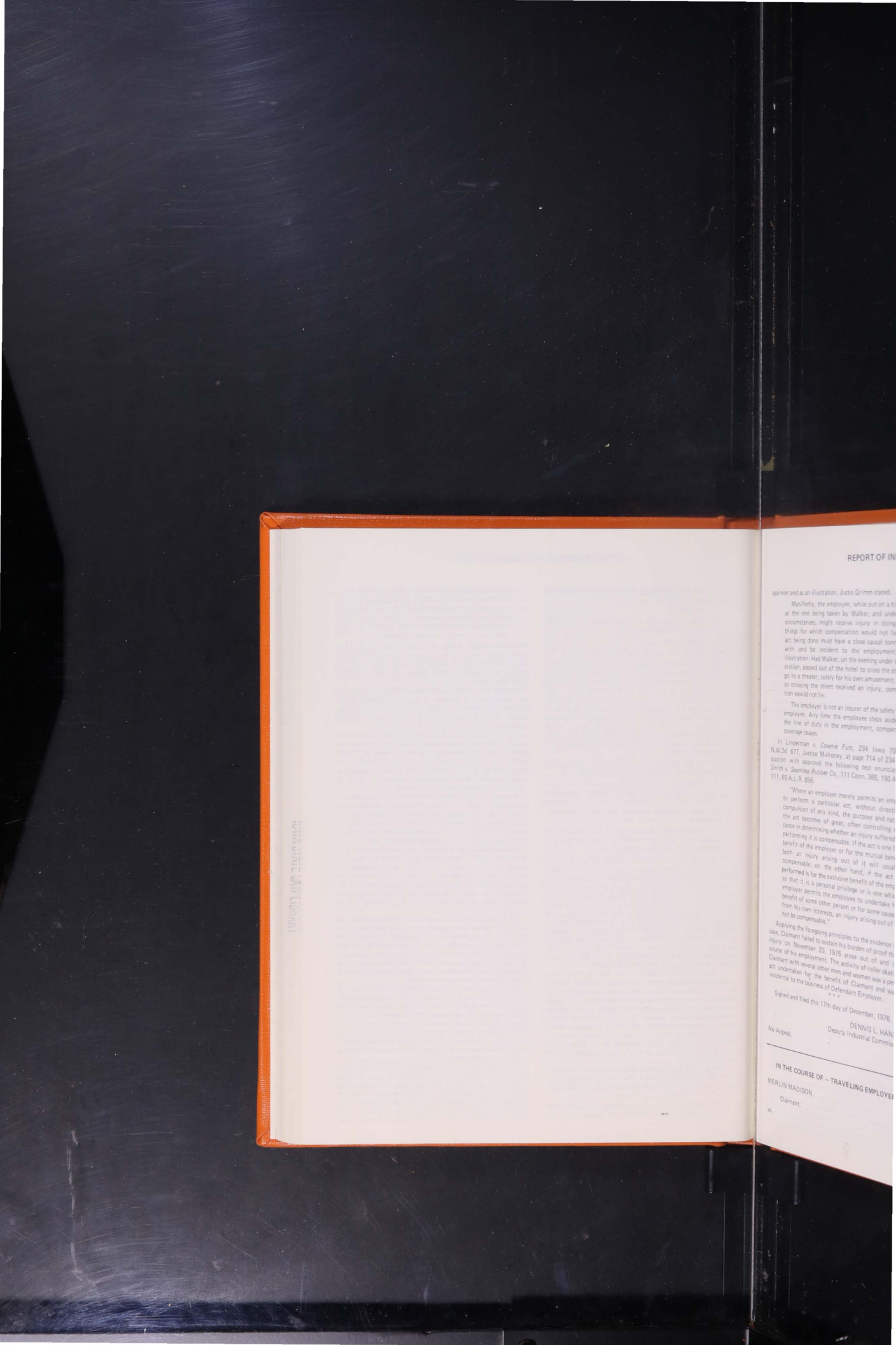
Recreational or social activities are within the course of employment when the employer derives substantial direct benefit from the activity beyond the intangible value of improvement in employee health and morale that is common to all kinds of recreational and social life. 1 Larson, *Workmen's Compensation,* §22.00, p. 349.

Claimant sustained his burden of proof that the injury on June 4, 1975 arose out of and in the course of his employment for Lewis Suzuki. The racing activities of Claimant were incidental to the business of Lewis Suzuki and Lewis Suzuki derived a substantial direct benefit from the racing activities. Gary Lewis attributed the success of Lewis Suzuki to the participation by the dealership in racing activities.

At the time of the injury on June 4, 1975 Claimant was within the period of his employment, at a place where he may be in the performance of his duties, and engaged in doing something incidental to his employment. He was transported to the vacant lot by Gary Lewis in a van owned by Lewis Suzuki to test modifications that were being considered for a RM 125 motorcycle provided to Claimant by Lewis Suzuki for racing at this time.

A causal connection also existed between the conditions under which the work was performed by Claimant and the injury on June 4, 1977. Modifications of motorcycles for racing were an integral part of the business for Lewis Suzuki. For Claimant to test the modifications and to report to Gary Lewis the merits of the modifications, he had to ride the motorcycle under simulated racing conditions. At the time of this injury, Claimant was performing this activity at the vacant lot.

Little significance was attributed to the fact that Claimant at the time of the injury was riding a motorcycle financed by him at a Newton bank. This fact was diminished by the testimony that the motorcycle was used by Lewis Suzuki as a test motorcycle. The motorcycle also contained modifications owned by Lewis Suzuki. Gary Lewis also testified that he required Claimant to purchase



opinion and as an illustration, Justic Grimm stated:

> Manifestly, the employee, while out on a trip such as the one being taken by Walker, and under such circumstances, might receive injury in doing many things for which compensation would not lie. (The act being done must have a close causal connection with and be incident to the employment.) For illustration: Had Walker, on the evening under consideration, passed out of the hotel to cross the street to go to a theater, solely for his own amusement, and in so crossing the street received an injury, compensation would not lie.
>
> The employer is not an insurer of the safety of the employee. Any time the employee steps aside from the line of duty in the employment, compensation coverage ceases.

In *Linderman v. Cownie Furs,* 234 Iowa 708, 13 N.W.2d 677, Justice Mulroney, at page 714 of 234 Iowa, quoted with approval the following test enunciated in *Smith v. Seamless Rubber Co.,* 111 Conn. 365, 150 A. 110, 111, 69 A.L.R. 856.

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

Applying the foregoing principles to the evidence in this case, Claimant failed to sustain his burden of proof that the injury on November 23, 1975 arose out of and in the course of his employment. The activity of roller skating by Claimant with several other men and women was a personal act undertaken for the benefit of Claimant and was not incidental to the business of Defendant Employer.

* * *

Signed and filed this 17th day of December, 1976.

DENNIS L. HANSSEN
Deputy Industrial Commissioner

No Appeal.

IN THE COURSE OF – TRAVELING EMPLOYEE

MERLIN MADISON,

Claimant,

vs.

JEROME KAPPERMAN d/b/a
KAPPERMAN CONSTRUCTION
COMPANY,

Employer,

and

WESTERN CASUALTY & SURETY,

Insurance Carrier,
Defendants.

Decision on Appeal

This is an appeal filed December 28, 1976 by the defendant employer, Jerome Kapperman d/b/a Kapperman Construction Company, and its insurance carrier, Western Casualty & Surety Company, seeking review of an arbitration decision filed December 9, 1976, wherein claimant, Merlin A. Madison, was awarded healing period benefits, medical expenses and permanent partial disability.

* * *

At issue here is whether or not claimant sustained an injury arising out of and in the course of his employment.

In June, 1972 claimant began working for the defendant employer who is a general contractor with offices in Luverne, Minnesota. On August 27, 1973 claimant started work for his employer on a storm sewer project in Moville, Iowa, which is approximately one hundred miles from Luverne. It became the practice of the men assigned to the project to meet on Monday mornings in the Kapperman parking lot in Luverne to decide who would drive to Moville. Although Kapperman did not supply transportation to the project, designate who should drive to the project or reimburse the employee who drove, each employee was paid an hourly wage for travel time from Luverne to Moville. They were not, however, paid for their return trip. While no restrictions were placed on the employees, who were free to spend their non-working hours wherever they wished, they developed a pattern of staying in a motel room which was paid for by defendant.

On September 24, 1973 the work crew including Madison was transported to Moville in pickups driven by Russell Swenson, project superintendent, and Denny Cauwells, a member of the crew. Cauwell's vehicle was the only privately owned transportation at the construction site. Employees, with the exception of Swenson, were not permitted to use company vehicles after work. No meals were furnished by Kapperman to any employees except Swenson. At quitting time the crew customarily went to eat at a restaurant with an early closing time before returning to their motel room to fill out time cards. On this date the crew stopped working at approximately 6:00 p.m. and went in Cauwell's pickup to the restaurant to eat. As they were enroute from the restaurant to their motel, claimant fell from the back of the pickup and was injured.

In order to receive compensation, claimant must prove by a preponderance of the evidence that his injury arose out of and in the course of his employment. *Musselman v. Central Telephone Co.,* 261 Iowa 362, 154 N.W.2d 128 (1967). Iowa Code §85.61(6) provides:

> 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.

"In the course of" the employment refers to time, place and circumstances of the injury. *McClure v. Union County,* 188 N.W.2d 283 (1971). "An injury occurs in the course of employment when it is within the period of employment, at a place where the employer reasonably may be performing his duties, while he is fulfilling those duties or engaged in doing something incidental thereto." *Bushing v. Iowa Railway & Light Co.,* 208 Iowa 1010, 1018, 226 N.W. 719, 723 (1929). "[C]ases involving an injury from a highway accident suffered while enroute to or from work require a determination whether the employee was engaged in his employer's business at the time and whether there was a causal relation between the injury and such employment." *Pribyl v. Standard Electric Co.,* 246 Iowa 333, 339, 64 N.W.2d 438 (1965).

The general rule as to traveling employees is found in 1 Larson, *Workmen's Compensation Law,* §25.00 at 5-64 (Desk edition 1977) which states that:

> [e]mployees whose work entails travel away from the employer's premises are held in the majority of jurisdictions to be within the course of their employment continuously during the trip, except when a distinct departure on a personal errand is shown. Thus, injuries arising out of the necessity of sleeping in hotels or eating in restaurants away from home are usually held compensable.

Defendants argue that the deputy industrial commissioner's reliance on *Walker v. Speeder Machinery Corp.,* 213 Iowa 1134, 240 N.W. 725 (1932) and *Crees v. Sheldahl Telephone Company,* 258 Iowa 292, 139 N.W.2d 190 (1965) is misplaced as the employment relationship of those claimants can be distinguished. It is true that the positions of Walker and Crees are somewhat different from Madison's situation here. Specifically, Walker and Crees were subject to their employers' call and were paid for all expenses. Defendants are also correct in stating, "Labels and classifications do not overcome the necessity of each case being decided on an individual basis, considering all of the facts and circumstances." Labels and classifications are not used in the Larson treatise. Only the generic term "employee" is used. Defendants rightly assume that "[c]onsideration must be given to the time, place and circumstance of the accident with review and determination based upon a totality of the circumstances." The reasoned approach suggests that being subject to call or having all expenses paid are only two factors considered by the court in the *Walker* and *Crees* decisions. It would seem likely that the court, if presented with an employment relationship such as that of Madison and Kapperman, would expand *Crees* and *Walker* and would follow the rule applied by other jurisdictions which is to examine the reasonableness of an employee's actions under the particular circumstances in which he was placed. [See *Ahart v. Preload,* 394 N.Y.S.2d 104 (App. Div. 1977); *Charles v. Industrial Commission,* 2 Ariz. App. 202, 407 P.2d 391 (Ct. App. 1965); *Cavalcante v. Lockheed Electronics Company,* 85 N.J. Super. 320, 204 A.2d 621 (Union County Ct. 1974)].

One of the factors examined by the Iowa Supreme Court in *Walker,* supra, was that claimant had no reason to be in the place of his injury for any purpose other than his employer's business. He had no personal reason. He had traveled to Pittsburgh and was staying in town so that he might be about his employer's business the next day. Madison's sole reason for being and remaining in Moville was to help to complete the project his employer had undertaken. It is clear that the actions of Madison and his co-employees were reasonable under the circumstances. The men were approximately one hundred miles from their homes. The record shows that the crew frequently worked longer than a standard eight-hour day. Adding a two-hour early morning trip to the beginning of the day and a two-hour trip to the end of a hard day's work had so little appeal for the members of the crew that the workmen rarely returned to Luverne during their work-week. Instead, they reasonably accepted Kapperman's offer of paid lodging where each evening they filled in their time cards. Before returning to that lodging following their working day, they reasonably and routinely sought a meal at a restaurant in Moville. Because the restaurant closed early, they reasonably and customarily went from the worksite to the restaurant and then to the motel.

Defendants cite 1 Larson, *Workmen's Compensation Law,* §24.40, at 5-167 (1972) for the following propositions:

> When residence on the premises is merely permitted, injuries resulting from such residence are not compensible under the broad doctrine built up around employees required to reside on the premises . . . . The theory is that when residence is mandatory, it is the constraints and obligations of the employment that subject the employee to the risks that injured him, while if the residence is optional, the employee is free to do as he pleases and there is no continuity of employment obligation of any kind during the time that the employee is voluntarily sleeping in a place provided for his convenience by the employer.

Defendants neglect to quote the language following this paragraph. "Logically, however, even in the absence of a requirement in the employment contract, residence should be deemed 'required' whenever *there is no reasonable alternative,* in view of the distance of the work from residential facilities or the lack of availability of accommodations elsewhere." (emphasis added) As a case supporting what Larson believes to be the better view he cites *Wilson Cypress Company v. Miller,* 157 Fla. 459, 26 So.2d 441 (1946). The employer in *Miller* had furnished a house boat. The Florida court noted at p. 442 that the employee

> was not required to sleep on the house boat. He could have held the job without sleeping there. The employer furnished the house boat, without cost to the employees, for the obvious purpose of furthering his business. It cannot be argued seriously that the

employer did not contemplate the use of the boat to sleep his employees.

The habitual pattern developed by the Kapperman crew benefited defendant employer. The crew's traveling together gave some assurance they would arrive promptly at the jobsite and remain in Moville. Defendant could be relatively certain that the members of the crew would be available for work each day. Project superintendent Swenson testified on cross-examination that it was helpful to have the crew all stay in one place. Jerome Kapperman responded almost identically to a similar question.

Defendants urge that claimant had his choice on what to do and where to go after regular working hours. The nature of claimant's employment required him to accept the transportation and facilities which were available to him. The location of his employment made each of these limited. If he was going to get a ride, he had to go in the pickup of his co-employee or the company truck of his foreman. If he was going to eat, he had to go to the place where the transportation was taking him. If he was going to have room, he had the choice of only one motel which also happened to be the one paid for by his employer.

* * *

It is found and held as findings of fact:

That claimant sustained an injury on September 24, 1973 which arose out of and in the course of his employment.

* * *

Signed and filed this 16 day of August, 1977.

ROBERT C. LANDESS
Industrial Commissioner

Appealed to District Court; Affirmed.

IN THE COURSE OF –
VIOLATION OF EMPLOYER'S RULE

SCOTT DAVID STAHLE,

Claimant,

vs.

HOLTZEN HOMES,

Employer,

and

UNITED STATES FIDELITY AND GUARANTY COMPANY,

Insurance Carrier,
Defendants.

Appeal Decision

This is a proceeding brought by Holtzen Homes, defendant employer, and United States Fidelity and Guaranty Company, its insurance carrier, pursuant to Rule 500-4.26 of the Iowa Administrative Code and §86.24 of the Iowa Workmen's Compensation Act on appeal of an arbitration decision wherein the claimant, Scott David Stahle, was found to have sustained an injury arising out of and in the course of his employment on May 20, 1975.

* * *

Defendant contends the record does not support a finding that claimant sustained his burden of proof that he received a personal injury arising out of and in the course of his employment.

Claimant testified that he had been employed by defendant, Holtzen Homes, as a painter and laborer from September, 1974 through May, 1975. During that time he worked at more than one job site. Throughout his period of employment, employees were given two coffee breaks a day, at 10:00 a.m. and 2:30 p.m., of fifteen minutes duration each, in addition to the daily lunch break. For some time claimant and fellow employees had worked for defendant at a West 19th Street job site. It was common practice at that job site for employees to gather at one location for their coffee breaks and on more than a few occasions, the foreman would join them. At times, motor vehicles were used to travel to the common meeting site and no one complained of this practice.

After the West 19th Street project was finished, claimant was assigned to work at the Sergeant Bluff project where he was engaged in scraping houses. He testified that he had worked at this job site for a couple of weeks before the accident took place. He would go straight to the particular house he was working on without joining in any groups before work began and continued the practice of congregating for coffee breaks in which he had participated at the West 19th Street job site. Claimant testified that he sometimes would not see his foreman for two days at a time, that he was never told not to congregate with other employees during coffee breaks and that no other employee had advised him that such practice was in violation of work rules. On May 20, 1975, while returning to the house he and his co-worker were to scrape, claimant's motorcycle fell causing injury to him.

Jack Goodwin, another employee of defendant, testified that he had been told for twenty-five or thirty years that the painters were not to leave the houses on which they were working to gather for coffee breaks. Goodwin had worked at the West 19th Street site and testified that numerous employees would congregate for their coffee breaks.

William Kane, foreman for defendant, substantiated the fact that employees at the West 19th Street site congregated at a common location during their coffee breaks and that he had, on occasion, joined them for break. When work began at the Sergeant Bluff site where claimant was injured, Kane instructed the employees they were not to gather for their breaks. He testified that this was a rule newly formulated, it had not been in effect earlier, and that it was announced prior to the time claimant began work at this location. The purpose of the rule was to alleviate customer complaints of too many men congregating at one customer's house, using vulgar language and leaving garbage in the yard. Kane admitted that no violations of the rule had resulted in punishment or disciplinary action until after the accident in which claimant was injured.

The burden of proof is upon the claimant to establish his

case by a preponderance of the evidence. *Almquist v. Shenandoah Nurseries,* 218 Iowa 724, 254 N.W.35. Pursuant to the stipulation of the parties, the only issue to be decided is whether claimant was within the scope of his employment at the time of the injury. The testimony is uncontroverted that the injury occurred when claimant, then an employee of defendant, was taking his daily break for which time he was paid. It is apparently the contention of defendant that claimant's violation of the rule against congregating during breaks operated to take him outside the scope of his employment at the time of the injury and thus renders the injury not compensable. This contention cannot stand. Even the knowing violation of an explicit command of the employer does not necessarily remove an employee from the scope of his employment so as to preclude an award. *Wallace v. Rex Fuel Co.,* 216 Iowa 1239, 250 N.W. 589 (1933). For a discussion of the problem, generally, see 1A *Larson's Workmen's Compensation Law,* §31.20, pages 6-18 et seq.

The Workmen's Compensation Act is for the working man's benefit and should be liberally construed to that end. *Hoenig v. Mason & Hanger, Inc.,* 162 N.W.2d 188 (Iowa 1968). The supreme court of Iowa, in *Bushing v. Iowa Railway and Light Company,* 208 Iowa 1010, 226 N.W. 719 (1929), states, "It is not, in any sense, controlling that an employee, during the hours of his employment, happened to be a short distance from the actual situs of his work. In other words, the compensation act does not contemplate that an employee may not momentarily step outside of the circumference of his working place." The employee's departure from the usual place of employment must amount ot an abandonment of employment or be an act wholly foreign to his usual work. *Crowe v. DeSoto Consolidated School District,* 246 Iowa 402, 68 N.W.2d 63 (1955).

The Iowa Supreme Court addressed itself to the problem of violations of the employer's instructions in *Buehner v. Hauptly,* 161 N.W.2d 170 (Iowa 1968). There the court states, "The test is whether the employee was doing what a person so employed may reasonably do within the time of the employment and at a place he may reasonably be during that time." Justice LeGrand went on to say, "It is sometimes a thin line which divided a finding that the ultimate act itself is prohibited from one that the act was proper and was merely performed contrary to instructions. In the first case, compensation is denied; in the second, it is paid."

In the *Buehner* case, the claimant was denied compensation. But that case involved a considerably different factual situation from this situation. In the *Buehner* case, claimant was warned against the forbidden act on the day of the accident. Just one hour before the accident he had been instructed on the rule. The rule was promulgated to promote job safety. After the instruction was given, there were no violations of the rule until the accident occurred. In the case sub judice, claimant testified he had never been told of a rule against congregating at a common site for coffee breaks. He had observed and participated in the practice a number of times without warning or reprimand. Even after work began at the Sergeant Bluff site, violations of the rule prior to the accident were not uncommon and no one was reprimanded until after this accident occurred. This rule, unlike the one in *Buehner,* was not a safety rule but was designed to alleviate customer complaints relating to employee behavior during the breaks. In light of his previous experiences, both at Sergeant Bluff and at West 19th Street, without reprimand, it was not unreasonable for claimant to participate in a paid coffee break authorized by defendant. It is apparent that this situation falls within the second of Justice LeGrand's classes, that is, the act was proper and was merely performed contrary to instructions.

* * *

Signed and filed this 18 day of January, 1977.

ROBERT C. LANDESS
Industrial Commissioner

Appealed to District Court; Affirmed.

IN THE COURSE OF –
VIOLATION OF EMPLOYER'S RULE

LARRY RAY WOLFE,

Claimant,

vs.

DOUBLE D, INC.,

Employer,

and

HAWKEYE-SECURITY INSURANCE COMPANY,

Insurance Carrier,
Defendants.

Decision On Appeal

This is a proceeding brought by defendant employer, Double D, Inc., and its insurance carrier, Hawkeye-Security Insurance Company, appealing an arbitration decision wherein claimant, Larry Ray Wolfe, was awarded healing period benefits and medical expenses resulting from an injury arising out of and in the course of his employment on February 7, 1976.

* * *

Claimant was injured in a truck accident involving defendants' truck. At the time of the accident claimant was in the truck's sleeper and the truck was being driven by an unauthorized person.

At the hearing on appeal, defendants presented the additional testimony of Leland Charles Ruble, who, at the time of claimant's accident, was general manager of Double D, Inc. Ruble testified regarding company policy relating to allowing others to drive or to ride in trucks and regarding company hiring procedures.

Defendants argue that claimant's allowing an unauthorized person to drive defendant employer's truck was a violation of company safety rules and of governmental regulations which took claimant out of the course of his employment and that the deputy erred in failing to make

this finding. On reviewing the record, it is found that the deputy's findings of fact, the conclusions of law and the award are proper. It is to be noted that although there is a split of authority in awarding compensation in cases similar to this, the better view is the position taken by the deputy here.

The Utah Supreme Court in *M & K Corp. v. Industrial Commission,* 189 P.2d 132 (1948) faced the issue of whether or not to award death benefits to the dependents of an employee who at the time of his death was a passenger in a truck being driven by his unlicensed fourteen-year-old son in violation of Utah law. The court stressed the fact that the deceased was doing the work he was employed to do. The test to be applied, according to the Utah court at p. 139 is: "Was the regulation calculated to limit the scope of the employment or was it calculated only to govern the manner of performing a more comprehensive task." For application of this test the court looked to its own decision in *Buhler v. Maddison,* 109 Utah 245, 166 P.2d 205 (1946). In *Buhler* an employee who did blasting violated a safety rule by reentering the blast zone when a fuse failed to trigger an explosion. The court held that the violation of a rule which forbade the employee from doing his work in a particular way did not limit the course of his employment. A similar result was reached in *M & K Corp.,* at p. 141, with the court awarding death benefits holding "[t]hat in permitting his son to drive he did violate the law but that [violation] went only to the manner in which he was performing his work and not in the job which he was doing and therefore it did not constitute a departure from the course of his employment."

The Alabama Supreme Court in *Moss v. Hamilton,* 234 Ala. 181, , 174 So. 622, 623 (1937), saw a:

> . . . clear distinction between prohibitions which limit the sphere of employment, and prohibitions which deal only with conduct within that sphere. A transgression of a prohibition within this latter class leaves the sphere of employment where it was, and of consequence will not prevent recovery, while a transgression of the former class carries with it the result that the employee has gone outside the sphere.

Moss was followed in *Malbis Bakery Co. v. Collins,* 15 S.2d 705 (Ala. 1943) which involved an award of compensation to an employee who was injured when his truck which was driven by an unauthorized driver was involved in an accident. See also, *Glass v. Sullivan,* 94 S.W.2d 381 (Tenn. 1936); *Bryan v. Inter-State Iron Co.,* 250 N.W. 814 (Minn. 1933); *Employers' Liability Assurance Corporation Ltd. v. Industrial Accident Comm'n.,* 36 Cal. App. 568, 177 P. 171 (1918).

Applying the principle enunciated by other jurisdictions to the case sub judice results in a finding that claimant's performances of a prohibited act did not remove him from the course of his employment.

* * *

Signed and filed this 3 day of November, 1977.

ROBERT C. LANDESS
Industrial Commissioner

Appealed to District Court; Dismissed.

JUDICIAL NOTICE

JAMES D. HULS,

Claimant,

vs.

AMERICAN OIL COMPANY,

Employer,
Self-Insured,
Defendant.

Order

On November 2, 1977, an arbitration decision was filed denying benefits to claimant. On November 22, 1977, claimant appealed. Claimant's request for taking additional evidence was filed on November 30, 1977.

Claimant specifically asks that the commissioner take official notice of a transcript and exhibits from a review-reopening proceeding filed November 26, 1974. Claimant also petitions for the right to submit a medical report by C. Leslie Thompson, M.D., a performance report by J. R. Olson, a medical report by Harold W. Spies, M.D. and a medical report by George Pester, M.D.

Claimant will be allowed to submit reports by Drs. Thompson, Pester, and Spies as they had been referred to in the course of this action. The report by J. R. Olson will not be allowed as it was available at the time of final hearing and could have been presented at that time. Official notice will not be taken of the transcript and exhibits from the March, 1974 proceeding as this is a proceeding in arbitration and not review-reopening. The reasons recited by claimant for taking official notice of the prior proceedings to "show by comparison the nature and extent of claimant's claim in the instant case as an aggravation of the 1966 injuries . . . ." in no way attributed causal connection for the claimant's condition to the defendants in the instant action.

THEREFORE, claimant's request to submit additional evidence is denied in part and allowed in part.

Signed and filed this 31 day of January, 1978.

ROBERT C. LANDESS
Industrial Commissioner

No appeal.

JURISDICTION

WALTER N. HYSLOP,

Claimant,

vs.

MID-WEST COAST TRANSPORT, INC.,

Employer

and

ST. PAUL INSURANCE COMPANIES,

Insurance Carrier,
Defendants.

Review Decision

NOW on this 31st day of January, 1977 the above captioned matter comes on for review brought by the defendant employer, Mid-West Coast Transport, Inc., and its insurance carrier, St. Paul Insurance Companies, pursuant to §86.24, Code of Iowa, of an arbitration decision entered on March 3, 1976 wherein it was determined this tribunal had jurisdiction over the claimant, Walter N. Hyslop, and subject matter of the controversy.

* * *

The issues to be determined in this matter are whether or not the Iowa Industrial Commissioner may apply the Iowa Workmen's Compensation Law to claimant's injury of January 24, 1974 which occurred in the state of Montana; and whether or not the acceptance of the injury and payment by the employer's insurance carrier under the South Dakota Workmen's Compensation Law has any effect on the applicability of the Iowa law, or if no such effect, on the entitlement of the claimant under the Iowa Workmen's Compensation Law.

As indicated in the arbitration proceeding, no conflict exists that claimant is domiciled in the State of Iowa. Section 85.71, Code of Iowa provides in pertinent part:

> If an employee, while working outside the territorial limits of this state, suffers an injury on account of which he, or in the event of his death, his dependents, would have been entitled to the benefits provided by this chapter had such injury occurred within this state, such employee, or in the event of his death resulting from such injury, his dependents, shall be entitled to the benefits provided by this chapter, provided that at the time of such injury:
>
> 1. His employment is principally localized in this state, that is, his employer has a place of business in this or some other state and he regularly works in this state, *or if he is domiciled in this state* (emphasis added).

Entering into the agreement for the payment of compensation in one state does not prevent pursuing a remedy in another state as long as the other state has jurisdiction. This does not, however, allow double recovery as credit is to be given for amounts previously paid.

* * *

It is held that the Iowa Industrial Commissioner has jurisdiction over the subject matter and that the claimant may pursue his remedy under the Iowa Workmen's Compensation Law.

* * *

Signed and filed this 31 day of January, 1977.

ROBERT C. LANDESS
Industrial Commissioner

Appealed to District Court; Dismissed.

**JURISDICTION --
EXTRATERRITORIAL EMPLOYMENT**

HAROLD FREDERICK,

Claimant,

vs.

W. HODGMAN & SONS,

Employer,

and

UNITED STATES FIDELITY AND GUARANTY COMPANY,

Insurance Carrier,
Defendants.

Order

NOW on this 27 day of June, 1978, defendants' motion to dismiss comes on for ruling.

On April 13, 1978, claimant filed an application for review-reopening alleging an injury dated July 28, 1976. Claimant's address was stated as Estherville, Iowa. Claimant further alleges that the claimant answered an ad for employment with the defendant employer placed in an Estherville Iowa, newspaper. Claimant further alleges he worked in Iowa and Minnesota. The employer's address is in Fairmont, Minnesota. Claimant has been paid benefits for the July 28, 1976 injury under the workers' compensation law of Minnesota. The injury occurred in Minnesota.

Defendants' motion is directed to the jurisdiction of the industrial commissioner over the circumstances of the injury occurring July 28, 1976, outside the boundaries of the state of Iowa. The issue is better stated: Whether or not the Iowa Workers' Compensation Law can be applied to entitle the claimant to benefits under the Iowa law for the July 28, 1976 injury occurring outside the boundaries of the state of Iowa.

Defendants' motion is also directed to the right of the claimant to "reopen", given no Iowa memorandum of agreement and payments thereunder, when payments were made under the Minnesota Workers' Compensation Law.

Claimant alleges facts sufficient to be entitled to a determination of his right to Iowa Workers' Compensation benefits for the July 28, 1976 injury, given that he initiates the proper proceeding. The claimant has an Iowa domicile *and* the employer has a place of business in "some other state", §85.71, Code of Iowa. Accordingly, this facet of defendants' motion is overruled.

The claimant alleges an injury in Minnesota and payments pursuant to Minnesota law. Nothing filed at the Iowa Industrial Commissioner's Office, or otherwise, indicates that an Iowa agreement, or award, and payments thereunder exist. Any agreement, if payment in Minnesota is so considered, would be made pursuant to the Minnesota law. Nothing exists in Iowa which can be reopened. Claimant is not entitled to a review-reopening proceeding. The review-reopening proceeding must, therefore, be dismissed. Claimant's right to any Iowa benefits must be sought via an

"original proceeding".

Signed and filed this 27 day of June, 1978.

ALAN R. GARDNER
Deputy Industrial Commissioner

No appeal.

JURISDICTION – EXTRATERRITORIAL EMPLOYMENT

J. CURTIS KLINE,

Claimant,

vs.

WEAVER POTATO CHIP CO.,

Employer,

and

INSURANCE COMPANY OF NORTH AMERICA,

Insurance Carrier,
Defendants.

Arbitration Decision

This is a proceeding in arbitration brought by the claimant, J. Curtis Kline, against Weaver Potato Chip Co., his employer, and Insurance Company of North America, the insurance carrier, to recover benefits under the Iowa Workmen's Compensation Act by virtue of an industrial injury that occurred on January 10, 1974.

* * *

The parties stipulated in part as follows:

1. Claimant sustained an injury arising out of and in the course of his employment on January 10, 1974.

2. By reason of the injury, claimant was temporarily disabled a total of 22 5/7 weeks. The periods of temporary disability were from January 11, 1974, to June 17, 1974, inclusive and September 16, 1974, and September 17, 1974.

3. By reason of the injury, claimant sustained permanent partial disability. The parties are unable to agree as to the extent of the permanent partial disability.

4. The injury occurred at an office and warehouse facility operated by the employer in Omaha, Douglas County, Nebraska.

5. Employer is a Nebraska corporation with its offices, principal place of business and plant located in Lincoln, Nebraska. It operates sales and delivery routes from its warehouse in Omaha, Nebraska. Those routes are in Nebraska and Iowa. At the time of the occurrence, 87 plus percent of the sales from the Omaha warehouse were made in Nebraska, and 12 plus percent of the sales from the Omaha warehouse were made in Iowa.

6. Claimant is a resident of Council Bluffs, Pottawattamie County, Iowa, and at all times during his employment with employer has been domiciled in Iowa.

7. A claim for benefits under the Nebraska Workmen's Compensation Act was made by claimant, and the claim was accepted by employer and insurance carrier.

The defendant-employer filed a special appearance wherein the commissioner's jurisdiction of the subject matter was raised.

The primary issue to be resolved is whether or not the Iowa industrial Commissioner has such jurisdiction over the subject matter.

It is appropriate to recite here the following statutory language found in Section 85.71 (Code) which reads as follows:

EXTRATERRITORIAL JURISDICTION

85.71. If an employee, while working outside the territorial limits of this state, suffers an injury on account of which he, or in the event of his death, his dependents, would have been entitled to the benefits provided by this chapter had such injury occurred within this state, such employee, or in the event of his death resulting from such injury, his dependents, shall be entitled to the benefits provided by this chapter, provided that at the time of such injury:

1. His employment is principally localized in this state, that is, his employer has a place of business in this or some other state and he regularly works in this state, or if he is domiciled in this state, or

2. He is working under a contract of hire made in this state in employment not principally localized in any state, or

3. He is working under a contract of hire made in this state in employment principally localized in another state, whose workmen's compensation law is not applicable to his employer, or

4. He is working under a contract of hire made in this state for employment outside the United States.

In Larson, *Workmen's Compensation* (Desk Ed.) at Section 86.00, Dr. Larson states:

> Any state having a more-than-casual interest in a compensable injury may apply its compensation act to that injury without violating its constitutional duty to give full faith and credit to the compensation statutes of other states also having an interest in the injury. Among the factors which, if occurring within the state, will give rise to such a legitimate interest are: the making of the contract, the occurrence of the injury, the existence of the employment relation, and possibly also the residence of the employee and the localization of the employer's business.

This doctrine has been followed in a number of prior decisions in other jurisdictions and, more particularly, by the United States Supreme Court, which has resolved problems occurring between application of workmen's compensation statutes and full faith and credit requirements. *Ind. Comm. v. McCartin,* 330 U.S. 622, 169 ALR 1179, *Alaska Packers Ass'n. v. Comm'r.,* 294 U.S. 532 (1935).

In the recent case of *Crider v. Zurich Ins. Co.,* 380 U.S. 39, 41 (1965), the court extended the analysis of various state interests to include the employee's residence:

> The state where the employee lives and where he was injured has a large and considerable interest in the

> event . . . The state where the employee lives has perhaps even a larger concern, for it is there, that he is expected to return; and it is on his community that the impact of the injury is apt to be most keenly felt.

Defendants admitted that Claimant's domicile at the time of his injury on January 10, 1974, was Council Bluffs, Iowa. Section 85.71, supra, provides that an employee is entitled to the benefits of the Iowa Workmen's Compensation Law provided that at the time of his injury his employment is principally localized in this state. The language "employment is principally localized in this state" is defined as (1) his employer has a place of business in this state and he regularly works in this or some other state or (2) if he is domiciled in this state. Since Claimant is domiciled in Iowa, the Industrial Commissioner of Iowa does have jurisdiction under Section 85.71, Code of Iowa. The Iowa legislature in enacting this provision recognized the domicile of a claimant as giving rise to a more than casual interest in a compensable injury.

It is therefore adjudged that the Iowa Industrial Commissioner, pursuant to Section 85.71, Code of Iowa, has jurisdiction to determine the merits of Claimant's claim arising from the injury of January 10, 1974.

The parties further stipulated as follows:

8. As of this date, employer and insurance carrier have paid to claimant benefits in the sum of $3,059.14. This is comprised of $1,819.72 for temporary disability benefits and $1,239.42 permanent partial disability benefits.

9. All medical, hospital, drug and miscellaneous expense incurred to date for treatment of the injury in the sum of $3,694.73 has been paid by employer and insurance carrier except for a portion of the bill from Dr. Dennis Green and the bill of Dr. Ronald K. Miller. Among the bills paid was the bill of Dr. David Minard for surgery on claimant's back in March, 1974 and the bill of Dr. David Minard for surgery on the ulner (sic) nerve in the claimant's left arm in September, 1974.

10. Claimant contends he is entitled to benefits under the Iowa Workmen's Compensation Act. He further contends that he has a 20 percent permanent partial disability of the body as a whole by reason of the injury to his back plus a 20 percent permanent partial disability of his left upper extremity by reason of the injury to his ulner (sic) nerve during the March, 1974 hospitalization for surgery on his lower back. He agrees that he had 22 5/7 weeks temporary disability but claims benefits at the rate for temporary disability provided by the Iowa act.

11. The applicable rate of the Iowa Workmen's Compensation Act for temporary disability is the sum of $91.00 per week, and the applicable rate for permanent partial disability is the sum of $84.00 per week.

12. In the event the claim is held to be compensable under the Iowa act, the employer and insurance carrier shall be entitled to credit for the $3,059.14 paid to Claimant to date under the Nebraska act.

13. Dennis R. Green, D.C., 520 Ervin Building, Council Bluffs, Iowa 51501, treated Claimant for the injury during a period commencing January 12, 1974 and ending February 2, 1974. Dr. Green's bill for services rendered was $487.00. The insurance carrier requested and obtained a peer group review of the bill. Pursuant to an opinion received from the peer group on November 7, 1974, the insurance carrier paid to Dr. Green the sum of $344.00. The unpaid balance was $143.00. Claimant refused to pay the unpaid balance. The bill in the amount of $146.00 has been submitted for collection by Dr. Green to Business and Professional Credit Management, Inc., Suite 216, Council Bluffs Savings Bank, Council Bluffs, Iowa 51501. Claimant contends that either the insurance company should be required to pay the balance of the bill or Dr. Green and his agents should be enjoined from attempting to collect the bill.

Dennis R. Green, D.C., testified in support of his charges, and based upon his testimony it is concluded that the doctor's charges of $544.00 are fair, reasonable and were necessary to treat the injury in question. In his direct testimony Dr. Green was sufficiently persuasive to convince the undersigned that the treatment furnished was necessary and reasonable to treat the injury. The remaining issue is the reasonableness of Dr. Green's charges. Dr. Green's total bill was $544.00, covering his entire treatment of the claimant.

The professional review organization for the chiropratic physicians of Nebraska in their report of November 7, 1974, to the defendant insurance carrier took issue with Dr. Green's charges for physical therapy, limiting them to $4.00 per treatment, but allowing $8.00 for chiropractic adjustments. Dr. Green charged $6.00 for physical therapy treatments and $6.00 for chiropractic adjustments. We conclude these charges to be fair and reasonable in Iowa.

Claimant testified that he is aged 33 and is married with four dependent children, and that he began his employment activities as a route driver for the defendant-employer in January, 1970. The claimant further stated that he has been a resident of Council Bluffs, Iowa, since 1964, and the contract of employment was agreed to in the Ambassador Lounge, which is located in Council Bluffs, Iowa. In 1973 the claimant was promoted to a position of sales supervisor, with two Omaha routes and one Council Bluffs route coming under his responsibility.

On January 10, 1974, while scraping ice and snow at the warehouse in Omaha, Nebraska, the claimant sustained a back injury and sought assistance from Dennis R. Green, D.C.

On February 1, 1974, at the suggestion of the defendant-employer carrier, the claimant was seen by David W. Minard, M.D., who after conservative treatment, performed a fusion of L4 and L5 correcting a Grade II spondylolisthesis. In Dr. Minard's opinion the employment activities of the claimant aggravated this congenital condition and required the surgical intervention.

The claimant continued under Dr. Minard's care. On September 16, 1974, Dr. Minard performed surgery on the left elbow in order to correct a condition diagnosed as ulnar neuritis, which may have been the result of a positional strain during treatment of his spinal injury.

During subsequent medical examinations conducted by Robert J. Klein, M.D., for the defendant-employer, and Ronald K. Miller, M.D., for the claimant, these two recognized orthopedic surgeons both expressed the opinion that the ulnar neuritis is causally connected to the industrial episode of January 10, 1974.

The remaining problem requiring our attention is the

nature and extent of the claimant's industrial disability.

Dr. Minard in his report of August 22, 1975, felt the claimant had a 15% permanent partial disability of the body as a whole.

Dr. Klein expressed his medical opinion that the claimant had a 10% disability of the left upper limb together with a 20% permanent disability of the body as a whole.

Dr. Miller, the only physician who took the left arm disability into account, felt that the combination of the two disabilities resulted in a 25 to 27% total body disability.

The claimant has the burden of proving by a preponderance of the evidence that the injury of January 10, 1974, is the cause of his disability on which he now bases his claim. *Lindahl v. L. O. Boggs,* 236 Iowa 296, 18 N.W.2d 607. *Bodish v. Fisher, 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 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 claimant has sustained his burden of proof.

This claimant handled work assignments successfully for the period preceding the episode in question, and it is apparent that he has an industrial disability, which is defined in *Diederich v. Tri-City Railway Co.,* 219 Iowa 587, 593, 258 N.W.2d 899, as follows:

> It is, therefore, plain that the legislature intended the term "disability" to mean "industrial disability" or 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 noted in *Martin v. Skelly Oil,* 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 this issue, we quote from *Olson*, supra, at page 1021:

> Disability * * * as defined by the Compensation Act means industrial disability, although functional disability is an element to be considered (citing the Martin case, supra).

This 33-year-old man will be in the labor market for some lengthy period in the future. His current occupation of route supervisor requires him to handle active delivery of merchandise in a relief function when the regular driver is not available. Cold weather affects his arm and interferes with his ability to drive. The pain in his back prevents him from operating a motor vehicle more than 150 miles in a day. He finds his ability to operate as a relief route salesman has been substantially impaired.

Based upon the foregoing evidence, it is concluded that the claimant has sustained and industrial disability of 37½% of the body as a whole.

* * *

Signed and filed this 5th day of November, 1976.

HELMUT MUELLER
Deputy Industrial Commissioner

No Appeal.

JURISDICTION – INSURER-INSURED

KIRBY F. KILKER,

Claimant,

vs.

GARRY LAUBSCHER, d/b/a
LAUBSCHER TREE SERVICE

Employer,

GARRY LAUBSCHER,

Cross-Petitioner,

vs.

H. E. McCORD d/b/a
H. E. McCORD INSURANCE AGENCY,

Defendant to Cross-Petition.

Order on Appeal

NOW on this 27th day of October, 1977, the matter of the appeal from the order of the deputy industrial commissioner filed May 10, 1977, comes on for determination. On August 10, 1976, claimant filed a petition for arbitration, medical benefits and vocational rehabilitation benefits against Garry Laubscher d/b/a Laubscher Tree Service. The petition indicated that there was no insurance carrier. An appearance was filed on behalf of defendant employer on September 1, 1976. On September 16, 1976, defendant employer filed an answer and denial. On February 2, 1977 defendant employer filed a cross-petition against H. E. McCord d/b/a H. E. McCord Insurance Agency, defendant to cross-petition. Basically, the cross-petition alleges negligence against the defendant to cross-petition for failure to procure workmen's compensation coverage for the defendant employer and cross-petitioner. On the same date a motion for leave to bring in the third party was filed. On April 7, 1977, a resistance to the motion for leave to bring in third party was filed on behalf of the defendant to the cross-petition. On May 10, 1977, the deputy industrial commissioner reviewed the file, the motion, the resistance, and the Iowa Workers' Compensation Law in respect thereto and held that the Iowa industrial commissioner has jurisdiction to decide the question thereby granting the motion for leave to bring in a third party and the filing of the cross-petition and overruling the resistance thereto. On May 20, defendant to cross-petition filed a notice of appeal to the industrial commissioner from the order of the deputy industrial commissioner overruling their resistance and granting the motion of the cross-petitioner to bring in a third party.

Cross petitioner cites the case of *Travelers Insurance Co.*

v. Sneddon, 249 Iowa 393, 86 N.W.2d 870, to support the proposition that the industrial commissioner has jurisdiction to determine the liability of the defendant to cross-petition in this action. The *Travelers* case was one where the insurer brought an action in district court and involved the issue of the jurisdiction of the district court to hear a controversy pending before the Iowa industrial commissioner as to whether the insurance carrier had effectively canceled its policy issued to an employer before his workman was injured. The district court held the industrial commissioner had exclusive jurisdiction over the controversy and the supreme court affirmed. Although that case went far in indicating that the industrial commissioner had broad powers involving the right to decide all questions properly arising out of the controversy before him, it further indicated that these powers could only be exercised in matters coming within his jurisdiction. Jurisdiction in the *Travelers* case appears to be premised upon the provisions of §87.10 of the Code which indicate that jurisdiction of the insured shall be jurisdiction of the insurer and the insurer shall be bound by every agreement, adjudication, award, or judgment rendered against the insured. This is not a case where an action is being brought against an "insurer". Nor is it a case where the validity or existence of an insurance policy is being questioned. The cross-petition alleges negligence on the part of the defendant to the cross-petition in their failure to procure workmen's compensation insurance.

The Iowa cases concerning the relationship between persons seeking insurance and an insurance agent or broker is that the agent is the agent of the insured and not the insurer. *Wolfswinkel v. Gesink,* 180 N.W.2d 452 (1970). *Collegiate Manufacturing Co. v. McDowell's Agency, Inc.,* 200 N.W.2d 854 (1972). *Smith v. State Farm Mutual Auto Insurance Company,* 248 N.W.2d 903 (1976). The *Wolfswinkel* case cited with approval in both the *Collegiate Manufacturing* and *Smith* cases quotes from Am.Jur.2d Insurance, §174, pages 230, 231 where it states:

> As a general rule, a broker or agent who, with a view to compensation for his services, undertakes to procure insurance for another, and unjustifiably and through his fault or neglect, fails to do so, will be held liable for any damage resulting therefrom. The agent or broker is liable on the theory that he is the agent of the insured in negotiating for a policy and that he owes a duty to his principal to exercise reasonable skill, care, and diligence in effecting the insurance. He may be sued for breach of contract or negligent default in the performance of a duty imposed by contract, at the election of his client. *Wolfswinkel v. Gesink,* supra, at page 456.

No case could be found in Iowa where the insurance which was to be procured was workmen's compensation insurance. Two cases from Kansas which are very similar to the matter sub judice are *Keith v. Schiefen-Stockham Insurance Agency, Inc.,* 498 P.2d 265 (Kan. 1972) and *King v. ElDorado Motor Co.,* 311 P.2d 999 (Kan. 1957). In the *Keith* case the court indicated that they followed the same general rule followed in Iowa that a broker or agent who undertakes to procure insurance for another and thereafter, neglects or fails to do so will be held liable for any damage resulting therefrom. The liability is based upon the theory that he is agent for the insured and may be sued for breach of contract or negligent default.

The *King* case appeared to be a case of first impression in Kansas. The situation in Kansas is so similar to that in Iowa that extensive quoting from the case is deemed appropriate.

> In the first place, the Workmen's Compensation Act itself requires that every employer shall secure compensation to his employees by insuring in one of two ways, namely, by insuring and keeping insured the payment of compensation with a company authorized to transact the business of workmen's compensation insurance in the State of Kansas or by showing the Commissioner that he is qualified as a self insurer to pay such compensation (G.S. 1949, 44-532). Moreover such Act specifically provides (G.S. 1949, 44-559) that every policy of insurance against liability under the Act shall be in accord with its provisions and shall be in a form approved by the Commissioner of Insurance. In addition it requires such policy shall contain an agreement that the insurer accepts all provisions of the Act, that the same may be enforced by any person entitled to any rights thereunder, that the insurer shall be a party to all agreements or proceedings under its terms, and that his appearance may be entered therein and jurisdiction over his person obtained as in the Act provided. When these two sections are considered together we think it is clear the Legislature not only meant to make certain the type of insurance required to protect a workman under the Act but intended to limit jurisdiction of the Commissioner in a compensation proceeding to insurance companies executing policies of compensation insurance in form as contemplated by its terms.
>
> In the second, we are constrained to the view, that from the standpoint of public policy, the Act must be construed as just indicated. To hold otherwise and place our stamp of approval, even by implication, on side arrangements or agreements between an employer and third parties, who are in no way qualified to transact the business of workmen's compensation insurance, would permit employers to violate the express provisions of 44-532, supra, and in many cases, due to financial irresponsibility of the third parties, work a hardship on workmen covered by the Act instead of protecting them.
>
> Next we are cited to no decisions recognizing that in a compensation proceeding under our Act, and for that matter under any other compensation Act, the Commissioner has jurisdiction to hear and determine the rights and liabilities of an employer and an insurance agent or broker under the terms of a side arrangement or agreement such as is here involved. In that situation we may well assume appellant's counsel, after diligent search, have been unable to find any. (citations omitted). In fairness it should be here stated that counsel for appellees have cited no case, in support of their positions, which can be

regarded as a controlling precedent and our somewhat extended search of the decisions has failed to disclose any. Hence, the case at bar must be regarded as one of first impression in this jurisdiction.

Finally, even on the basis of strained construction, we do not find anything in the Act giving the Commissioner power and authority to make the involved award. Indeed, in the face of our view respecting the consequences flowing from approval of action of that character in a compensation proceeding, if such a construction were possible we would refuse to make it for reasons previously indicated. *King v. ElDorado Motor Co.,* supra, at pages 1003, 1004.

In the *Keith* case in which the facts are strikingly similar to that in this situation the court said:

> In response to plaintiff's analysis of the theory of their cause of action, defendants argue the trial court's ruling was correct because it has no original jurisdiction, at common law, to determine issues concerning recovery of workmen's compensation. Defendants say that such jurisdiction is vested solely and exclusively in the director of workmen's compensation and the courts on appeal. Of course, as an abstract statement, the assertion of defendants is entirely correct. This court has said many times the Workmen's Compensation Act provides a procedure of its own which is substantial, complete and exclusive in compensation cases. (Garrigues v. Fluor Corporation Ltd., 201 Kan. 156, 439 P2d 111, and cases cited therein.) The trouble with defendants' position in this regard is that the petition states a common law claim for damages against an insurance broker, not a claim for workmen's compensation.

Defendants further argue that the contract alleged by plaintiffs is null, void and against public policy creating no liability against defendants in favor of plaintiffs. In support of this argument defendants rely on the case of King v. ElDorado Motor Co., 181 Kan. 477, 311 P.2d 999. The *King* case was a claim for workmen's compensation under the Workmen's Compensation Act. In the *King* case, one Murray, an independent insurance agent, made a side arrangement or agreement with Noffsinger, an employer, to personally carry Noffsinger's compensation coverage. We held:

> "In a proceeding under the Workmen's Compensation Act the Commissioner lacks jurisdiction to enter an award against an insurance agent or broker who is in no way qualified to transact the business of workmen's compensation insurance in the State of Kansas and, by a side arrangement or agreement with an employer, undertakes the workmen's compensation insurance coverage of the employer." (Syl.)

The *King* case simply stands for the proposition that an award of compensation cannot be made in a workmen's compensation proceeding against a broker or other third party. The decision has no bearing on a common law action against a broker for breach of contract or negligent default, which must be pursued in a court action at common law.

Applying this law to the case sub judice, it can be seen that the industrial commissioner does not have jurisdiction over the defendant to cross-petition.

* * *

Signed and filed this 27 day of October, 1977.

ROBERT C. LANDESS
Industrial Commissioner

No appeal.

LIMITATIONS – ACTIONS

ELOIS EWING,

Claimant,

vs.

IOWA INDUSTRIAL HYDRAULICS,

Employer,

and

AID INSURANCE COMPANY (MUTUAL),

Insurance Carrier
Defendants.

Decision on Appeal

This is a proceeding brought by defendant employer, Iowa Industrial Hydraulics, and its insurance carrier, Aid Insurance Company, pursuant to Iowa Code §86.24 seeking review of a proposed decision in arbitration wherein claimant, Elois Ewing, was awarded benefits under the Iowa Workmen's Compensation Act.

* * *

Claimant, who began working for defendant employer in 1969, worked as a drill operator making holes in metal cases. The drilling produced "little shavings" and fumes which came from a coolant within the machine. Claimant testified to experiencing coughing, weakness, and difficulty in breathing which eventually led to her hospitalization in August, 1972. Although she was able to return to work in January and continued to work in February and March, she stated that she suffered recurrent symptoms, this time accompanied by loss of weight. Her last day of work was March 16, 1973.

On March 27, 1973, she saw Ashton McCrary, M.D. whose testimony by deposition on both March 19, 1977 and November 2, 1977 established a causal connection between claimant's work environment and her disability. Although the doctor cautioned there could be a slight margin of error, he believed "the overwhelming evidence would suggest that this [disability] is due to dust in the plant or something around which she was working that her lungs became hypersensitive to." He further stated that "I was in complete accord [with claimant] that this was an industrial illness contracted and developed over a period of her working there [Iowa Industrial Hydraulics] and exposure and secondary sensitization to some material which

remains unindentified." According to the doctor, it was March or April of 1974 before he put a formal statement in his chart; and regarding communication with claimant, he said:

> . . . she has felt and I have felt at earlier periods of time that it was related to her employment, but whether I ever told her that I thought so and agreed with her emphatically in the office or agreed with her to the point that she understood me, apparently, I can't say anymore than that.

The doctor's diagnosis was "chronic bronchitis and bronchiectasis with intrinsic asthma apparently occupationally related and aggravated." Dr. McCrary thought it was probably September or October of 1973 before claimant understood "that she probably shouldn't go back to work," but he didn't recall specifically ever telling her she should not do so.

Claimant's own testimony indicates that as early as March, 1973, she was of the opinion that there was a causal connection between her illness and her employment (Transcript. p. 22).

Defendants here argue that claimant's claim is barred by the statute of limitations which for workmen's compensation actions is set out in Iowa Code §85.26. Section 85.26, applied to occupational disease cases through Iowa Code §85.16A, provides, "No original proceedings for compensation shall be maintained in any case unless such proceedings shall be commenced within two years from the date of the injury causing such death or disability for which compensation is claimed." This statute of limitations has been strictly construed by the Iowa Supreme Court. *Mousel v. Bituminous Material & Supply Co.,* 169 N.W.2d 763 (Iowa 1969). In *Mousel,* supra, the court dismissed a claim filed in 1966 for a 1958 injury citing with approval 100 C.J.S. Workmen's Compensation §468(2) which states:

> Further, it is held that the requirement as to the time within which a claim for compensation must be made or filed as 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 court strictly applied Iowa Code §1386 (1939) which was essentially the same as Iowa Code §85.26 in *Otis v. Parrot,* 233 Iowa 1039, 8 N.W.2d 708 (1943). In *Otis* an employee was injured on January 4, 1939, developed tuberculosis in March, 1939 and died on July 21, 1939. A petition for arbitration was filed February 5, 1941. Claimant, contending that the time for filing must begin to run in March, argued that the date of the accident and the date of the injury were not the same. The court, however, focused on the "injury causing" language and indicated that the language did not refer to compensable injury or to the state of facts or conditions which first entitle claimant to compensation; but rather the language referred to the causal injury.

Claimant's last day of work was March 16, 1973, meaning that this was the last possible time claimant could have received a causal injury arising out of and in the course of her employment and making it necessary that a petition be filed by March 17, 1975. Claimant's petition was filed December 5, 1975.

Although this commissioner believes the law relating to the statute of limitations to be as it is here stated, even if the statute does not start to run until claimant knew or should have known of the industrial relatedness of her condition, the record indicates claimant was aware that her condition was caused by her employment no later than October of 1973.

Testifying as to company insurance programs was Kenneth Freund, personnel manager at Industrial Hydraulics since September 9, 1973, who said that in addition to workers' compensation insurance coverage provided by AID, the company had a group program with Western Insurance Company. Although he was not personnel manager when Elois Ewing was hired, he assumed that his predecessor had followed his procedure with new employees which included an explanation of workers' compensation and other insurance coverage. According to Freund, the determination of whether a condition should be covered by the compensation carrier or the group carrier was made by a doctor. Regarding group hospital insurance forms he said that "it appeared that Elois was getting these forms from some place else and mailing them in direct herself."

Claimant filed a group insurance form on August 12, 1972. The question in the employee section of whether the ailment resulted from patient's occupation is answered "no." The employer's section is likewise marked "no" in response to whether the disability was due to occupational causes. J. M. Rhodes, Jr., M.D. also checked the "no" box reporting claimant's condition did not arise out of her employment.

Claimant filed another form on March 19, 1973. This time her answer was that she didn't know whether the ailment resulted from the occupation. The employer's answer remained "no."

Claimant's brief asserts that:

> (1) the statute of limitations had been tolled by payment of weekly compensation payments by the Employer without the filing of a Memorandum of Agreement; and (2) that there was constructive fraud and acts of equitable estoppel by the Employer in this cause when they knew that the Claimant had an occupational disease or a "personal injury," arising out of and in the course of her employment and instead of filing an Employer's First Report and filing a Memorandum of Agreement and instead of processing it as a workmen's compensation claim and instead of informing the Claimant that she had an industrial "personal injury" they misled and misrepresented to the Claimant and arranged to have payments made under their group insurance program consisting of twenty-six weeks of weekly compensation at the rate of $60.00 per week which is the maximum payable under said policy in addition to payment of hospital and medical benefits that were limited under said policy.

Claimant's first contention is that the statute of limitations has been tolled by payment of weekly benefits under the group sickness and accident policy. Section 86.13, Code

of Iowa, stated in part:

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

Section 86.13 specifically refers to "compensation." Payment of weekly benefits from the group program was not instituted on the basis of a disability attributable to claimant's employment and is not the form of payment contemplated as tolling the statute of limitations.

Claimant's second argument is that defendants should be estopped from asserting the statute of limitations.

The Iowa Supreme Court in *Axtell v. Harbert,* 256 Iowa 867, 872, 129 N.W.2d 637, 639 (1964), listed the following essential elements of estoppel:

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 representation 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.

See also *Paveglio v. Firestone Tire and Rubber Co.,* 167 N.W.2d 636 (1969). If claimant is to be successful in asserting this claim, all four essential elements must be proved. There is no indication that facts in defendants' possession where any different from those in the possession of claimant. Therefore, claimant's estoppel argument must fail.

* * *

Signed and filed this 2 day of March, 1978.

ROBERT C. LANDESS
Industrial Commissioner

Appealed to District Court; Affirmed Special Appearance By Defendant Contesting Jurisdiction.
Appealed to Supreme Court; Pending.

LIMITATIONS – ACTION

GARLAND B. HILES

Claimant,

vs.

PAKCERS SANITATION SERVICES

Employer,

and

ALLSTATE INSURANCE COMPANY

Insurance Carrier,
Defendants.

Ruling on Motion for Rehearing

Now on this 15 day of December, 1977, the matter of Claimant's Application For Rehearing comes on for determination.

The Industrial Commissioner's file shows that the undersigned deputy industrial commissioner on November 15, 1977 sustained Defendants' Motion To Dismiss on the basis of the statute of limitations. On November 30, 1977, Claimant filed his Application For Rehearing. Appended thereto was an affidavit by Claimant which stated that on May 27, 1975, he fell at work. The affidavit also states that it was not until February 16, 1977 that he realized the May 27, 1975 incident was causing his problems. The affidavit further states that Claimant was in the hospital March 1977, and after that time, talked to a representative of the insurance company. Claimant states that he was left with the impression that the insurance company would take care of the claim.

Claimant had surgery in March 1977 and was discharged from the hospital on April 3, 1977. He was released to return to work on June 6, 1977. In July 1977, he states, the insurance company turned down his claim.

Under this state of the facts, it is possible to infer that the Claimant was strung along by the insurance company until the statute of limitations, Section 85.26, Code of Iowa, had run. However, Claimant does not state that he was in any way defrauded by the insurance company; additionally, there is in the industrial commissioner's file a letter of May 10, 1977, addressed to the Claimant and signed by a representative of the insurance company, which turned down the claim.

In his Application For Rehearing, Claimant cites *Jacques vs. Farmers Lumber and Supply Company,* 242 Iowa 548, 47 N.W. 2nd 236 (1951), stating that Claimant should have two years from the date that he "discovered the injury". It is upon this point that this ruling is made. Unlike the Jacques case, which involved an insidious condition, Claimant here suffered a palpable fall on May 27, 1975. For purposes of this ruling, it is taken as true that Claimant did not realize the consequences of that fall until February 16, 1977. The plain fact is that Claimant still had over three months before the statute of limitations expired. The main point, however, is that Claimant suffered a trauma in May 1975 and had actual knowledge at that time that he was injured. One reason for a statute of limitations is to give the party whom against it runs sufficient time to assess his injury; here it is clear that the two-year period was sufficient in that, within the two-year period, Claimant did in fact know of his condition. The two-year statute of limitations begins to run when the Claimant has knowledge, as in this case, of an incident which is compensable under the workers' compensation law.

WHEREFORE Claimant's Application For Rehearing, filed November 30, 1977, is hereby overruled.

Signed and filed at Des Moines, Iowa this 15 day of December, 1977.

BARRY MORANVILLE
Deputy Industrial Commissioner

Appealed to District Court; Special Appearance By Defendant Overruled.

LIMITATIONS – ACTIONS

BOB RUSTVOLD,

Claimant,

vs.

HY-TOP FOODS,

Employer,

and

EMPLOYERS MUTUAL CASUALTY CO.,

Insurance Carrier,
Defendants.

Review Ruling

This is a proceeding brought by the defendants, Hy-Top Foods, employer, and its insurance carrier, Employers Mutual Casualty 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 §85.26, Code of Iowa, 1973.

An application for arbitration before the Iowa Industrial Commissioner was filed on September 30, 1974. A motion to dismiss was filed by Defendants on October 25, 1974.

* * *

The order of the deputy industrial commissioner entered September 17, 1975 overruled Defendants' motion to dismiss. It was found, in accordance with *Powell v. Bestwall Gypsum Co.*, 255 Iowa 937, 124 N.W.2d 448 (1963), that §85.26, Code 1973, did not bar Claimant's request for medical treatment available in §85.27, Code 1973. Therefore, it was ordered that Defendants answer or otherwise plead to Claimant's application for arbitration. The question on review is whether the running of §85.26, Code 1973, requiring that an original proceeding shall be commenced within two years, precludes the award of medical benefits under §85.27, Code 1973.

The claimant is seeking compensation for personal injuries occurring on March 29, 1972, allegedly arising out of and in the course of his employment with Defendant Employer. Claimant acknowledges that the period of limitations set forth in §85.26, Code 1973, prevents him from seeking weekly compensation, but that it is not a bar for an award of medical benefits pursuant to §85.27, Code 1973. The claimant relies upon the recent decision of *Jacobsen v. Iowa Paint Mfg. Co.*, filed February 11, 1976 in the Office of the Industrial Commissioner. Defendants contend Claimant's action is an original proceeding barred by §85.26, Code 1973, and distinguish the *Jacobsen* decision by renewing their argument that the legislative intent behind the phrase, ". . . no statutory period of limitation shall be applicable thereto . . .", of §85.27, Code 1973, was to modify the statutory dollar maximum ($7,500.00), provided in §85.27, Code 1973.

Although several of the issues in *Jacobsen v. Iowa Paint Mfg. Co.*, supra, are not presently before the industrial commissioner, the question of whether or not the running of §85.26, Code 1973, precludes the award of medical benefits under §85.27, Code 1973, was answered.

The decision in *Jacobsen v. Iowa Paint Mfg. Co.*, supra, rests primarily upon two decisions of the supreme court of Iowa: *Secrest v. Galloway Co.*, 239 Iowa 168, 30 N.W.2d 793 (1948) and *Mousel v. Bituminous Material & Supply Co.*, 169 N.W.2d 763 (Iowa 1969).

In *Secrest v. Galloway Co.*, supra, the claimant was injured in 1941 and a memorandum of agreement was filed that year. Subsequently, in 1945 §1457, Code 1939 (currently §86.34), was amended by chapter 77, §6, Acts of the 51st G.A. to provide that an application to review an award or settlement must be made within three years rather than five years. The court held that it was unable to distinguish §1386 (currently §85.26) and the amendment to §1457, Code 1939. The following language on page 173 is particularly noteworthy:

> 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."

Later in 1969 in *Mousel v. Bituminous Material & Supply Co.*, supra, the supreme court of Iowa in examining the contention that §85.26, Code 1966, must be plead as a special defense in accordance with the provisions of §86.14, Code 1966, stated with approval on page 768:

> 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 compen-

sation 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 on review, ". . . no statutory period of limitation shall be applicable thereto", was absent when the injuries in *Secrest v. Galloway Co.*, supra, and *Mousel v. Bituminous Material & Supply Co.*, supra, occurred. The court in *Secrest v. Galloway Co.*, supra, held that the limitation in §1457, Code 1939 (currently §85.26) was a limitation upon the right of interested parties to receive benefits. However, the quoted language in *Mousel v. Bituminous Material & Supply Co.*, supra, seems to indicate that the better and favored position accepted in most jurisdictions is that the limitation on filing a claim is jurisdictional; but the supreme court of Iowa refused to overrule *Secrest v. Galloway Co.*, supra, which held that the limitation refers to the right of the claimant 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. *Youngs v. Clinton Foods, Inc.*, (D.C. Iowa) 188 F. Supp 15 (1960). It should be noted the supreme court of Iowa in *Powell v. Bestwall Gypsum Co.*, supra, held that the Iowa Workmen's Compensation Act creates three distinct types of benefits: 1) medical and hospital care, 2) burial expenses and 3) weekly death or disability compensation. The *Powell* decision is often erroneously relied upon as holding professional and hospital services are not "compensation" within the terms of the Iowa Workmen's Compensation Act. The proper holding in the *Powell* decision is, however, that professional and hospital services are not paid as "weekly compensation".

The specific language of §85.27 that "no statutory period of limitation shall be applicable. . ." to benefits pursuant to that section controls 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). It is the position of the industrial commissioner that §85.27, Code 1973, provides unlimited benefits. This position was affirmed in *Hager v. Employers Mutual Casualty Co.*, (Judge Bown, Polk County District Court, October 6, 1972).

The logical resolution of the case at bar is to hold in accordance with *Jacobsen v. Iowa Paint Mfg. Co.*, supra. Thus, the industrial commissioner is not deprived of the jurisdiction to award benefits pursuant to §85.27, Code 1973, the nature of such benefits being unlimited.

* * *

Signed and filed this 21 day of July, 1976.

ROBERT C. LANDESS
Industrial Commissioner

No appeal.

LIMITATIONS – ACTIONS

FRANK D. CARDA, SR.,

Claimant,

vs.

SOO TRACTOR SWEEPRAKE CO., INC.,

Employer,

TRAVELER'S INDEMNITY INS. CO.,

Insurance Carrier,
Defendants.

Order

On Tuesday, August 2, 1977 defendants' motion to dismiss in the above matter came on for hearing at the courthouse in Sioux City, Iowa.

Defendants' motion dealt only with claimant's claim for weekly compensation. Although medical benefits in issue in the case were discussed at some length at the hearing, this order deals only with matters raised by the motion.

On the surface of the pleadings and by agreement of counsel that no benefits were paid following the date of an April 26, 1974 review-reopening decision, the current petition for review-reopening filed May 11, 1977 is filed over three years from the date of payment of last compensation. If this were all, the statute of limitations would have run as to claimant's right to weekly compensation.

However, it was agreed by counsel at the time of the hearing on the motion that an appeal of the April 26, 1974 decision was taken to the district court. A ruling of the district court is now on appeal to the Iowa Supreme Court. It appears that a ruling of the Iowa Supreme Court could, in theory, result in a different ruling than that given in the April 26, 1974 decision. Thus a later payment could theoretically be ordered so that the "last payment" of weekly compensation could be at a point where the statute of limitation had not run. Accordingly this deputy commissioner feels that the defendants' motion cannot now be ruled upon until a resolution of the matter pending before the Iowa Supreme Court is resolved. Likewise, it would appear the merits of the case cannot be reached until the

issue on appeal is decided. To require defendant to appear and defend a case where on the surface the statute of limitations has run would require undue time and expense. Unless claimant can show matters on issue not integrally tied to the appeal of the April 26, 1974 decision the matter should not proceed. A stay of the current proceeding however is beyond the scope of the instant motion or order.

Defendants' motion to dismiss is denied.

Claimant received adequate notice of the time for hearing. However counsel was fifteen minutes late. The first fifteen (15) minutes of the court reporters time for this proceeding are taxed to the claimant, the remainder to defendants.

Signed and filed this 9 day of August, 1977.

ALAN R. GARDNER
Deputy Industrial Commissioner

No appeal.

LIMITATIONS – ORIGINAL PROCEEDING

CHARLES W. HOWARD,

Claimant,

vs.

JOHN DEERE WATERLOO
TRACTOR WORKS,

Employer,
Self-Insured,
Defendant.

Review Decision

This is a proceeding brought by claimant, Charles W. Howard, seeking review of an arbitration decision filed June 23, 1976, and of a proposed decision on rehearing filed February 10, 1977, wherein the claimant was denied compensation benefits for an injury which was found to have occurred June 20, 1966.

* * *

It should be noted that incorrect procedure was followed in the case sub judice. An application for arbitration was filed December 13, 1974 concerning an injury of June 20, 1966. The deputy commissioner's decision was filed June 23, 1976. On July 2, 1976 claimant filed both a petition for review and a motion seeking reopening of the case so that additional testimony might be heard. Although the petition for review was an appropriate procedure for a proceeding in process prior to July 1, 1975, the effective date of the Iowa Administrative Procedure Act, the deputy's allowance of the additional evidentiary deposition which was, in effect, a rehearing was not. Defendant filed neither a resistance to claimant's motion nor an appeal from the deputy commissioner's order. An arbitration decision on rehearing was filed by the deputy on February 10, 1977. This decision affirmed his previous decision. Because the decision to be rendered by this commissioner will reach the same outcome as the prior decisions of the deputy, no prejudice is found to have resulted from the granting of the rehearing.

Claimant alleges an injury on June 20, 1966 when he crawled on a shake-out to retrieve a mold that had been placed too far down on the machine. At that time he felt a pop in his back which forced him to quit working for the remainder of the shift. He consulted his family physician, Warren Nash, M.D. who on June 20 confined him to the hospital. Less than a month later claimant was again hospitalized for a myelogram and back surgery. Additional back surgery was performed later.

Pete Urban, a member of the personnel department, described John Deere's handling of injuries. An employee injured in the plant would be treated by the company doctor and would be paid workers' compensation by the company. An employee injured outside the plant would be paid a weekly indemnity by Travelers Insurance Company. Because claimant had not been seen by the plant physician, he was automatically placed on weekly indemnity. John Deere's procedure in this area was to provide fifty-two weeks of sick pay under the Travelers Insurance Company program. Following this fifty-two week period, life insurance benefits were paid. The final phase of the program was separation payment which was part of the union contract supplemental agreement. Urban, who helped claimant fill out an application for separation pay, testified that this procedure was carefully explained to the claimant who indicated that he understood what was being done.

Claimant, who has given testimony regarding his injury on four separate occasions which include a discovery deposition on June 4, 1975; an arbitration hearing on October 14, 1975; a second deposition on October 26, 1976; and the appeal proceeding August 15, 1977, asserts his belief that at the end of a five-year period he could take a physical; and if he passed, he could regain his old job.

Defendant alleges that this action is barred by Iowa Code §85.26 which says: "No original proceedings for benefits under this chapter, chapter 85A or 86, shall be maintained in any contested case unless such proceedings shall be commenced within two years from the date of the occurrence of the injury for which benefits are claimed except as provided by section 86.20."

Claimant's response has been an attempt to show that defendant should be estopped from using this bar because claimant was mislead as to the conditions attached to his receipt of disability payments. The Iowa Supreme Court in *Axtell v. Harbert*, 256 Iowa 867, 872, 129 N.W.2d 637, 639 (1964), listed the following essential elements of estoppel:

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.

See also *Paveglio v. Firestone Tire and Rubber Co.*, 167 N.W. 2d 636 (1969). If claimant is to be successful in asserting this claim, all four essential elements must be proved.

The first allegation to be proved is that defendant falsely represented or concealed a material fact. The facts here presented do not show that defendant did either. Claimant saw his own doctor regarding his back problem and any information about his health condition was in his possession.

Richard Acker, M.D. who is medical director at John Deere Waterloo, examined his records which were admitted into evidence and found injuries for which Howard had been treated beginning in 1962. A summary of his records written June 6, 1975 indicated no compensable injury related to the disc surgery. The doctor's file also contained a letter from Robert H. Kyle, M.D. which stated claimant "did not describe any specific injury" at the time his history was taken on June 24, 1966. A letter from Coleman C. Burns, Jr., M.D. of the Northeastern Psychiatric Clinic writes that claimant's acute low back strain "apparently was not job connected."

Because defendant had no knowledge of an injury arising out of and in the course of claimant's employment, it would be impossible for defendant either to falsely represent or to conceal a material fact from claimant. As failure to prove one required element prevents claimant from asserting defendant is estopped, claimant's claim is barred by the statute of limitations. Further, since it is found that there was no false representation or concealment, proof of the other elements is not possible.

WHEREFORE, it is found and held:

That claimant's claim is barred by the statute of limitations set out in Iowa Code §85.26.

That claimant has failed to prove defendant should be estopped from asserting the statute of limitations as a bar.

* * *

Signed and filed this 16 day of February, 1978.

ROBERT C. LANDESS
Industrial Commissioner

Appealed to District Court.

LIMITATIONS – APPEAL FROM DECISION OF DEPUTY

MILDRED A. FROST,

Claimant,

vs.

S. S. KRESGE COMPANY,

Employer,
Self-Insured,
Defendant.

Ruling

NOW ON THIS 15 day of March, 1977, the matter of defendants' motion to dismiss claimant's application for appeal, along with claimant's resistance thereto, comes on for determination.

It should be noted at the outset that claimant filed an application for rehearing, pursuant to §17A.16, Code of Iowa. Section 17A.16 provides only for rehearing from a *final* decision by the agency. An arbitration decision is a *proposed* decision. Rehearing of the *proposed* decision of a deputy industrial commissioner is provided by Rule 500-4.24, Iowa Administrative Code.

Ruling

NOW on this 1 day of March, 1978, the matter of claimant's motion to dismiss defendant's notice of appeal and defendant's resistance to this motion comes on for determination.

A review of the file indicates an arbitration decision was filed August 31, 1976 in which it was held that claimant's injury arose out of and in the course of her employment with defendant employer. A supplemental decision, filed January 13, 1978, awarded benefits to claimant. Defendant's Notice of Appeal was filed January 31, 1978.

The basis for claimant's motion to dismiss is that the Notice of Appeal was not filed within twenty days of the arbitration decision. In this instance, however, the arbitration decision was filed with leave given to claimant to supplement the record with additional evidence to satisfy the medical requirements of the case in order to substantiate her claim. The supplemental decision, filed January 18, 1978, rendered it a complete decision. Therefore, the entire matter is subject to appeal as of the date of the completed decision.

THEREFORE, defendant's motion to dismiss should be and is hereby overruled.

Signed and filed this 1 day of March, 1978.

ROBERT C. LANDESS
Industrial Commissioner

No appeal.

LIMITATIONS – APPEAL FROM DECISION OF DEPUTY

JAMES FREDRICKSEN,

Claimant,

vs.

LEWIS SYSTEMS OF IOWA, INC.,

Employer,

and

ZURICH-AMERICAN INSURANCE CO.,

Insurance Carrier,
Defendants.

Ruling

A review of the record in this case yields the following pertinent information: An arbitration decision was filed in this office on January 14, 1977; claimant's application for rehearing was filed January 31, 1977; claimant's application for appeal from the arbitration decision was filed in this office on February 7, 1977; defendants' motion to dismiss was filed February 10, 1977.

Rule 500-4.25 (1) provides inter alia, "When a decision in arbitration is to be appealed to or reviewed by the industrial commissioner, it shall be as provided in 4.26". Also, "Use of the rehearing procedure provided in this rule does not extend the time for appeal from the arbitration decision." Rule 500-4.26 provides, "An appeal to the commissioner from a decision, order or ruling of a deputy commissioner in an arbitration proceeding shall be as provided in sections 86.24 and 86.37."

Section 86.24, Code of Iowa, states in part, "Any party aggrieved by the decision or findings of a deputy industrial commissioner may, within twenty days after such decision is filed with the industrial commissioner, file in the office of the commissioner a petition for review, and the commissioner shall thereupon fix a time for the hearing on such petition and notify the parties." Section 86.37 relates to the place of such hearing. Section 86.24 clearly provides that the time for filing an application for review or appeal begins to run when the arbitration decision is filed with the industrial commissioner. See also *Herbig v. Walton Auto Co.*, 186 Iowa 923, 171 N.W. 154 (1919).

Section 4.1(22), Code of Iowa, provides the method for computing time in applying §86.24 and, according to that method, the last date on which an application for appeal of the arbitration decision in this case could have been timely filed was Thursday, February 3, 1977.

The provisions of §86.24 are jurisdictional in nature and when the time provided by that section for filing appeals has run, the commissioner is without jurisdiction to hear an appeal. *Barlow v. Midwest Roofing Co.*, 249 Iowa 1358, 92 N.W.2d 406 (1958). "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." *Barlow*, supra.

WHEREFORE, it is found and held as a finding of fact that claimant's application for appeal was not timely filed within the period provided by Rules 500-4.25(1) and 4.26 and §86.24, Code of Iowa.

* * *

Signed and filed this 15 day of March, 1977.

ROBERT C. LANDESS
Industrial Commissioner

No appeal.

LIMITATIONS – APPEAL FROM DECISION OF DEPUTY

SHIRLEY DUVALL, n/k/a
SHIRLEY PESCI,

Claimant

vs.

ROYAL ALUMINUM FOUNDRY, INC.,

Employer,

and

AETNA CASUALTY & SURETY,

Insurance Carrier,
Defendants.

Review Decision

This is a proceeding brought by claimant, Shirley Duvall, n/k/a Shirley Pesci, pursuant to Iowa Code §86.24 for review of an arbitration decision wherein it was found that although claimant sustained an industrial injury on March 24, 1972, she neither lost time nor suffered any permanent partial disability as a result of such injury.

* * *

A procedural history is necessary to place this case in the proper perspective. Claimant originally filed her action pro se on March 19, 1974. After consulting several members of the bar concerning representation, claimant finally obtained representative counsel on January 3, 1975. The matter was finally heard on September 24, 1975. An arbitration decision was filed on January 13, 1976. Claimant filed an application for rehearing on January 21, 1976 which was denied on January 23. On January 29, 1976, claimant filed a petition for review of the arbitration decision. Defendants responded with a motion to dismiss filed April 12, 1976. Claimant resisted the motion on May 11, 1976. On May 21, 1976, claimant's counsel filed a withdrawal of counsel.

The hearing on appeal of this matter was conducted on September 28, 1977. During the considerable period of time from the filing of the notice of appeal to the time of actual hearing, claimant was repeatedly encouraged to obtain counsel because of the legal technicalities involved in her case. Counsel was not obtained by the claimant, and she proceeded to the review hearing pro se.

It is necessary to determine what law applies to the review of this case. Claimant filed an application for arbitration on March 19, 1974 making this case a proceeding in process prior to the enactment of the Iowa Administrative Procedure Act which became effective July 1, 1975. The language of Iowa Code §17A.23(2) (1975) expressly provides:

> The Iowa administrative procedure Act shall be contrued 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 added)

The Iowa Administrative Procedure Act (IAPA) failed to define "proceedings in process". This failure necessitates the examination of the IAPA in toto, in an effort to ascertain 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). Iowa Code §17A.11 allows 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.

Sections 17A.15(1) and 17A.15(2) distinguish "final decision" from "proposed decision". When the agency did not preside at the reception of evidence in a contested case, a proposed decision is made by the hearing officer. A proposed decision which is not appealed becomes a final decision. If a proposed decision is appealed, the agency issues the final decision. Since the hearing officer in the first instance issues only a proposed decision, the finalizing of that decision either by passage of time, appeal or review on motion is all a part of the same proceeding. Judicial review of any *final* agency action by a person or party who has exhausted all adequate administrative remedies is provided for in §17A.19(1).

Therefore, it is found that "proceedings in process" include the appeal within the agency and that the appeal is not an independent proceeding.

Arthur Earl Bonfield's article, *The Iowa Administrative Procedure Act: Background, Construction, Applicability, Public Access to Agency, Law, The Rulemaking Process,* 60 Iowa Law Review 758, suggests a construction of 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 proceeings 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 Legislative 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.* (emphasis supplied)

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. The broad construction provisions of Iowa Code §17A.23 are inapplicable to this proceeding.

Iowa Code §86.24 does apply to this case. It states in part, "Any party aggrieved by the decision or findings of a deputy industrial commissioner may, within ten days after such decision is filed with the industrial commissioner, file in the office of the commissioner a petition for review, and the commissioner shall thereupon fix a time for the hearing on such petition and notify the parties." Section 86.37 relates to the place of such hearing. Section 86.24 clearly provides that the time for filing an application for review or appeal begins to run when the arbitration decision is filed with the industrial commissioner. See also *Herbig v. Walton Auto Co.,* 186 Iowa 923, 171 N.W. 154 (1919).

Iowa Code §4.1(22) provides the method for computing time in applying §86.24 and, according to that method, the last date on which an application for appeal of the arbitration decision filed January 13, 1976 could have been timely filed was Friday, January 23, 1976.

The provisions of §86.24 are jurisdictional in nature and when the time provided by that section for filing appeals has run, the commissioner is without jurisdiction to hear an appeal. The Iowa Supreme Court in *Barlow v. Midwest Roofing Co.,* 249 Iowa 1358, 1360, 92 N.W.2d 406, 407 (1958) declared:

> 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.

As a caveat, it is noted that even if this were a proceeding initiated after the effective date of the IAPA and the rules of the industrial commissioner adopted pursuant thereto applied, claimant's appeal still would not have been timely. Rule 500-4.25(1) dealing with appeal when a rehearing is requested as in effect at that time provided inter alia, "When a decision in arbitration is to be appealed to or reviewed by the industrial commissioner, it shall be as provided in 4.26. . . . Use of the rehearing procedure provided in this rule does not extend the time for appeal from the arbitration decision." Rule 500-4.26 provides, "An appeal to the commissioner from a decision, order or ruling of a deputy commissioner in an arbitration proceeding shall be as provided in sections 86.24 and 86.37."

This commissioner found at the time of hearing that claimant's application for appeal was not timely filed within the period provided by §86.24 and in addition that claimant had not given defendants notice of an intent to present additional evidence in compliance with that section. As all parties were present at the review hearing, claimant was allowed to make an offer of proof. This offer of proof which included statements by claimant and various exhibits was viewed as a means of expediting any further hearing of this matter in the event this ruling was determined by a higher tribunal to be incorrect. Correspondence from the claimant prior to and since the time of hearing as well as the offer of proof have not been considered in this decision for the reasons indicated.

WHEREFORE, it is found and held as findings of fact: That claimant's appeal was not timely filed.

* * *

Signed and filed this 2 day of December, 1977.

ROBERT C. LANDESS
Industrial Commissioner

Appealed to District Court; Affirmed.

LIMITATION – APPEAL FROM DECISION OF DEPUTY

EMMA JOANN CURRY,

Claimant,

vs.

WALLY RAY d/b/a FRANK'S MAIDRITE,

Employer,

and

UNITED STATES FIDELITY & GUARANTY COMPANY,

Insurance Carrier,
Defendants.

Review Ruling

Emma Joann Curry, claimant, filed an application for arbitration on September 25, 1974, alleging that she sustained injuries arising out of and in the course of her employment with Wally Ray, d/b/a Frank's Maidrite, defendant employer. On December 19, 1975 the arbitration decision in this matter was filed dismissing Claimant's application for arbitration. It was found that Claimant failed to sustain her burden of proof by a preponderance of the evidence that the injuries of May 10, 1974 and May 16, 1974 resulted in compensable disability and medical expenses.

On January 7, 1976 an amended decision was filed by the deputy industrial commissioner. The amended decision provided that a clerical error had been committed in the arbitration decision and amended the decision to read:

1. On page 2, the date inthe first sentence, "She was examined by G. C. Colson on December 24, 1974, at the emergency room of Pekin Memorial Hospital in Pekin, Illinois," should read December 24, 1973.

2. On page 2, the date in the last sentence of paragraph three, "At approximately 11:00 a.m. on May 16, 1975, Claimant was taken to Broadlawns County Hospital by the daughter of Mrs. Sowles," should read May 16, 1974.

It was further provided that the remainder of the decision shall stand as in the original decision filed December 19, 1974.

On January 12, 1976 Claimant filed an "appeal" to the industrial commissioner from the decision of the deputy industrial commissioner rendered December 19, 1975 and as amended by the decision of the deputy industrial commissioner dated and filed January 7, 1976. A "resistance to notice of appeal" was filed January 13, 1976 by Defendants alleging that Claimant did not comply with the ten day period provided in §86.24, Code of Iowa, 1973, and the filing of the "Amended Decision" doing no more than correcting the typographical errors as to dates and such action does not renew the period for filing notices of appeal (technically, a "petition for review" rather than "appeal" as it was a proceeding in process prior to July 1, 1975, the effective date of the Iowa Administrative Procedure Act).

Section 86.24, Code of Iowa, 1973, provides: "Any party aggrieved by the decision or findings of a deputy industrial commissioner or board of arbitration may, within ten days after such decision is filed with the industrial commissioner, file in the office of the commissioner a petition for review . . ." *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 supreme court of Iowa indicated that timely filing was jurisdictional and concluded "that the commissioner himself cannot extend or diminish jurisdiction to act under this law."

The issue presented for review is whether or not the filing of the amended decision, correcting typographical errors, renewed the period for filing a petition for review under §86.24, Code of Iowa.

The amended decision, although not so entitled, was in the nature of a nunc pro tunc order. It is fundamental law that courts possess the inherent power to correct the record and enter nunc pro tunc order or judgment, the lapse of time being no obstacle to the exercise of such power. *Yost v. Gadd,* 227 Iowa 621, 288 N.W. 667 (1939). The supreme court of Iowa in *Chariton & Lucas County Nat. Bank v. Taylor,* 213 Iowa 1206, 240 N.W. 740 (1932), stated that the function of "nunc pro tunc" judgment or order is to put on record and to render effective a finding or adjudication of a court actually or inferentially but by oversight not made of record. In other words, the exercise of the power to enter an order or judgment nunc pro tunc presupposes the actual finding or prior rendition of a judgment. Generally, notice is not even necessary to make a nunc pro tunc entry to correct an obvious mistake in the judgment. *Miller v. Bates,* 228 Iowa 775, 292 N.W. 818 (1940).

The record on review clearly supports the amendments

made by the deputy industrial commissioner. The claimant does not in any way dispute the sufficiency of the evidence on these questions of fact. The deposition of Claimant and Defendants' Exhibit 2 establish that Claimant was in the emergency room of Pekin Memorial Hospital on December 24, 1973. The deposition of Claimant supports the amendment that Claimant was taken to Broadlawns County Hospital on May 16, 1974.

It is undisputed that the deputy industrial commissioner had jurisdiction to enter the amended decision. The rights of no third party had in any way intervened and this action was not prejudicial to the parties. By inadvertance and mistake, the arbitration decision as originally entered contained two typographical or clerical errors. The errors were perfectly obvious and the amended decision merely corrected the errors and made the arbitration decision conform to the evidence contained in the record. It in no way, however, alters the outcome in the original decision.

Nunc pro tunc entries or orders of judgment are based upon a legal fiction. The general rule is that a nunc pro tunc entry is an entry of something actually previously done, which relates back to have validity from the date when it should have been entered. *Arnd v. Poston,* 199 Iowa 931, 203 N.W. 260 (1925).

Although the industrial commissioner or his deputies may not enter a "judgment" in the sense that one could not execute upon the order without taking it to district court it is clear that for the purposes of intra-agency review a decision, finding or order has finality when it is filed.

In his article, *Thirty Years of Motion Practice Under the Iowa Rules-or-Traps, Pitfalls and Other Hidden Dangers,* 21 Drake Law Review 447 (June, 1972), Associate Professor M. Gene Blackburn wrote under the subheading "Finality for Appeal" at p. 486:

> * * But Rule 331 (R.C.P. 331), having to do with appeals from final adjudication, is not confined to judgments, but includes "decisions." Thus, the question of finality is best determined by reference to Rule 331 and relates to the question of whether the order or decision finally adjudicates the rights of the parties. Thus the question of finality within this context should rightly turn on the nature of the order or decision and not on the technical nature of the judgment entry.

The arbitration decision of December 19, 1975 finally adjudicated (unless timely appealed) the rights of the parties. Nothing in the amended decision alters the adjudication of these rights.

Based upon the previous considerations, it is determined that the amended decision in the case at bar was in essence similar to a nunc pro tunc entry and therefore relates back to have validity from the date the arbitration decision was issued on December 19, 1975. In accordance with §86.24, the claimant failed to file a petition for review within ten days after the arbitration decision was filed. The general rule is that failure to appeal within the time provided by statute (§86.24, Code) is fatal to the jurisdiction of the industrial commissioner; hence, dismissal of the notice of appeal is correct. *Barlow v. Midwest Roofing,* supra.

WHEREFORE, it is hereby held that the period for appeal under §86.24, Code of Iowa, has passed, thus making the resistance to the notice of appeal valid.

* * *

Signed and filed this 19th day of November, 1976.

ROBERT C. LANDESS
Industrial Commissioner

No Appeal.

LIMITATIONS – APPEAL FROM DECISION OF DEPUTY

ORBRA B. GREERY,

Claimant,

vs.

UNIVERSITY AVENUE COAL CO.,

Employer,

and

ST. PAUL INSURANCE COMPANIES,

Insurance Carrier,
Defendants.

Ruling

On April 8, 1976 an arbitration decision was filed in the above captioned matter which denied the relief sought in Claimant's application for arbitration. On April 20, 1976 a petition for review and notice of additional testimony on behalf of the claimant were file stamped in the Office of the Industrial Commissioner. A motion to dismiss the petition for review was filed April 27, 1976. On May 3, 1976 a resistance to the motion to dismiss was filed by Claimant.

The petition for review and notice of additional testimony was file stamped twelve days after the filing of the arbitration decision. It is noted that proof of service signed by the claimant's attorney and affixed to the petition for review and notice of additional testimony is dated April 14, 1976.

Code §17A.15(3) provides for appeal from the presiding officer (deputy industrial commissioner) of a proposed decision (in this case, an arbitration decision) within the time provided by rule. Rule 500-4.26, Iowa Administrative Code, states an appeal to the commissioner from a decision, order or ruling of a deputy industrial commissioner in an arbitration proceeding shall be as provided in §86.24 and §86.37. Section 86.24 of the Code provides ten days from the filing of the arbitration decision for the filing of the petition for review by the commissioner. Section 86.37 relates to venue.

Section 86.24 has been interpreted by the supreme court of Iowa in the case of *Barlow v. Midwest Roofing Co.,* 249 Iowa 1358, 92 N.W.2d 406 (1958). In that case, the arbitration decision was filed in the Office of the Industrial Commissioner on April 24, 1957. The ten-day period prescribed in §86.24 of the Code expired on Saturday, May 4, 1957. The petition was not filed until Monday, May 6,

1957. The defendants filed a motion to dismiss the petition alleging that more than ten days had passed since the decision was filed and the commissioner no longer had jurisdiction to act on the matter. The claimant's resistance to the motion alleged that he attempted to file his petition on Saturday, May 4, 1957 but the office was closed. The Office of the Industrial Commissioner was conceded to be regularly and customarily closed on Saturdays. The case provides that §86.24 is a limitation on the jurisdiction of the commissioner. If the petition is not filed within the time provided, then the industrial commissioner is without jurisdiction to review the matter. The court held a motion to dismiss the petition was properly sustained on the ground more than ten days had expired, there being no statutory provisions for extending the time, except when the last day of the period falls on a Sunday.

The court stated in *Barlow v. Midwest Roofing Co.* at page 1362, "We, of course, have no authority to amend this statute and extend the time to file the petition for review, even though we feel it should be extended. It is obvious that we cannot extend the commissioner's jurisdiction nor interfere in the legislative discretion concerning certain rights which have been considered and acted upon by that body."

Rule 500-2.1, Iowa Administrative Code, allows the industrial commissioner or his designee to modify the time to comply with any rule. The question to be resolved is whether by virtue of Rule 500-2.1 the industrial commissioner may modify a rule which incorporates by reference the ten-day filing requirement of §86.24, which has been previously interpreted by the supreme court.

The 1961 case of *Clarion Ready Mixed Concrete Co. v. Iowa State Tax Commission,* 252 Iowa 500, 107 N.W.2d 553, involved a similar situation to the case at bar. The dispute arose when the tax commission attempted to interpret the meaning of §422.45(2), Code of Iowa, 1958, in Rule No. 41, 1958 Iowa Departmental Rules page 458. The supreme court of Iowa said that when statutes are clear and unambiguous, they are not subject to interpretation by the courts. If a real question on construction does arise, the court stated the interpretation of the statute rests solely with the courts. The following portion of Justice Larson's opinion on pages 507 and 508 is particularly clear:

> It is true that courts give weight to administrative interpretation of statutes where the meaning admits of doubt and the rule is of long standing. Northwestern States Portland Cement Co. v. Board of Review, 244 Iowa 720, 733, 58 N.W.2d 15, 23, and citations. However, it is equally clear that the plain provisions of the statutes cannot be altered by an administrative rule no matter how long it has existed or has been exercised. City of Mason City v. Zerble, 250 Iowa 102, 109, 93 N.W.2d 94 and citations; *City of Ames v. State Tax Commission,* supra, 246 Iowa 1016, 1022, 71 N.W.2d 15, 19. If Rule No. 41 therefore imposes the tax herein, as the commission contends, and it is not consistent with the statutory provisions in section 422.45(2), then it is ineffective. As we said in the Ames case, supra, "The function of the commission is an administrative one, and it may enact reasonable rules and regulations necessary in carrying out the legislative enactments. But it may not make law, or by rule change the legal meaning of the common law or the statutes."

The rule which sets the appeal in this matter incorporates the provisions of a statute. Since the rule incorporates a statute and since the statute has been previously interpreted by the supreme court of Iowa, it would logically follow that the judicial decision indicating that the timeliness of the filing is jurisdictional, prevents the industrial commissioner from acting under the authority of a rule allowing modification of time, essentially conferring jurisdiction upon himself which has previously expired. "It must be conceded that the commissioner himself cannot extend or diminish his jurisdiction to act under this law." *Barlow v. Midwest Roofing Co.,* supra, at page 1360.

Section 86.24, Code of Iowa, provides in part:

> 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 . . .

In computing time in a matter such as this, the first day shall be excluded and the last day included, unless the last day falls on a Saturday, Sunday or enumerated holidays in which case the time prescribed shall be extended as to include the whole of the following Monday. Section 4.1(23), Code of Iowa. (This section provides for the method of computing time in the construction of statutes and has been amended since the 1958 *Barlow* decision.) By this method of computing, the last day for timely filing of the appeal was Monday, April 19, 1976. The petition was file stamped the following Tuesday.

Claimant contends that he satisfied §86.24 by depositing the petition for review and notice of additional testimony in the mail addressed to the commissioner within the ten-day period. The meaning of "filed in the office" of §86.24 was considered by this commissioner in the case of *Barker v. Richeson Rental,* a review order filed July 31, 1975. The *Barker* decision relied upon the case of *Brembry v. Armour and Co.,* 250 Iowa 630, 95 N.W.2d 449 (1959), in which the supreme court of Iowa 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 attorney mailed an application for arbitration to the industrial commissioner. This was a 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 upon 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. This position was upheld earlier in *Mills v. Board of Supervisors,* 227 Iowa 1141, 290 N.W. 50 (1940), a non-workmen's compensation case. In *Mills v. Board of Supervisors,* supra, the supreme court of Iowa defined the word "filed" as "a paper is said to be filed when it is delivered to the proper officer and received to be kept on file". Hence, the ten-day period provided in §86.24 was not satisfied by the deposit of the petition for review and notice of additional testimony in the mail.

Although the *Barlow* case was replete with admonitions which indicated the opinion that the ten-day requirement for filing a petition for review was inadequate, nothing was done by the general assembly until 1976 to correct this inequity. The act which extended the time for filing for appeal was not effective until July 1, 1976, however, and is not therefore available in this proceeding.

As a caveat, it might be noted the claimant contends the defendants should be held to strict proof that the petition for review and notice of additional testimony was not in fact timely filed. It would serve no useful purpose to require the undersigned to certify the normal procedure for receiving documents in the Office of the Industrial Commissioner; that the procedure is to stamp all documents with the date they are received in the office and that such document was received in the normal course of doing business in the office. Since the undersigned is the individual who would normally make such a certification and then would be the same to reply upon it, official notice shall be taken of such facts. The claimant was apparently the unfortunate victim of an increasing delay in mail service. If the power were available to the commissioner to confer jurisdiction upon himself where it has not been delegated, this would be a case in which it most probably should be exercised. Such power is not, and perhaps should not be generally available, however.

* * *

Signed and filed this 11th day of August, 1976.

ROBERT C. LANDESS
Industrial Commissioner

Appealed to District Court; Reversed and Remanded. Appealed to Supreme Court; Denied.

MEDICAL EXAMINATION – EMPLOYEE Page

MEDICAL INFORMATION – RELEASE

MEDICAL REPORTS

MEDICAL SERVICE

CLIFFORD E. ALLISON,

Claimant,

vs.

LAKE OIL COMPANY, INC.,

Employer,

and

STATE AUTOMOBILE & CASUALTY UNDERWRITERS,

Insurance Carrier,
Defendants.

Ruling on Application for Payment of Medical Benefits

This is a proceeding in Review-Reopening brought by Clifford E. Allison, the claimant, against Lake Oil Co., his employer, and State Automobile & Casualty Underwriters, the insurance carrier, to recover $7,993.00, being the cost of hospital and medical services furnished by the Veterans Administration (herein called "VA") under the Iowa Workers' Compensation Act by virtue of an industrial injury which occurred on August 1, 1975.

On April 20, 1977 the parties entered into the following stipulation, to wit:

> For purpose of the hearing on the Petition for Review-Reopening and 85.27 Benefits by and between the Claimant, the Employer and State Automobile and Casualty Underwriters, Insurance Carrier, it is hereby stipulated that the hospital and medical services furnished by the Veterans Administration Hospital, Des Moines, Iowa were necessary for the treatment of an injury incurred or aggravated by the employment of the Claimant in the course of and arising out of Claimant's employment. Further, such charges in the amount of $7,993.00 are stipulated to be the fair and reasonable charge for the services at the material times.
>
> The parties stipulate that the only issues are, (1) the right of the Veterans Administration to charge and be paid for hospital and medical services furnished the Claimant, and whether or not the Iowa Industrial Commissioner has the power and authority to order payment, and (2) the allegation of the Employer and Insurance Carrier by way of Affirmative Defense, that Clifford E. Allison is not the real party in interest in this litigation.

On June 23, 1977 a ruling was entered by the undersigned sustaining the Defendants' Motion to Dismiss on the grounds that the VA had failed to establish itself as the legal representative of the claimant.

On July 18, 1977 an Application for Rehearing filed by the VA was sustained, the VA having filed a "Power of Attorney and Agreement" on June 30, 1977.

The agreement so filed reads as follows:

POWER OF ATTORNEY AND AGREEMENT

> For a valuable consideration I hereby assign to the Administrator of Veterans Affairs and his successors in such Office, to the extent hereinafter indicated, all claims, demands, entitlements, judgments, administrative awards, and the proceeds thereof, and all causes

of action which I now have, and which I may have hereafter, by reason of any liability of third parties entitling me to hospital care, or medical or surgical treatment, or to reimbursement for all or part of the cost of any such; or recovery of damages for all or part thereof:

(a) based on contract, partially enumerated here as (1) membership in a union, fraternal or other organization; (2) rights under a group hospitalization plan or under any insurance contract or plan which provides for payment or reimbursement for the cost of medical or hospital care,

(b) based on statute, State or Federal (other than P.L. 87-693, 76 Stat. 593), and regulations promulgated pursuant thereto, partially enumerated here as (1) "workmen's compensation" statutes; (2) "employer's liability" statutes; (3) right to "maintenance and cure" in admiralty.

The extent of this assignment is an amount equal to the total reasonable charges for hospital care, medical, surgical, and clinical treatment or any of them, including ambulance transportation and other auxiliary services received by me. This assignment does not include any sums to which I am entitled on a fixed basis which do not depend upon the amount incurred or disbursed by me for such care; (sometimes referred to in the insurance business as a right to indemnity).

The various provisions of this assignment are separable. The execution hereof is without prejudice to any lien in favor of the party providing me hospital or other care, on any such money, and any judgment, which I recover, or am or become entitled to recover, which lien arises by virtue of statute, or of contract, including this contract, (which shall be construed as granting such a lien, and not as an election, or waiver thereof); and I further covenant that any such rights of mine are and shall be for the benefit of said Administrator to the extent of the reasonable charges for the care furnished me.

I hereby irrevocably appoint the Administrator of Veterans Affairs and his subordinates authorized by him, my attorneys-in-fact in the premises, to do all acts, matters and things deemed necessary or desirable by any such authorized person, with full power and authority in my name, but at the cost, risk and charge, and for the sole benefit of said Administrator, his successors in such Office and his or their assigns, to sue for, or compromise, and to recover and receive all or part of the amount hereby assigned; and irrespective of assignment, to collect and disburse such funds in my behalf; and to give releases for the same; but no such action shall limit or prejudice my right to recover for my own benefit all sums in excess of those amounts representing said reasonable charges for said care and treatment, or other sums to which I may be entitled.

I hereby authorize the Veterans Administration and its employees to disclose to said insurer, or other party against whom liability is asserted, or his or their attorneys, such information concerning me as the responsible representatives of the Veterans Administration consider appropriate in connection with the subject matter hereof.

Dated this 22 day of September, 1975

/s/ Clifford E. Allison Ident. No. 477-10-0490

Witness: /s/ Rosemary Dunett

A careful reading of the "Power of Attorney and Agreement" as set forth above indicates that a legal relationship does exist between the claimant and the Veterans Administration.

A review of the holding in *Brauer v. J. C. White Concrete Co.,* 253 Iowa 1304, 115 N.W.2d 202, discloses the following language, to wit:

> We see no compelling reason why the party who rendered the medical or hospital services the employer was obligated to furnish may not assert a claim therefor. Unless this may be done, the real party in interest is denied the right to assert his claim, contrary to a statute or rule of procedure that has existed in Iowa since the Code of 1851. As previously stated, the special appearances allege the VA is the sole party in interest. In some cases and perhaps here the injured employee may have little interest in seeing to it that a medical or hospital claim is allowed and paid. If only he may assert it the employer in such cases might be relieved from a liability created by section 85.27.
>
> It would seem the rights of all interested parties would be sufficiently protected by submitting these claims to the commissioner and by appeal to the district court by any party aggrieved by his decision.

The 60th General Assembly saw fit to amend §85.26, Code of Iowa, by adding the following language, to wit:

> No claim or proceedings for benefits shall be maintained by any person other than the injured employee, his dependent or his legal representative if entitled to benefits.

This amendment was enacted with an effective date of July 1, 1963 and occurred after the decision of the Iowa Supreme Court in *Brauer v. J. C. White,* supra.

It is apparent that the phrase "legal representative" requires definition. An appropriate definition is found in *Black's Law Dictionary,* Revised Fourth Edition (1968), at page 1041, as follows:

> Legal Representative. The term in its broadest sense, means one who stands in place of, and represents the interest of, another.

The "Power of Attorney and Agreement" does meet the statutory requirement contained in §85.26. *U.S. v. Bender Welding & Machine Co.,* 5th Cir. 76-1770, 76-1916; *Texas Employers Insurance Association v. U.S.,* 5th Cir. 76-2056.

The claimant has assigned his rights to recover the value of the medical charges to the Veterans Administration. There is no prohibition contained in the Iowa Workers' Compensation Act preventing such action.

Having met the requirements of §85.26, supra, it is held that the Veterans Administration is the real party in interest in this matter and has the statutory authority to bring this claim.

WHEREFORE, it is ordered that the defendants pay seven thousand nine hundred ninety-three dollars ($7,993.00) to the Veterans Administration, together with statutory interest at an annual rate of six percent (6%), beginning on the date the obligations became due.

There being no costs, none are assessed.

Signed and filed this 16th day of December, 1977.

HELMUT MUELLER
Deputy Industrial Commissioner

No Appeal.

MEDICAL SERVICES – REFUSAL

WINFIELD M. JOHNSON,

Claimant,

vs.

TRI-CITY FABRICATING & WELDING COMPANY,

Employer,

and

FIREMAN'S FUND AMERICAN INSURANCE COMPANIES,

Insurance Carrier,
Defendants.

Decision on Appeal

This is a proceeding filed March 4, 1977, by Tri-City Fabricating and Welding Company, defendant employer, and Fireman's Fund American Insurance Companies, its insurance carrier, appealing a review-reopening decision filed February 28, 1977 wherein Winfield M. Johnson, claimant, was awarded six weeks of healing period benefits as a result of an injury arising out of and in the course of his employment sustained on August 18, 1975.

The sole issue presented on appeal is whether or not the deputy commissioner's award of six weeks of healing period was correct.

On August 18, 1975, as claimant was feeding metal into a shearer machine, the middle finger of his right hand was caught under the metal and crushed by the hydraulic hold-down. He was taken to Mercy Hospital where he was x-rayed by E. L. Johnson, M.D. whose impression was an open fracture of the distal phalanx of the third digit of the right hand. The treating physician was P. O. Atienza, M.D. who advised debridement and skin grafting. This treatment was described by Dr. Atienza's partner, J. H. Sunderbruch, M.D.

> Debridement is to clean it away, cut away dirty, necrotic, destroyed tissue so that you would have only viable tissue on which to set a graft of skin or to complete good healing, because, with the dead tissue, and then if you do not do that at that time by a surgical procedure, you rely on soaking in warm water and that it would follow the normal process of nature's debridement and healing.

The doctor was asked if debridement was major or minor surgery. He replied, "It can well be minor. It can be done without an anesthetic, because much of the tissue that you cut away is dead and not felt." The skin grafting was described thusly:

> That would have entailed a local anesthesia into the forearm. It can be done in the arm, or, my process is to put some local anesthesia in the forearm, taking off some of the skin from that anesthetized area, preparing it, and putting it to the finger tip where the injury was, covering the exposed bone. In that way, you have covering and have healing by primary intention instead of secondary intention, usually causing less deformity, a shorter period of morbidity, and more likely, less tenderness.

Claimant refused to undergo the treatment as he testified, "I have had several minor injuries, nothing very great, and they healed easily and rapidly, and am acquainted with healing animals of various degrees of injuries, and I didn't feel that it was necessary." Dr. Sunderbruch, seemingly assuming that claimant had accepted treatment, testified:

> If the original skin graft took as it should, it would have healed in ten to fourteen days. If, for some reason or other, not all of the graft had taken, which can happen, it is a possibility but not a likelihood, not a probability, then another portion of the skin which is kept, which is left over, is applied, and another ten days would then have completely healed it. So, under almost any event, even if the first graft hadn't taken, I doubt that this man would have had any disability beyond three weeks from the time of accident. Within a period of four weeks, he would have been able to do just about anything you would have wanted. There would be meager tenderness like a fresh cut, but it would have been markedly improved. Now, the fracture part would have taken between four and six weeks, but, usually, a fracture phalanx is healed within a period of four weeks. So, at the outside, with the fracture involved and all, I am sure that it would have been nothing more than six weeks.

It would seem that claimant's refusal of proper medical care under the circumstance here presented was unreasonable. Defendants should not be penalized because of this refusal. Dr. Sunderbruch's testimony quoted above stated that a skin graft would heal in ten to fourteen days and a fracture would usually heal in four weeks.

The ultimate objective of the workmen's compensation act is to return the injured employee to work. Achieving the return-to-work goal requires the cooperation of all parties -- the employee, the employer, and the insurance company. The conduct of defendant employer in this case is admirable. Initially, it fulfilled its responsibility under Iowa Code §85.27 to furnish medical care. Next it offered

to provide for claimant work which could be done with one hand. Dr. Atienza's report of August 22, 1975, indicated there would be no loss of time. However, claimant frustrated his employer's attempt to return him to productive employment by not accepting reasonable medical care and not going back to the job.

* * *

THEREFORE, it is ordered:

That defendant employer, Tri-City Fabricating & Welding Company, and its insurance carrier, Fireman's Fund American Insurance Company, pay to claimant, Winfield M. Johnson a healing period of four (4) weeks at the rate of one hundred twenty-two and 39/100 dollars ($122.39) per week in a lump sum.

* * *

Signed and filed this 30th day of September, 1977.

ROBERT C. LANDESS
Industrial Commissioner

No Appeal.

MEDICAL SERVICES – SPOUSE OF CLAIMANT

JOSEPH G. SCHULTE,

Claimant,

vs.

IOWA STATE PENITENTIARY,

Employer,

and

STATE OF IOWA,

Insurance Carrier,
Defendants.

DECISION ON APPEAL

This is a proceeding brought by defendants, Iowa State Penitentiary, employer, and the State of Iowa, insurance carrier, pursuant to Rule 500-4.27 appealing a review-reopening decision filed June 23, 1977 wherein the claimant, Joseph G. Schulte, was awarded healing period benefits and medical expenses which included psychiatric treatment for his wife. Claimant has filed a cross-appeal.

* * *

On February 29, 1972, claimant, a guard at Iowa State Penitentiary, was stabbed by an inmate. He subsequently underwent a series of operations stemming from this stabbing. This causative event has left the claimant with both emotional and physical disability.

Dr. De Lashmutt, general surgeon, who treated claimant's stab wound, testified that as of September 29, 1972, claimant was "probably a hundred per cent capable of working" at work "that would not involve any heavy lifting or straining." In June, 1972, the doctor recognized that "the patient [claimant] was extremely nervous and needed psychiatric evaluation before returning to work" as his "'[s]ymptoms [were] out of proportion to his physical condition.'" Dr. De Lashmutt felt that "Joe had a inordinate fear of returning to work that was not compatible with his physical condition."

Claimant did return to work in the prison tower from March, 1973, to December, 1974, at which time the supervisor of the guard discharged him. During this period he began seeing Dr. Kim who formed a dual diagnosis of Alzheimer's disease and schizophrenia. According to the doctor, Alzheimer's disease, a deterioration of the brain cortex, was evidenced by claimant's inability to recall words and events and to solve simple mathematical problems. In responding that Alzheimer's was a type of hysterical reaction, Dr. Kim suggested that "a person getting into a very severe trauma, especially war trauma or life-threatening stress or civil action -- they come out with a sudden picture of distortion with their personality and some sort of psychiatric sumptoms [sic] with impairment of realities or disjointed or disorganized conversation." Schizophrenia was evidenced by "disorientation of the reality concept and inability to distinguish reality from the fantasy, and lack of stamina; lack of interest in life, slow psychomotor speed." Regarding causation, the doctor testified, ". . . I must make it clear although there is no etiology or causes of his current mental illness, I strongly believe that kind with serious physical stress should provoke the emotional problems which Joe Schulte is suffering from now." Dr. Kim believed that claimant, who took tranquilizers and antidepressant medication, was in a state of remission but was not in a state of recovery which would enable him to conduct his own business without supervision.

Claimant's cross-appeal raised the following specific issues: sufficiency of healing period, lack of permanent disability rating, provision for future medical expenses, and allowance for rehabilitation payments. Defendants in their appeal brief also address the issue of healing period; and additionally, question whether or not there is "substantial evidence in the record to sustain the psychiatrist's opinion, expressed while being deposed, that the work-related injury was responsible for the claimant's *present* mental disability. They also contend that they should not be required to supply psychiatric treatment for claimant's wife.

The deputy industrial commissioner found a fluctuation in claimant's condition with a deterioration leading to incapacitation. Because this case deals with a 1972 injury, the deputy used the test for healing period benefits applicable at that time and found claimant precluded from gainful employment. Work in a community activity center for minimal pay has led to improved potential employability for claimant. Reuben Kristianson, director of the center, testified that "[w]hen he [claimant] first started he was very withdrawn to the point that – and now where he is coming in – and I think other workers are being able to relate to him." Although Dr. Kim testified that claimant's condition was permanent, the slight improvement which claimant has showed made it impossible to assign a permanent disability rating at the time of the hearing. Claimant's condition is permanent; but, as claimant's condition has not stabilized, it may not be permanently and totally disabling. Claimant will never reach a point where he

is not to some degree partially permanently disabled. Defendants argue that three hundred weeks of healing period should not be allowed as any permanent partial disability would result in a lesser time period. While this is so, no change will be made in this award. Defendants will be given appropriate credit for any benefits paid at the time the degree of permanent partial disability can be ascertained. Payments are to be made pursuant to the deputy's order until the expiration of the three hundred week period or until claimant's condition stabilized. When claimant's condition has stabilizes. or after the expiration of three hundred weeks, whichever occurs first, the facts will be reviewed to determine the basis of payments at that time. The deputy's explanation of the healing period as it existed in 1972 is found to be correct.

Claimant has requested provision be made for future medical care. Such provision is not necessary as any care which is reasonable and necessary and related to claimant's injury arising out of and in the course of his employment is covered. It is anticipated that defendants would voluntarily pay these expenses.

In spite of claimant's failure to indicate in his petition that vocational rehabilitation benefits were being sought, the testimony reveals that claimant was seeking such benefits and that defendants were aware benefits were desired. Under Iowa Code §85.70, a payment of twenty dollars per week is allowed with the industrial commissioner empowered to "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." Because the circumstances here presented do not indicate that a continuation of the training being offered will in fact accomplish rehabilitation, rehabilitation benefits will be limited to a thirteen week period.

The deputy commissioner suggested in allowing payment for treatment of claimant's spouse that treatment of someone other than the claimant was "highly unusual". This commissioner finds that such payments for treatment are beyond the compensation contemplated by the workmen's compensation act. Dr. Kim testified to the "anxiety, depression, guilt, unhappiness, [and] frustration" which necessitated psychiatric treatment for claimant's spouse. Such feelings are common within the families of injured workers. The benefits provided by the workmen's compensation act do not contemplate payment for services other than those provided to the injured employee. Payments for the psychiatric care of claimant's spouse will be disallowed.

* * *

Signed and filed this 30th day of September, 1977.

ROBERT C. LANDESS
Industrial Commissioner

No Appeal.

Additional Case: Page

MEDICAL TREATMENT

RUTH ROSE,

Claimant,

vs.

WOODWARD STATE HOSPITAL-SCHOOL,

Employer,

and

THE STATE OF IOWA,

Insurance Carrier,
Defendants.

Decision on Appeal

This is a proceeding brought by defendants, Woodward State Hospital-School, employer, and The State of Iowa, insurance carrier, pursuant to Rule 500-4.27 appealing a review-reopening decision wherein the claimant, Ruth Rose, was awarded permanent total disability benefits and medical expenses. Defendants were further ordered to offer and claimant to accept psychiatric treatment by a psychiatrist or a psychiatric clinic and testing by John T. Bakody, M.D.

* * *

Claimant, whose son is mentally retarded and who has received several commendations for care of her patients, was employed at the Woodward State Hospital-School as a child development worker with duties somewhat similar to those of a nurse's aide. She was injured on January 6, 1975 when she was beaten about the head with a padlock wielded by one of the patients. Her wounds required both stitching and hospitalization. Her employment relationship with Woodward State Hospital-School ended February 19, 1976 when she was discharged. She was hospitalized in March, 1976. The final diagnosis consisted of "chronic migraine headaches, tachycardia, thyroid nodule, [and] benign thyroid goiter." A diet, psychotherapy, regulation of medication and neurological evaluation were recommended. She testified that placement in the psychiatric ward had been recommended to her prior to the review-reopening proceeding in January, 1977.

Claimant's medical history included removal of blood clots from her brain following an auto accident more than thirty years ago. She entered the hospital in 1960 or 1961 and again in 1965 in an attempt to discover the etiology of the headaches. The record indicates absences from her work at Woodward because of severe headaches. Her present physical complaints are nervousness, insomnia, tacycardia, and migraine headaches which she had experienced prior to the beating, but which had grown increasingly more severe and frequent. Emotional problems are an inability to go anywhere alone, nightmares, crying spells, loss of memory, lack of concentration, and a general fear of people. Claimant's spouse verified her statements concerning her emotional difficulties.

Richard E. Preston, M.D., psychiatrist, saw claimant on June 30, 1975 and on four other occasions thereafter with the last session February 7, 1977. The symptoms claimant related to the doctor are primarily those she listed at the review-reopening proceeding.

Claimant sought help from the West Central Mental Health Center, Inc. on March 3, 1976. She was assigned a counselor with whom she had one session and then did not keep a subsequent appointment.

Joseph A. Heaney, M.D., psychiatrist, examined claimant on March 12, 1976. He found her "moody, tense and nervous." He recorded her lack of confidence, memory impairment, concentration problem, short attention span, impairment of personal relationship, and phobias including fear of a mental health unit. He noted disturbance in her sleep pattern, poor eating habits, reduced energy level, headaches, and dizziness. Dr. Heaney conducted another examination on February 1, 1977 which resulted in essentially the same findings as he had made almost a year before.

John T. Bakody, M.D., neurosurgeon, examined claimant on March 27, 1976. Although he did believe computerized axial tomography should be done, his neurological findings were "essentially normal."

David D. Musgrave, D.O. first saw claimant on May 26, 1976 and treated her until August 20, 1976 for a "myofascial strain involving the occipit, first and second cervical segments." She failed to keep a September appointment.

Defendants stated that the issue on appeal is "whether there is substantial evidence in the record to sustain the conclusion of the deputy commissioner that the claimant is permanently and totally disabled as a result of the work-related injury arising out of and in the course of employment with the defendants." The deputy's finding of permanent total disability is not sustained by the record.

The ultimate objective of workers' compensation is to return the injured employee to work.

A claimant is permanently totally disabled when her physical condition is such as to disqualify her from regular employment. Based on the record submitted here, it is too early to make a determination of disability as there is evidence of claimant's desire to return to gainful employment and of medical treatment or rehabilitation efforts that could be made to insure that claimant is not cast on the human scrap pile of the totally permanently disabled.

Claimant testified that she "would much rather work than be the way . . .[she is] now" and that she would "take any kind of treatment to try to get some help" to get back to where she was before January 6, 1975. The evidence submitted demonstrates that prior to being attacked, except for being somewhat undependable because of health problems, claimant was a good worker who received several commendations for her work with patients at Woodward.

Dr. Preston reported that although claimant indicated her willingness to do anything to get well, she had rejected his suggestion of hospitalization for intensive treatment. The doctor's statement that he "did try Mrs. Rose on a couple different medications, but did not feel that an adequate trial was accomplished" seems to intimate that more might be done for claimant in the area of drug therapy. It was the doctor's opinion:

> that she [claimant] continues to suffer from a post-traumatic syndrome which will leave her with a permanent partial disability. Although she should be able to continue to fulfill her basic duites within the home and limited activities outside the home such as minor recreational, shopping and social activities, she is in my opinion permanently disabled for any gainful employment. Although she has had bad headaches for at least the past fifteen years prior to her injury, these do seem to have been aggravated probably to the extent of fifty per cent by the beating which she received. It is highly probable that she will continue to require intensive drug therapy for these headaches the remainder of her life. Although the emotional and psychological problems which have resulted from the beating she received are very likely to be permanent to some degree, I would feel that over an extended period of time, such as five years, there should be some gradual improvement. Whether or not she would be able to return to gainful employment at the end of five years from the date of her injury is impossible for me to predict at this time. It seems highly probable that the severity and extent of her present illness were complicated by two antecedent and pre-existing conditions, namely the old subdural hematoma, the vascular or migraine headaches, and the fact that she has a mentally retarded son who has required institutionalization himself.

The report by Phyllis Brown, A.C.S.W., of West Central Mental Health Center, Inc. states that "Mrs. Rose could benefit from individual counseling had she been motivated to make use of our services."

Dr. Heaney's opinion as of August 9, 1976 was that claimant was at that time totally disabled, but he did suggest a month of hospitalized psychiatric care. He also believed drug changes might be in order. A later report by the doctor refers to a permanent disability but does not refer to a total disability.

Dr. Bakody believed that a computerized axial tomography, which is a relatively new procedure only recently available in Des Moines, should be conducted. Drs. Heaney and Preston concurred.

[Claimant was found to be in a healing period.]

* * *

A caveat to the claimant is necessary. The record is replete with possible treatments on which claimant could avail herself. Claimant should be encouraged to seek restorative care. Failure to assert to such care may enable defendants to raise the issue of claimant's failure to accept appropriate and necessary medical care and might affect claimant's receipt of future compensation benefits. This issue will be determined if and when it is raised.

* * *

Therefore, it is ordered:

* * *

That defendants hold open a tender of three psychiatrists or psychiatric clinics for a period of sixty (60) days from the date of this decision. Claimant is to accept such tender within this time. Treatment is to run for as long as is necessary.

That defendants hold open a tender of the testing indicated by John T. Bakody, M.D. for a period of sixty (60) days from the date of this decision. Claimant is to accept such tender within this time. If treatment is indicated by such tests, it is to run for as long as is

necessary.

* * *

Signed and filed this 30 day of November, 1977.

ROBERT C. LANDESS
Industrial Commissioner

Appealed to District court; Pending.

MEMORANDUM OF AGREEMENT

ROBERT L. BAUGHMAN,

Claimant,

vs.

KNOX ENTERPRISES, INC.,

Employer,

and

LIBERTY MUTUAL INSURANCE CO.,

Insurance Carrier,
Defendants.

Review—Reopening Decision

This is a proceeding in Review-Reopening brought by Robert L. Baughman, the claimant, against Knox Enterprises, Inc., his employer, and Liberty Mutual Insurance Company, the insurance carrier, to recover benefits under the Iowa Workmen's Compensation Act by virtue of an industrial injury which occurred on May 27, 1975.

* * *

The records of the Iowa Industrial Commissioner contain two First Reports of Injury concerning this incident, the first one having been filed September 23, 1975, the second having been filed October 8, 1975. The file of the Iowa Industrial Commissioner also contains a Memorandum of Agreement which was approved by the Industrial Commissioner on October 16, 1975, as well as a letter of November 3, 1975, addressed to the insurance carrier herein, Liberty Mutual, which reads as follows:

> On October 27 you called asking that the Memorandum of Agreement filed not be approved. At the time of your call the Memorandum had been approved, which approval was accomplished on October 16, 1975. It therefore appears that the Memorandum is in effect.

The claimant, upon proper motion, was granted leave to amend his application from one in arbitration to one in review-reopening.

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

Claimant, age 36, was employed as a farm employee by the defendant employer beginning June 1, 1966. He was responsible for crop production of a thousand acres, as well as a cattle feeding operation. He resided in a house supplied by the defendant employer, and received $400 per month base wages, together with a bonus arrangement to be paid at the end of the calendar year. The defendant employer furnished all utilities, with the exception of heat; a cow for milk, one-half beef carcass for meat; chickens together with the necessary livestock feed. The defendant employer provided a pickup truck, allowing for personal use by the claimant.

On May 26, 1975, a Saturday, after having finished the corn planting for that growing season, the claimant was sorting cattle that afternoon. While so engaged, the claimant's eyes began to water and he experienced a burning sensation.

The following Tuesday the claimant, feeling the need for medical assistance, sought out the services of F. C. Perkins, M.D., of Hedrick, Iowa. After one visit Dr. Perkins referred the claimant to D. O. Bovenmyer, M.D., of Ottumwa, Iowa, a specialist who, after three visits, sent the claimant to Jay H. Krachmer, M.D., an ophthalmologist and a specialist in corneal diseases, located at the University of Iowa Hospitals, Iowa City, Iowa. The claimant remains under the care of Dr. Krachmer.

The record stands uncontroverted on the issue of whether the claimant was an employee on May 27, 1975.

The defendants urge that no injury occurred on that day, basing this position on the statements of Dr. Krachmer, who diagnosed the cause of the claimant's corneal ulcer as mycobacterium fortuitum, a microorganism. The doctor testified that this microorganism is "found at random in various parts of the environment," (Deposition, page 6, line 16) and that it causes "damage to the tissue when there is some predisposing result or injury to the tissue . . . such as a scratch of the cornea." (Deposition, page 6, line 22).

By the time Dr. Krachmer saw the claimant on June 5, 1975, the claimant had a huge corneal ulcer, making the attempted diagnosis of a scratch difficult. Dr. Krachmer found no evidence of a scratch. However, the doctor stated that within reasonable medical certainty the claimant's condition was job-related. To illustrate the doctor's opinion, we feel it prudent to quote from his disposition on page 20 as follows:

> A. If I am to believe Mr. Baughman, and I do believe him, I have seen him and his wife over a long period of time, many, many visits, and if I am to believe him and I do, this is a man who had two good eyes, was working out in the field, felt something suddenly in his left eye and from that point on had trouble with his left eye. I saw it at the stage of a corneal ulcer in his left eye.
>
> Q. Suppose, Doctor, that that isn't what the man stated originally.
>
> A. I couldn't have guessed that that happened. Like I said, I couldn't see any scratch from a piece of vegetable material. I couldn't see a foreign body there. I am just basing my story on his history which we have to do in medicine. We have to depend on the patient's history to a certain extent.
>
> Q. Would your opinion be different if the man were to have stated that on or about the 24th or 25th of May he simply felt a watering sensation in his eye?
>
> A. No, it wouldn't be different.

The deposition of Dr. Krachmer was the only medical

evidence presented and the doctor was clear and unequivocal under vigorous examination by defense counsel that in his medical opinion, based upon a reasonable medical probability, the claimant's corneal ulcer was job-related. Dr. Krachmer's testimony is accepted and given great weight in this decision.

Having reached the conclusion that an injury did occur, the remaining issue of proximate cause must be found in the claimant's favor. The injury did cause the ulcer.

The claimant began gainful employment on July 1, 1976, after having been discharged by defendant employer on March 31, 1976. The claimant had been continued on full wages from the date of disability until his discharge.

The primary issue to be resolved is the legal effect of the Memorandum of Agreement, approved October 16, 1975, by the Iowa Industrial Commissioner.

The requested withdrawal of the Memorandum of Agreement in question cannot be granted by the Industrial Commissioner once approval has been given. *Whitters & Sons, Inc., v. Karr,* 180 N.W. 2d 444 (Iowa). The defendants were given leave to file an appropriate action in equity, but have not as of this writing availed themselves of this opportunity.

In the recent case of *Freeman v. Luppes Transport,* 227 N.W.2d 143, the Iowa Supreme Court said in answer to a rhetorical question of what does a Memorandum of Agreement finally settle?

> Under our workmen's compensation act, a workman must establish three principal elements: (1) an employer-employee relationship at the time of the injury, Hassebroch v. Weaver Const. Co., 246 Iowa 622, 67 N.W.2d 549, (2) an injury arising out of and in the course of the employment, McClure v. Union County, 188 N.W.2d 283 (Iowa); Code 1973, Sec. 85.3, and (3) the disability (or death) aproximately caused by the injury, Poole v. Hallett Const. Co., 261 Iowa 481, 154 N.W.2d 716 (original proceedings for compensation); Deaver v. Armstrong Rubber Co., 170 N.W.2d 455 (Iowa) (review-reopening proceedings).

The defendants, having admitted the foregoing by filing a Memorandum of Agreement, cannot now ask the commissioner to require the claimant to prove the matters that stand as "settled."

Notwithstanding the effect of the filed and approved Memorandum of Agreement, the claimant has reestablished by a preponderance of the evidence those necessary elements as required by *Freeman v. Luppes Transport,* supra, and as commented upon earlier in this decision.

The claimant's weekly rate of compensation is found to be $97 per week for temporary total disability payment and $89 per week for permanent partial disability payments. The claimant's gross income for 1975 is found to be $9,685, based upon total wages of $6,300 plus $900 housing allowance, $540 utility allowance, $790 being the yearly value of a cow and its feed, $365 being the yearly value of chickens and their feed, and $790 for the personal use of a pickup truck with employer-provided fuel.

Dr. Krachmer expressed the medical opinion that the claimant has lost 90% of the vision in his affected eye. It is found that the claimant has a 90% functional loss of his left eye. * * *

Signed and filed this 15th day of February, 1977.

HELMUT MUELLER
Deputy Industrial Commissioner

No Appeal.

NONRESIDENT EMPLOYER Page

NOTICE – APPEAL WITHIN AGENCY

PERCY G. McSPADDEN,

Claimant,

vs.

BIG BEN COAL COMPANY,

Employer,

and

OLD REPUBLIC INSURANCE CO.,

Insurance Carrier,
Defendants.

Order

NOW on this 1st day of March, 1978, the matter of defendants' motion to dismiss claimant's petition for review and motion to strike or disallow additional evidence, and claimant's resistance to and motion to strike defendants' motions comes on for determination.

A review of the file indicates an arbitration decision was filed January 9, 1978. On January 26, 1978, a document entitled "Petition for Review and Notice of Additional Evidence" was filed by claimant. Defendants' "Combined Motions to Dismiss, To Strike and To Disallow Additional Evidence" was filed February 16, 1978. This was followed by claimant's resistance to and Motion to Strike defendants' motions filed February 22, 1978.

One of the grounds for defendants' motion to dismiss is that a "Notice of Appeal" must be filed with the Industrial Commissioner when seeking an appeal to the commissioner from a decision, order, or ruling of a deputy in a contested case. The precise language is not determinative here and claimant's document on file entitled "Petition for Review" gives sufficient notice of such action.

Defendants also assert as a basis for their motion to dismiss the failure of claimant to obtain a grant of application for rehearing before the deputy industrial commissioner so as to extend the time for appeal. A rehearing before the deputy industrial commissioner is not a necessary step in order to exhaust administrative remedies. In this case claimant sought an appeal to the industrial commissioner. Claimant's notice of appeal was filed within twenty days following the filing of the proposed decision. Thus, the notice of appeal is timely as prescribed by Rule 500-4.27, and defendants' motion to dismiss is overruled.

Claimant is directed to state with specificity the additional witnesses and evidence intended to be adduced at the hearing on appeal within twenty days upon receipt of this order. Ruling will then be made upon the Motion to Strike or Disallow Additional Evidence.

WHEREFORE, the defendants' motion to dismiss should be and is hereby overruled with ruling on defendants' motion to strike or disallow additional evidence to be made upon claimant's compliance with the above instructions.

Signed and filed this 1st day of March, 1978.

ROBERT C. LANDESS
Industrial Commissioner

No Appeal.

NOTICE – DIFFICULT DIAGNOSIS

CLYDE E. BURKS,

Claimant,

vs.

MIDWEST IRON AND METAL CO., INC.

Employer,

and

CNA INSURANCE COMPANY,

Insurance Carrier,
Defendants.

Arbitration Decision

This is a proceeding in Arbitration brought by the Claimant, Clyde E. Burks, against his employer, Midwest Iron and Metal Co., Inc., and its insurance carrier, CNA insurance Company, on account of injuries on November 29, 1974, and February 20, 1975.

* * *

The issue to be determined is whether Claimant sustained injuries arising out of and in the course of his employment and resulting in compensable disability and medical expenses.

On November 29, 1974, Claimant was breaking rails with a sledge hammer for Defendant Employer. While swinging the sledge hammer, Claimant experienced a sharp pain in his right side. He finished the work day and returned home. While at home on this date, Claimant complained to his sister, Ethel Crook, and his wife about pain in his right side. Claimant returned to work the next day and on the following Monday, December 2, 1974. He missed work on December 3 and 4, 1974.

On December 4, 1974, Claimant sought treatment for his complaints from G. L. Elliott, D.O. No history of injury was noted by Dr. Elliott.

Claimant returned to work on December 5, 1974, and worked regularly until February 20, 1975. On February 20, 1975, Claimant experienced a sharp pain on the right side of his body while assisting a customer of Defendant Employer to load barrels weighing approximately 300 pounds. Claimant returned to work the next day and experienced sharp pains all over his body while operating the crane. He stopped the crane and went to the office where he "passed out".

On February 22, 1975, Claimant was treated as an outpatient at Des Moines General Hospital for the following complaints:

"Pain in upper abdomin (sic). Got taste of blood in mouth with pain. Fainted for undetermined time."

Diagnoses made at the hospital were:

> "Acute syncope undetermined etiology-gastritis venteral hernia. Sudden unconsciousness due to dimunition of blood supply to brain."

Claimant sought further treatment for his complaints from Dr. Elliott on February 25, 1975. Dr. Elliott noted Claimant's complaints to be soreness in his chest and a burning sensation in his stomach. He was subsequently examined by Dr. Elliott on March 3 and 10, 1975. Dr. Elliott referred Claimant to Alan E. Tyler, D.O. Dr. Tyler felt that Claimant had a herpes type condition of the abdomen, he treated the condition with cortisone. Dr. Tyler saw Claimant on March 24 and 31, 1975, and noted that his abdominal discomfort was improving. Claimant was released to return to light work on April 1, 1975.

On April 3, 1975, Claimant sought medical treatment from the emergency department of Broadlawns Polk County Hospital. The following history was recorded by the examining physician:

> 38 y/o crane operator who had an episode of syncope while on the job 1½ months ago. He saw Dr. Elliott who did EKG, extensive x-rays of the spine. He was "dazed" for 15-20'. He had another episode 20' later that left him "dazed" for ½ hour.
>
> He noted blurred vision, some nausea, prior to episode. Never completely unconscious. No loss of stool or urine. He went home, and experienced a broad band of pain across the lower abdomen.
>
> Today, he c/o a deep epigastric (upper quadrant) burning pain and numbness and tingling of the L leg and L arm. Face OK. He has been receiving local steroid injections in both arms periodically.
>
> The examining physician's impressions were:
>
> Difficult to sort out all of these complaints with clinical findings. *Chronic prostatitis* is probable . . .

Claimant failed to keep return appointments on April 7 and April 10, 1975.

During April, 1975, Claimant started to work for Mitchell Transmission. After approximately two weeks, Claimant terminated his employment because he was unable to perform the work.

On June 2, 1975, Claimant was admitted to Broadlawns

Polk County Hospital for acute urinary retention. He was discharged on June 11, 1975, with a final diagnosis of "benign prostatic hypertrophy".

On June 15, 1975, Claimant was admitted for further evaluation at Iowa Lutheran Hospital by Phillip H. Kohler, M.D., a urologist. His impressions were kyphosis, urinary retention-etiology unknown, and possible neurogenic bladder. Dr. Kohler referred Claimant to F. M. Hudson, M.D., a neurosurgeon. Dr. Hudson's diagnosis was a severe stretch and compression of the spinal cord with a tug on exiting nerve roots in the area of a congenital fusion at 9th, 10th, 11th, and 12th dorsal vertebrae. Dr. Hudson transferred Claimant on June 26, 1975, to University of Iowa Hospitals and Clinics under the care of Dennis McDonnell, M.D., a neurosurgeon.

The following history was recorded by Dr. McDonnell:

> Mr. Burks is a 38-year-old laborer who has worked in a junk yard involved with heavy lifting of scrap iron. He has noted progressive difficulty with weakness in his legs since March and April of 1975. His symptoms first began in November of 1974 when he noted a "pull in the low back and cramping in my belly muscles" while swinging a sledge hammer. However, this subsided. In February of 1975 he was lifting a heavy barrels (sic) of scrap iron when he felt a similar "sudden pull in my back" and this was associated also with pain. These symptoms again subsided. However, the following day while running a crane, he noted numbness in and around his abdomen in the region of the "belly button." Additionally he had pain in the back and had to stop his work. He got off of the crane and "passed out." He was unable to say exactly what happened at that time, but he had numbness around his abdomen again. He has not been able to work since that time and sought treatment with Osteopathic manipulation because of numbness and cramping pain in his abdomen and numbness in his legs. Approximately 6-8 weeks prior to this admission, he started stumbling on his right leg and "walked like a drunk." This gradually progressed to involve his left leg as well to a point that he was unable to walk without crutches. Then two weeks prior to admission he was unable to pass his urine and required catheterization. He then underwent initial myelography at the Lutheran Hospital in Des Moines on June 23, 1975 which confirmed a flexion deformity of the dorsal spina and possible compression of the spinal cord at D9-10-11 & 12 vertebral levels.

Physical examination by Dr. McDonnell revealed the following:

> . . . he was noted to be paraparetic with marked weakness in the lower limbs particularly in the proximal pelvic girdle muscles. There was an obvious gibbous deformity in the low dorsal spine andhypoalgesia involving the segments from D7 through L1 bilaterally. There were hyperactive reflexes and the plantar responses were extensor bilaterally with clonus sustained on the right ankle and unsustained on the left.

Evaluation by the urology department revealed a neurogenic bladder. A myelogram on July 1, 1975, indicated a compression of the spinal cord from a dorsal flexion deformity. Surgery to make more room for the spinal cord was recommended by Dr. McDonnell.

In a report to Claimant's brother dated July 10, 1975, Dr. McDonnell stated that "The spinal cord dysfunction was most likely aggravated by heavy lifting required in his previous line of work." On the same date, Dr. McDonnell performed a right costotransversectomy of D9, D10, D11, and D12 with an anterolateral decompression of the spinal cord. He removed the D9-10 disc and the anterior spinal wall in order to decompress the spinal cord from an anterolateral direction. Following this procedure, Dr. McDonnell decompressed the dorsal spinal dura and subarachnoid space. Claimant was discharged from the hospital on July 25, 1975.

On August 11, 1975, Claimant was admitted to Iowa Lutheran Hospital with complaints of a fever and headache. He was discharged on August 23, 1975, with final diagnoses of bacterial meningitis and residuals of myelopathy.

Follow-up examinations were conducted by Dr. McDonnell on September 17, 1975, and January 21, 1976. Dr. McDonnell made the following recommendations to Claimant on January 21, 1976.

> . . . it is advised that he not return to heavy manual labor, as lifting will certainly put an excessive strain on the kyphosis. Also, the residual myelopathy which he exhibits will impair normal agility and activity. He is advised to continue doing leg-lift and sit-up exercises and to avoid excessive weight gain. He will return in six months for follow-up evaluation.

Dr. McDonnell testified that Claimant, as a result of the compression of the spinal cord, continues to evidence spasticity in his lower limbs which is likely to be permanent. He further testified that the symptoms experienced by Claimant following the injuries of November 29, 1974, and February 20, 1975, were compatible with the spinal cord dysfunction and that the injuries aggravated Claimant's preexisting congenital deformity.

The 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. 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 supreme court of Iowa 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 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.*** The injury to the human 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.***

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.

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. 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).

The testimony of Claimant; his wife, Betty Burks; his sister, Ethel Crook; and Dr. McDonnell sustained Claimant's burden of proof that on November 29, 1974, and February 20, 1975, he incurred injuries arising out of and in the course of his employment and resulting in compensable disability and medical expenses. Claimant's preexisting congenital deformity was aggravated by the incidents of November 29, 1974, and February 20, 1975. Dr. McDonnell causally connected the spinal cord dysfunction with the history provided to him by Claimant of injuries on November 29, 1974, and February 20, 1975.

[Claimant was allowed running healing period benefits.]

* * *

Little evidence was offered by either party concerning the appropriate rate of compensation in this case. A time card admitted in evidence indicated an hourly wage rate of $3.00 per hour. The First Report of Injury stated that Claimant worked between 27 and 54 hours per week. Except for Claimant being married, no evidence was offered pertaining to the maximum number of exemptions claimant is entitled.

As a result of the lack of evidence, Claimant's rate is determined by the undersigned to be $78.18. The rate was computed on the basis of a 40-hour week at the rate of $3.00 per hour and with two exemptions.

* * *

[Claimant was awarded medical expenses and transportation costs.]

* * *

Defendants pleaded as an affirmative defense that Claimant's Application for Arbitration is barred by reason of Section 85.23, Code of Iowa. Section 85.23 provides:

> Unless the employer or his representative shall have actual knowledge of the occurrence of an injury, or unless the employee or someone on his behalf or some of the defendants or someone on their behalf shall give notice thereof to the employer . . . within ninety days after the occurrence of the injury, no compensation shall be allowed.

The supreme court of Iowa interpreted the above requirement in the case of *Jacques v. Farmers Lumber & Supply Co.,* 242 Iowa 548, 27 N.W. 2d. The court held at page 240 of 47 N.W. 2d that the 90 day notice does not begin to run until a physician's diagnosis discloses to the employee the nature of his disability.

Claimant learned about the nature of his disability from Dr. Hudson and Dr. McDonnell during the last part of June, 1975, and first part of July, 1975. Until Dr. Hudson's diagnosis of the spinal cord compression, no physician who treated Claimant at the Wilden Clinic, Broadlawns, and Des Moines General was able to determine the nature of his problem. Even though no physician had determined the nature of his disability, the evidence is undisputed that Defendants were aware of a workmen's compensation claim by Claimant during March, 1975. The above evidence is determinative that Defendants received notice within the required time period of Section 85.23, Code of Iowa, and *Jacques,* supra.

* * *

Signed and filed this 23rd day of July, 1976.

DENNIS L. HANSSEN
Deputy Industrial Commissioner

Appealed to Commissioner; Dismissed.

NOTICE – INJURY

EARL L. HECK,

Claimant,

vs.

GEORGE A. HORMEL COMPANY,

Employer,

and

LIBERTY MUTUAL INSURANCE COMPANY,

Insurance Carrier,
Defendants.

Decision on Appeal

This is a proceeding brought by Earl L. Heck, claimant, against George A. Hormel Company, defendant employer, and Liberty Mutual Insurance Company, its insurance carrier, for appeal, pursuant to Rule 500-4.26 and §86.24 of the Code of Iowa, of an arbitration decision wherein the deputy industrial commissioner found that adequate notice under §85.23 and §85.24, Code of Iowa, was not given by the claimant to the defendant employer. The only issue on appeal is the adequacy of notice.

Claimant, formerly employed at defendant employer's Fort Dodge plant, testified that on February 8, 1974, he was assigned to the sausage department. His task was to

push a tub loaded with about 650 pounds of meat from the cooler to the grinder, a distance of about 150 feet. At the grinder, claimant was to shovel the meat from the tub into the grinder. Claimant testified that he pushed the tub to the grinder, but when he attempted to unload the tub, he lost his grip and the fork he was using turned in his hands. Claimant reported his inability to perform the job to his supervisor and was sent to the first aid department. There he discussed his problem with the plant nurse who suggested he see a doctor and sent claimant to the personnel director. Claimant testified that he then went to see the personnel director, discussed his problem with him, and was excused from work in order to seek medical attention. On February 11, 1974 claimant was examined by Michael W. Stitt, M.D., and was advised to seek further medical attention in either Iowa City, Iowa or Rochester, Minnesota. Claimant testified that he came under the care of Titus C. Evans, Jr., M.D., and R. D. Beckenbaugh, M.D., in Rochester on February 26, 1974 and, after extensive testing, he was told the nature of his ailment on April 9, 1974. Claimant underwent surgery on April 10 and again on May 10, 1974 for bilateral carpel tunnel syndrome.

David Gardner, personnel manager of defendant employer's Fort Dodge plant, testified that he remembered no conversation with claimant on February 8, 1974.

Rita Kreger, R.N., is the head nurse at defendant employer's Fort Dodge plant. She testified that claimant came to her office on February 8, 1974 complaining of arthritis and pains in both arms and that she released claimant to go home that morning. She also testified that claimant did not report an injury or accident on that date.

Joe Adent was a foreman in charge of the sausage department at defendant employer's Fort Dodge plant on February 8, 1974. He testifiqd that claimant worked for a short time that morning, but, after a few minutes' work, claimant complained of arthritis and was told to report to personnel or first aid. Adent also testified that the incident on February 8 was not reported as a work-connected injury.

Included in the extensive documentary evidence submitted in this case is defendants' exhibit "D" which bears the title, "Report of Employee Disability Claim." The document, signed by Dr. Stitt, indicates that Dr. Stitt examined claimant on February 11, 1974 and in the blank following the words "Your complete diagnosis" is typed the word "arthritis".

Also included in the documentary evidence submitted is a collection of correspondence from Drs. Evans and Beckenbaugh of the Mayo Clinic marked as "claimant's exhibit 3". These are records from the Mayo Clinic to David Gardner, personnel manager for defendant employer, and were a part of the personnel files. One of the letters, dated May 23, 1974, from Dr. Beckenbaugh, addressed to John Kersten, M.D., George A. Hormel Company, Fort Dodge, Iowa contains the following paragraph:

> I have examined and treated Mr. Earl L. Heck in our Orthopedic Section in the Department of the Hand Clinic with regard to bilateral problems with his hands. He was noted to have bilateral carpal tunnel syndrome which was felt to be related to and aggravated by his work; specifically, he has developed an inflammatory condition of the tendons of the arm and wrist which cause compression at the wrist secondary to overuse. We have been unable to document any other causes such as rheumatoid arthritis as an etiological cause of this problem.

The letter goes on to give the date when claimant was first examined and the length and nature of the history of claimant's problem. The testimony of Mr. Gardner, the personnel manager, indicates he had full access and control over the personnel files of which this letter was a part.

Section 85.23, Code of Iowa, provides that notice of the injury for which compensation is sought must be given the employer within ninety days of the occurrence of the injury. The supreme court of Iowa has defined "occurrence" as follows:

> Since the legislature made disease compensable under its term 'injury' then clearly it must have meant the 'occurrence' of this type of 'injury' was when the employee found out about the disease. To hold otherwise would defeat the obvious legislative purpose. The employee could hardly be held under a duty to notify his employer of a disease of which he had no knowledge.
>
> * * *
>
> Whether or not a person is suffering from a disease, or any particular disease, or the lighting-up of some latent disease, is generally a question to be determined by physicians. The condition must be said to occur, within a statute placing a burden of notice of occurrence on the employer, when the physician's diagnosis discloses to the employee the nature of his disability.

Jaques v. Farmer's Lumber and Supply Co., 242 Iowa 548, 47 N.W.2d 236 (1951). The court has also indicated, in *Mousel v. Bituminous Material and Supply Company*, 169 N.W.2d 763 (Iowa, 1969), that the claimant must exercise ordinary or reasonable care in discovering the nature of the trouble.

In the case sub judice, both Kreger, the company nurse, and Adent, the foreman of the department where claimant was working on February 8, 1974, testified that claimant complained that day of arthritis. The nurse's notes substantiate this. It's apparent that claimant did not know the nature of his problem on February 8. Three days later claimant was examined by a physician whose diagnosis did not disclose the nature of the ailment to claimant. The diagnosis and nature of carpal tunnel syndrome were not revealed to claimant, despite his reasonable diligence in seeking medical advise, until April 9, 1974 and the ninety day period for giving of notice under §85.23 cannot be said to have begun to run, under the *Jacques v. Farmer's Lumber* rationale until that date.

Section 85.24 provides that no particular form of notice is required, but the notice must be "sufficient to advise the employer that a certain employee, by name received an injury in the course of his employment on or about a specified time, at or near a certain place." "The purpose of the statute is to enable the employer to investigate the facts pertaining to the injury . . . The statute does not require, in order for the employer to have knowledge, that he witness the accident resulting in the injury, but provides that

knowledge may be acquired, as well as notice given, within the prescribed time after the injury." *Hobbs v. Sioux City,* 231 Iowa 860, 2 N.W.2d 275 (1942). In this case, the letter from Dr. Beckenbaugh dated May 23, 1974 provides all the requisite information of notice and is sufficient to give defendant employer knowledge of the "injury" within the meaning of §85.23 and §85.24 and the time period therein.

* * *

Signed and filed this 29th day of March, 1977.

ROBERT C. LANDESS
Industrial Commissioner

Appealed to District Court, Affirmed.

NOTICE – INJURY

RICHARD I. CROSS,

Claimant,

vs.

SMITH'S TRANSFER CORPORATION,

Employer,

and

TRANSPORT INSURANCE COMPANY,

Insurance Carrier,
Defendants.

Appeal Decision

This is a proceeding brought by Smith's Transfer Corporation, defendant employer, and Transport Insurance Company, its insurance carrier, pursuant to Rule 500-4.26 and §86.24 of the Iowa Workers' Compensation Act for appeal of an arbitration decision wherein Richard I. Cross, claimant, was found to have suffered an occupational disease which "flared up" during a later return to work. The deputy industrial commissioner also found the claimant to have sustained an industrial disability of 50% of the body as a whole.

* * *

Claimant had been employed as a truck driver and dock worker, handling freight for defendant employer for a period of some twelve years. On December 13, 1973 claimant was loading tires at Armstrong Tire Company in Des Moines when the pain in his wrists that he had been suffering intermittently for the last month became severe. Though he was able to finish the week's work, his arms felt weak and the pain of his wrists did not subside. On Sunday, December 16, claimant called in to report he would not be in for work. The precise nature of claimant's report is somewhat uncertain. Claimant testified, "I believe on Sunday night I called and was supposed to go to work and didn't. That's a little bit vague. I'm not absolutely sure." At any rate, claimant's testimony indicates that at that time he was not giving notice of, or making claim for a compensable injury.

Q. You were aware of some procedure that the company had for calling in if you weren't feeling well?

A. Yes.

Q. And this was the procedure; to call the certain number and tell them that you wouldn't be available for work?

A. Right.

Q. And that is what you did?

A. Yes.

Q. What did you tell whoever you talked to?

A. Well, I told them all about how my arms felt and the general procedure was that they would just mark you off sick.

On Monday, December 17, 1973 claimant was examined by R. E. Alley, D.O., whose findings suggested a probable Carpal Tunnel Syndrome, and who referred claimant to Robert C. Jones, M.D., for neurological evaluation. After the examination by Dr. Alley, claimant returned to work for a few days in December, 1973 and January, 1974 but the pain increased and he obtained a general disability certificate from Dr. Alley on January 30, 1974 excusing him from work.

Dr. Jones examined claimant on January 10, 1974 and diagnosed a pinched median nerve at the wrist on both sides, which was confirmed by electrical tests at Younker Rehabilitation Center. Claimant was admitted to Mercy Hospital on February 11 and on February 14, 1974 Dr. Jones performed a carpal tunnel release on both wrists of claimant. He was discharged from the hospital on February 16 and the sutures were removed in Dr. Jones' office on February 28. The doctor testified that at the time the preoperative symptoms of claimant were improved and this was confirmed by a follow-up examination on March 22. Dr. Jones further testified that on May 24, 1974 the last time that year that he saw claimant, there was still some tenderness of the palm but that claimant's preoperative symptoms of pain were relieved. Dr. Jones also testified that it is not unusual for him to leave the decision of when to return to work to the patient.

Claimant did not immediately return to his position with defendant employer but sought work in various light-duty occupations from July, 1974 until May, 1975. On May 13, 1975 claimant returned to his work with defendant employer as a truck driver. He made several hauls in May and the first of June without serious difficulty although he did notice a bit of soreness and tenderness in his arms. On June 16, 1975 claimant left Des Moines on a haul for his employer to Atlanta, Georgia and sometime on the return trip from Atlanta to Mason City, Iowa he was forced to strenuously exert his hands and arms when the truck slid while rounding a curve on a rain-slickened highway. Claimant's arms became quite sore and he was excused from his duties as a driver upon arrival in Mason City. His last day on the job for defendant employer was June 19, 1975. Claimant returned to Dr. Jones for further examination on July 7, 1975. No further treatment was indicated at that time.

Dr. Jones testified that the lifting of tires at Armstrong

on December 13, 1973 aggravated claimant's condition. He further testified that the incident on or about June 16, 1975 involving the grabbing and twisting of the steering wheel of the truck which claimant was driving aggravated claimant's condition. In a letter addressed to Polk County Department of Social Services, dated July 22, 1975; Dr. Jones indicated that claimant was able to return to work at that time. The letter reads in part as follows: "in my opinion this patient could handle *normal* loads on the job. I think that the patient has been subjected to excessive loads on the job which has aggravated the condition for which he saw me most recently. I will approve his going back to work if the company will permit him to drive normal loads." (emphasis added)

The claimant has the burden of proving by a preponderance of the evidence that the "injury" arose out of and in the course of the employment. *Lindahl v. L. O. Boggs,* 236 Iowa 296, 18 N.W.2d 607 (1945). An injury may be compensable even though it does not arise out of an accident or any unusual occurrence. *Lindahl v. L. O. Boggs,* supra. The supreme court of Iowa addressed itself in *Almquist v. Shenandoah Nurseries,* 218 Iowa 724, 254 N.W. 35 (1934), to the question of what is a personal injury. There the court states, "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. The *Almquist* court also indicated that an injury to the body or health of an employee is not rendered noncompensable merely because of a weakened condition or disease which renders the employee more susceptible to an injury. When an employee is hired, the employer takes him as he finds him subject to active or dormant impairments of health or conditions incurred prior to the employment. If the employee's condition is more than slightly aggravated, the resultant condition is considered a personal injury under the Iowa law. *Ziegler v. United States Gypsum Company,* 252 Iowa 613, 106 N.W.2d 591 (1961). The claimant must show by a preponderance of the evidence, a direct causal connection between the exertion of the employment and the injury for which compensation is claimed. *Ziegler v. United States Gypsum Company,* supra. But if the employment results in a personal injury in the nature of an aggravation, acceleration, worsening, or lighting up of an active or dormant preexisting condition or susceptibility to injury or disease, the employee is entitled to recover under the Workmen's Compensation Statute. *Rose v. John Deere Ottumwa Works,* 247 Iowa 900, 76 N.W.2d 756 (1956). *Nicks v. Davenport Produce Co.,* 254 Iowa 130, 115 N.W.2d 812 (1962).

The test of whether the employment results in a compensable personal injury is whether there was a causal connection between the conditions under which work was performed and the injury, that is, whether the injury followed as a natural incident of the work. *Musselman v. Central Telephone Company,* 154 N.W.2d 128 (Iowa, 1967). 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 (1960). Dr. Jones' uncontroverted testimony was that the incidents on December 13, 1973, and June 16, 1975 both aggravated claimant's condition. Both events occurred while claimant was in the employ of defendant employer.

The requirement of establishing that an injury for which compensation is sought arose out of and in the course of employment is not the only limitation on allowance of compensation. The legislature has placed an additional requirement in §85.23 and §85.24 of the Code of Iowa. Section 85.23 provides as follows:

> Notice of injury — failure to give. Unless the employer or his representative shall have actual knowledge of the occurrence of an injury, or unless the employee or someone on his behalf or some of the dependents or someone on their behalf shall give notice thereof to the employer within fifteen days after the occurrence of the injury, then no compensation shall be paid until and from the date such notice is given or knowledge obtained; but if such notice is given or knowledge obtained within thirty days from the occurrence of the injury, no want, failure, or inaccuracy of a notice shall be a bar to obtaining compensation, unless the employer shall show that he was prejudiced thereby, and then only to the extent of such prejudice; but if the employee or beneficiary shall show that his failure to give prior notice was due to mistake, inadvertence, ignorance of fact or law, or inability, or to the fraud, misrepresentation, or deceit of another, or to any other reasonable cause or excuse, then compensation may be allowed, unless and then to the extent only that the employer shall show that he was prejudiced by failure to receive such notice; but unless knowledge is obtained or notice given within ninety days after the occurrence of the injury, no compensation shall be allowed.

Section 85.24 provides that no particular form of notice is required but does require, inter alia, that the notice be "sufficient to advise the employer that a certain employee, by name, received an injury in the course of his employment on or about a specified time, at or near a certain place." Larson has indicated the nature of the requisite notice as follows:

> It is not enough, however, that the employer, through his representatives, be aware that claimant 'feels sick' or has a headache, or fell down, or walks with a limp, or has a pain in his back, or shoulder, or is in the hospital, or has a blister, or swollen thumb, or has suffered a heart attack. There must in addition be some knowledge of accompanying facts connecting the injury or illness with the employment, and indicating to a reasonably conscientious manager that the case might involve a potential compensation claim.

3 Larson's Workmen's Compensation Law, §78.31, p. 15-39. There was nothing in claimant's report of inability to work on Sunday, December 16, 1973 or in subsequent general disability medical excuses to give the employer any indication of facts connecting claimant's injury with his employment or to indicate to the employer the presence of a potential compensation claim.

The time requirement for giving notice to the employer, as found in §85.23, Code of Iowa, does not begin to run until the nature of the disease is made known to the claimant. *Jacques v. Farmers Lumber and Supply Co.*, 242 Iowa 548, 47 N.W.2d 236 (1951). However, claimant must exercise ordinary or reasonable care in discovering the nature of the trouble. *Mousel v. Bituminous Material and Supply Company*, 169 N.W.2d 763 (Iowa, 1969). "The time period for notice or claim does not begin to run until the claimant, as a reasonable man, should recognize the nature, seriousness and probable compensable character of his injury or disease." However, "The claimant need not necessarily have positive medical information linking his condition to the employment if he has sufficient information from any source to put him on notice." *3 Larson's Workmen's Compensation Laws*, §78.41.

In the case sub judice, claimant knew that the onset of severe pain occurred at work. Dr. Alley indicated to him the probable presence of Carpal Tunnel Syndrome. Claimant's return to work in December, 1973 and January, 1974 resulted in pain so severe as to force him to obtain a medical excuse from work. Dr. Jones confirmed to claimant the presence of Carpal Tunnel Syndrome in early February, 1974. The severity of the problem was certainly evident by the operation performed by Dr. Jones on claimant on February 14, 1974. Yet the record indicates claimant gave no notice to defendant employer of a potential claim until after his meeting with Dr. Jones in July, 1975. As §85.23, Code of Iowa, is an absolute limit on recovery, no compensation can be awarded for expenses arising out of claimant's injuries received in December, 1973. A different situation exists as to the incident of June 16 (1975). If claimant'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 State Gypsum Co.*, supra. The record indicates that such is the situation at hand. Dr. Jones' testimony and the aforementioned letter of July 22, 1975 are clear in that regard. Sufficient notice of this injury was given to defendant employer within the statutory period with the filing of the application for arbitration. The record of claimant's earnings indicates he was eligible for the maximum allowable benefits at the time. Review of the medical expenses herein reveals the amount attributable to the June incident is $50.

* * *

Signed and filed this 18 day of March, 1977.

ROBERT C. LANDESS
Industrial Commissioner

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

NOTICE – INJURY

RONALD N. MEFFERD,

Claimant,

vs.

ED MILLER & SONS, INC.,

Employer,

and

UNITED STATES FIDELITY AND GUARANTY COMPANY,

Insurance Carrier,
Defendants.

Decision on Appeal

This is a proceeding brought by defendant employer, Ed Miller & Sons, Inc., and its insurance carrier, United States Fidelity and Guaranty Company, pursuant to Rule 500-4.26, Iowa Administrative Code, and Iowa Code §86.24 for review of an arbitration decision wherein claimant was awarded medical expenses and healing period benefits for an injury arising out of and in the course of his employment in July or August of 1975.

* * *

The issue to be determined here is whether or not the employer received notice of injury as provided for in Iowa Code §85.23. It should be noted at the outset that the entire complexion of this case is colored by claimant's extreme deafness. This deafness was present at birth; and in addition to an impairment in his hearing, the claimant evidences a pronunciation defect which is related to his hearing deficiency. These disabilities influence the claimant's ability to communicate effectively with others and lead to uncertainty on the parts of those trying to converse with him as to whether or not he has heard and has understood what the person speaking to him wished to convey.

In July or August of 1975, claimant was running a dozer along a dike cut for trucks when the machine slipped into the mud at a 45° angle. He got on the platform on the left side and put his left foot on the track. As he brought up his right foot, he slipped going down on his left hip and falling on the track. He rolled off the track and fell three to four feet to the ground feeling pain in his lower left hip. Shortly thereafter, Leonard Zahm, superintendent and Dean Teten, foreman, drove up. Claimant described what transpired as follows: "Then Leonard got out of the pickup, and I was holding my hip, and he asked me what was the matter, and of course, I was disgusted at the time, and I told him. I said, 'I slipped and fell on that God-damned dozer truck [sic]', like that, you know." He recounted Zahm's reaction thusly: "Well, then he just stood there for a minute and never said anything. Then he said, 'Well, I'll go up and get a machine to pull you out.' " Zahm's response, which was undoubtedly masked by his sense of responsibility for keeping the project moving by extricating the dozer as quickly as possible, was a typically human one. Claimant manifested no visible signs of trauma. In fact, he continued to work that day and until October 1, 1975, when he was laid off. It appears that claimant was accustomed to working on a daily basis while in pain. He believed he had complained to the co-workers of leg pain each day following the injury.

On November 1, 1975 claimant went to work for N. P.

Construction for whom he worked until he suffered an episode of paralysis in February of 1976. He entered the hospital on February 24, 1976; and, following a myelogram which revealed a herniated disc, he underwent surgery on March 1, 1976. Claimant has not worked since this hospitalization.

Zahm, who was superintendent of the Iowa Power and Light project on which claimant was injured and who continued to work for defendant at the time of the hearing, recalled neither the particular incident nor claimant's limping nor his complaining of an injury. He did, however, remember several dozers being stuck; and he did not discount the possibility that the incident might have happened. Teten, defendant's foreman, who also continued in defendant's employ, did not recall either complaints or the incident. Donald G. Wilwerding, defendant's paymaster, ascertained from his record that claimant had not been paid any wages for the weeks ending June 1 or June 15 eliminating the possibility of an injury having occurred during thos periods.

Claimant's co-workers, Stanley Dofner, David Heart, and Oren Gorman, also testified. Dofner, who operated the same type of machine as claimant, testified to having been told by claimant that he had fallen off his dozer and to having heard claimant complain of pain. Heart, who had worked on the project in July and who no longer worked for Ed Miller & Sons, did not recollect any complaints of pain by claimant. Gorman, in describing the consistency of the material with which claimant was dealing at the time of his injury, analogized the experience to standing on grease. Although he could not reconstruct specific occasions when claimant talked of pain, he did remember them generally. The prevalence of complaints around the construction site may have resulted in little attention being paid to lamentations of claimant with whom communication was difficult.

Claimant's mother, Odelia Meffered with whom he was living at the time of this injury, was able to place the injury in July because she related the injury to a family reunion in August which claimant because of his physical condition was unable to attend.

Nicholas Paulson, owner of N. P. Construction Company, who has himself suffered from back problems, was claimant's employer after he left Ed Miller & Sons. Paulson testified that upon observing claimant dragging his leg, he inquired as to the problem and was told by claimant, " 'I've got terrific back pains. And my leg goes numb . . . Ever since I fell from a dozer while working for Miller on the Iowa Power and Light job, I've had this pain.' "

Claimant first sought treatment on October 13, 1975 from Raymond R. Koski, D.C. Dr. Koski was unaware of claimant's hearing disability, treated him only once, and seemed to confuse claimant with claimant's brother whom he had also treated.

Roger C. Dahlgaard, D.C., acknowledging that communicating with claimant was hard because of his hearing problem, stated that although he did not make written record of any incident, it did stick in his memory that claimant was involved in "some type of altercation with a bulldozer." Maurice P. Margules, M.D., neurosurgeon, who was cognizant of claimant's hearing impairment, reported that taking a history from the claimant was difficult; however, "[t]he clinical findings and the surgical findings of March 1, 1976, were consistent with Mr. Mefferd's statement that he suffered an injury in July-August of 1975 while at work." Defendants argue that the claimant did not report a "bad fall" to any of his doctors. Claimant testified that a "bad fall" to him implied a serious fall with immediate adverse consequences. The progressive worsening of his pain did not fit claimant's concept of a "bad fall".

Defendants in the case sub judice have pleaded the affirmative defense of lack of notice. The Iowa Supreme Court in *Reddick v. Grand Union Tea Co.*, 230 Iowa 108, 296 N.W. 800 (1941) set forth the rule for dealing with affirmative defenses. The opinion of the court in *Reddick* provided that once claimant sustains the burden of showing that an injury arose out of and in the course of employment, claimant prevails unless defendant can prove by a preponderance of the evidence an affirmative defense. In *DeLong v. Iowa State Highway Commission*, 229 Iowa 700, 295 N.W. 91 (1940) the court recognized the industrial commissioner's treatment of notice when the case was before him. The commissioner quoted in *DeLong* at 702-03, 92, wrote "that while the weight of the evidence is not entirely free from doubt, much of which may be due to lapse of time * * * we are of the opinion claimant sustained the burden of proof in that respect, but in this the question upon whom the burden of proof may rest is not free from doubt. We are constrained to believe that want of such notice is an affirmative defense and if that be ture the burden of proof would rest upon the defendant."

That same language seems applicable to the situation presented here. Once the claimant had established that his injury arose out of and in the course of his employment, the burden shifted to the defendants to prove the affirmative defense of lack of notice by a preponderance of the evidence. Defendants have failed to establish their affirmative defense by a preponderance of the evidence.

A study of the case law reveals the courts' universal understanding of the problems of the injured employee in giving notice of particular types of injury. The Iowa Supreme Court in *Jacques v. Farmers Lumber & Supply Co.*, 242 Iowa 549, 47 N.W.2d 236 (1951) discussed *Wallich v. Sandlovich*, 111 Neb. 318, 196 N.W. 317 (1923) [*Selders v. Cornhusker Oil Co.*, 111 Neb. 300, 196 N.W. 316 (1923).] In *Wallich, [Selders]*, the claimant believed he had received a minor injury to his back. Gradually his strength and health failed. A later x-ray revealed a fractured vertebra. The court found the injury occurred at the time of the x-ray. The Iowa court in *Jacques* at 554, 240, followed the reasoning of the Nebraska court by holding that a "condition must be said to occur, within a statute placing a burden of notice of occurrence on the employee, when the physician's diagnosis discloses to the employee the nature of his disability." Applying this analysis to the case here considered would result in a finding that claimant became aware of the nature of his disability at the time of his February hospitalization and his duty to provide notice to his employer arose then.

At the appeal hearing claimant's exhibit two, a letter from Dr. Margules, was introduced and admitted without objection for the purpose of establishing the duration of the healing period which had been left open by the deputy

industrial commissioner. Iowa Code §85.34(1) requires the payment of healing period benefits for permanent partial disability until the claimant is either returned to work or competent medical evidence establishes recuperation has been achieved, whichever comes first. Healing period can exist only with a permanent partial disability. One with a permanent partial impairment can never "recuperate" completely; that is, return to the exact same prior physical condition, from such an 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 injuries where the portion of the body injured in a permanent manner is a principal portion, 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 may be 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.

An alternative test to that of medical stabilization is defining recuperation is whether or not the injured employee is capable of return to substantially similar employment as that in which the employee was engaged at the time he was injured. If either of the above tests are met, the claimant may be said to have reached a point of recuperation after which healing period benefits need not be paid.

Dr. Margules' letter stated:

> It was our opinion that Mr. Mefferd could return to a sedentary type of employment in October of 1976. As far as your second question regarding a possibility of future medical care, it is felt that the patient may require medication for relief of pain on occassions and possibly may have to receive physio-therapy because of muscular disturbance in the back.

This letter is insufficient to meet either of the two tests.

* * *

THEREFORE, the defendants, Ed Miller & Sons, Inc., employer, and United States Fidelity and Guaranty Co., insurance carrier, are ordered to pay to claimant, Ronald N. Mefferd, healing period benefits at the rate of one hundred sixty dollars ($160) per week until such time as the test for cessation of benefits provided for by Iowa Code §85.34 can be met.

* * *

Signed and filed this 26 day of August, 1977.

ROBERT C. LANDESS
Industrial Commissioner

Appealed to District Court; Affirmed.
Appealted to Supreme Court; Pending.

NOTICE – INJURY

BLAINE TURNEY,

Claimant,

vs.

CLINTON CORN PROCESSING CO.,

Employer,

and

COMMERCIAL UNION ASSURANCE COS.,

Insurance Carrier,
Defendants.

Arbitration Decision

This is a proceeding in arbitration brought by the claimant, Blaine Turney, against his employer, Clinton Corn Processing Company, and Commercial Union Assurance Companies, the insurance carrier, to recover compensation under the Iowa Workers' Compensation Act by virtue of a hearing loss alleged to have occurred on September 1, 1976.

* * *

The claimant has been employed by defendant-employer since April 8, 1941. During twenty-four and one-half years of that time, he was employed as turbine operator in the power division. The turbines generated a considerable amount of noise. The claimant last worked with defendant-employer on October 10, 1976. Prior to his retirement, he worked an eight-hour shift six days a week. Prior to being employed by the defendant-employer, he had no difficulty with hearing.

Sometime prior to 1959, the claimant noted that his hearing was failing. On April 21, 1959 the claimant was examined by G. T. Schultz, M.D., an otolaryngologist. The history taken at that time indicated that the claimant stated that he had a hearing loss which was progressive in nature for ten years prior to that time. After the claimant was informed of this hearing loss, he did not inform anyone at work with regard to his condition. About a year later he obtained a hearing aid, which he did not wear on the job because the noise was increased by wearing the hearing aid. The foreman at the time knew that the claimant had a hearing aid. In august of 1976 the claimant was at a fair and picked up a pamphlet dealing with workers' compensation. The pamphlet had a resume of the benefits payable to an injured employee and indicated that a hearing loss was a compensable loss. At this point the claimant promptly informed his employer that he had developed a hearing loss in both ears as a result of noise on the job.

In September of 1976 the claimant investigated and found out that the decibel level at the defendant-employer's place of business was excessive. The claimant was seen by C. M. Kos, M.D., on October 20, 1976.

Ed Obermiller testified at the hearing in this matter and stated that he first received any form of notice during the summer of 1976. However, on cross-examination this witness testified that although he was aware that the claimant was having hearing problems, it never occurred to him that the claimant had an injury that arose out of and in the course of his employment or would have a claim therefor. This witness also testified that in the area where the claimant was employed, the decibel level ran some 94 to 100 decibels and further testified that hearing protectors were available if they were requested by an employee.

The issues for determination in this matter are (1) Did the claimant receive an injury which arose out of and in the

course of his employment?; (2) Is the application for arbitration barred by operation of §85.26, Code of Iowa?; (3) Is the claimant's application for arbitration barred by operation of §85.23, Code of Iowa?

To be compensable an employee's injury must occur in the course of and also arise out of his employment. The burden rests upon the claimant to establish these factors by a preponderance of the evidence. *Musselman v. Central Telephone Co.,* 261 Iowa 352, 154 N.W.2d 128. *Almquist v. Shenandoah Nurseries,* 218 Iowa 724, 254 N.W. 35. The claimant has the burden of proving by a preponderance of the evidence that a work-related injury is the cause of the disability upon 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 Tractors Works,* 247 Iowa 691, 73 N.W.2d 732. The question of causal connection is essentially within the domain of expert medical testimony. *Bradshaw v. Iowa Methodist Hospital,* 251 Iowa 375, 101 N.W.2d 167.

While the claimant is not entitled to compensation for the result of a preexisting injury or disease, the mere existence at the time of a subsequent injury is not a defense. If the claimant has a preexisting condition or disability that was aggravated, accelerated, worsened or lighted up as the result of the disability found to exist, he is entitled to compensation to the extent of that injury. *Yeager v. Firestone Tire & Rubber Co.,* 253 Iowa 369, 112 N.W.2d 299. *Nicks v. Davenport Produce Co.,* 254 Iowa 130, 115 N.W.2d 812. Based on the foregoing principles, it is found that the claimant has established his claim by the requisite preponderance of the evidence.

Dr. Kos indicates that the claimant has a sensori-neurological impairment of both ears, which basically affects the frequencies above 1000 HC. Although Dr. Kos could only see a possibility in noise being the factor in the etiology of the claimant's condition, he indicates that the condition could have developed without noise but that noise could aggravate the condition. The problem is how much is due to the aging process and how much is due to the noise.

The defense under §85.26 bears very close scrutiny. It would appear that the claimant could not make a claim for hearing loss which occurred prior to April, 1975, two years prior to the filing of the application for arbitration herein. Since this is a progressive type of injury, any claim for injuries prior to two years prior to the filing of the application must be barred by the operation of §85.26.

The next issue which must be discussed concerns the defenses raised by the defendants. Specifically, the issue of notice must be approached. Section 85.23, Code of Iowa, in effect in 1976 states as follows:

> Notice of injury---failure to give. Unless the employer or his representative shall have actual knowledge of the occurrence of an injury received within ninety days from the date of the occurrence of the injury or unless the employee or someone on his behalf or a dependent or someone on his behalf shall give notice thereof to the employer within ninety days from the date of the occurrence of the injury, no compensation shall be allowed.

It is found that the claimant knew or should have known that the noise at work was aggravating this condition sometime in 1959. The evidence in this case, however, indicates that the hearing loss present in 1959 was slight and that the condition has progressively worsened over the years. The hearing loss was worsened by continuous exposure to noise over the years. Since there is a causal relationship between the exposure to the excessive noise and the portion of the hearing loss, it would appear that a continuous exposure on a daily basis to excessive noise would comprise a separate injury on each successive day. This, of course, changes the "date of occurrence of injury" within the meaning of §85.23. The claimant, therefore, has passed the hurdle of notice for the purposes of §85.23. Further, it is shown by the evidence, particularly in the testimony of Mr. Obermiller, that the defendant had knowledge at least of the claimant's condition and knew that there was significant noise in the area in question at least two years prior to April, 1977.

Therefore, the disability must be apportioned between the disability which existed prior to April, 1975 and subsequent to that time.

It can be generally seen that the claimant's condition was nearly normal in 1959. The amount of the allowable claim would be somewhat in the neighborhood of one year and a half out of 17 years of hearing loss. This is roughly 9% of the total hearing loss had by the claimant if there were an arithmetic progression of the hearing loss.

Dr. Kos indicates that the claimant had a 55.5% loss to hearing in the right ear and a 54% loss in the left ear. Dr. Kos used the loss devised by the American Academy of Opthamology and Otolaryngology. Other loss formulas are promulgated by the American Medical Association (AMA) and the National Institute of Occupational Safety and Health (NIOSH) and the National Research Council.

It should be noted that the hearing loss in Iowa is a scheduled disability, meaning that a set maximum amount is assigned to hearing loss in one ear (50 weeks) and another set maximum amount for hearing loss in both ears (175 weeks). This loss is not evaluated by statute or rule any table or formula by which hearing loss is to be measured. Rather, it is evaluated as any other scheduled permanent partial disability, solely on the amount of loss. Claimants, therefore, are compensated for loss of use, not merely hearing impairment. Wage loss is not a consideration. The evidence herein was not in a form which would allow this deputy commissioner to assign a percentage binaural hearing loss. No total loss figure was given applicable to any table or device to which a total binaural loss could be found.

WHEREFORE, it is found that the claimant sustained an industrial injury arising out of and in the course of his employment which resulted in hearing loss. The evidence as presented does not enable the undersigned to make an assignment of percentage of binaural hearing loss or apportion the loss which occurred after April, 1975.

THEREFORE, it is ordered that the claimant be allowed twenty (20) days from the date of this decision to present evidence as to his binaural hearing loss which occurred after April, 1975.

* * *

Signed and filed this 27 day of March, 1978.

JOSEPH M. BAUER
Deputy Industrial Commissioner

No appeal.

NOTICE – INJURY

LARRY HEALD,

Claimant,

vs.

GREAT PLAINS GAS CO., DIVISION OF NATIONAL PROPANE CORPORATION,

Employer,

and

KANSAS CITY FIRE AND MARINE INSURANCE COMPANY,

Insurance Carrier,
Defendants.

Appeal Decision

This is a proceeding brought by defendant employer, Great Plains Gas Co., Division of National Propane Corporation, and Kansas City Fire and Marine Insurance Company, its insurance carrier, appealing a proposed decision in arbitration wherein claimant, Larry Heald, was awarded medical expenses and temporary disability payments resulting from an injury arising out of and in the course of his employment on March 28, 1975.

* * *

Claimant testified that he started working for Great Plains in 1973 as a bulk truck driver making deliveries to residences. On the morning of March 28, 1975 he stated that as he was pulling on a hose from the truck in the process of making a delivery, he felt a "pull" in his stomach in the area in which he had undergone a splenectomy in 1957. He testified that he had never felt this discomfort before. He continued working. The following day he saw Paul E. Orcutt, M.D. No claim for the medical expense involved in this visit was made. When claimant returned to work on March 31, he testified he told his supervisor, Mike Simpson, that he had seen the doctor and that he had pulled a muscle in his stomach. Claimant stated that he questioned whether or not a first report of injury should be filed. In December, claimant, who testified to occasionally noticing pain, returned to the doctor. Following that consultation with the doctor, claimant stated that he again spoke with Simpson about making a workmen's compensation claim. On April 6, 1976, a surgical correction of an incisional hernia was performed.

Michael Simpson, district manager for the Cedar Rapids district of Great Plains, denied any conversation with claimant about a pulled muscle and testified to an incident in April, 1975 as follows:

> We were standing by the driver's room, and Larry lifted his shirt and showed me a spot on his abdomen, and it looked like a water blister, so he showed me that it had like water under it and thought it was kind of amusing, and that's as far as it went. There was nothing said bout it being a hernia.

He stated that his first awareness of claimant's claimed hernia came in December of that year.

Medical evidence in this case took the form of reports by Dr. Orcutt. Claimant's admission history on April 5, 1976 prior to surgery reveals that the doctor first noted the herniated area in March, 1975. Dr. Orcutt's report of May 8, 1976 indicates that in December, 1975 he discussed surgery with the claimant, but that they elected to postpone the hernioplasty until spring.

The sole issue presented in this case is whether or not claimant provided his employer with notice as required by Iowa Code §85.23 which states:

> Notice of injury -- failure to give. Unless the employer or his representative shall have actual knowledge of the occurrence of an injury, or unless the employee or someone on his behalf or some of the dependents or someone on their behalf shall give notice thereof to the employer within fifteen days after the occurrence of the injury, then no compensation shall be paid until and from the date such notice is given or knowledge obtained; but if such notice is given or knowledge obtained within thirty days from the occurrence of the injury, no want, failure, or inaccuracy of a notice shall be a bar to obtaining compensation, unless the employer shall show that he was prejudiced thereby, and then only to the extent of such prejudice; but if the employee or beneficiary shall show that his failure to give prior notice was due to mistake, inadvertence, ignorance of fact or law, or inability, or to the fraud, misrepresentation, or deceit of another, or to any other reasonable cause or excuse, then compensation may be allowed, unless and then to the extent only that the employer shall show that he was prejudiced by failure to receive such notice; but unless knowledge is obtained or notice given within ninety days after the occurrence of the injury, no compensation shall be allowed.

The burden of proof is upon the claimant to establish his case by a preponderance of the evidence. *Almquist v. Shenandoah Nurseries,* 218 Iowa 724, 254 N.W.35 (1934).

In the case sub judice as in many disputes coming before this commissioner involving this code section requiring notice, the problem is the resolution of diametrical averments. The claimant says he has informed the employer. The employer says he has not. In some instances, claimant's allegation alone will carry the burden of establishing a prima facie case thereby placing upon defendant the burden of presenting evidence to overcome or rebut claimant's case. Defendants' response may be nothing more than a negative allegation. Other circumstances must therefore be looked at to determine the preponderance of the evidence.

There is evidence to show that claimant should have been aware of proper procedure for filing a workmen's compensation claim as in July, 1973, he, himself, had filed a claimant for benefits under the act. Simpson testified that

during the entire period claimant worked for defendant, signs had been posted encouraging employees to report all injuries no matter how minor.

Claimant alleges time for notice should be counted from December, 1975. However, it is clear from the record that claimant's condition was known in March, 1973. Therefore, the March date is the relevant time from which notice must be given.

A letter from Dr. Orcutt states:

> According to my history, a preoperative evaluation by Dr. Richard Sedlacek reported that this patient began to complain of a bulging area in the spleenectomy incision in March of 1975. No definite distinct history of when this occured [sic] has been made in either my history or Dr. Sedlacek's.

While defendant may have known of the existence of a condition, there is no showing that defendant had knowledge of its causal relation to the employment.

WHEREFORE, it is found and held as finding of fact:

That claimant has failed to establish that he gave notice of an injury to his employer in the time prescribed by Code §85.23.

* * *

Signed and filed this 3rd day of February, 1978.

ROBERT C. LANDESS
Industrial Commissioner

Appealed to District Court; Pending.

NURSING SERVICES

ALVIN NIELSEN,

Claimant,

vs.

CITY OF SIOUX CITY,
A Municipal Corporation,

Employer,
Self-Insured,
Defendant.

Decision on Appeal

This is an appeal from a review-reopening decision wherein the claimant, Alvin Nielsen, was awarded benefits from the defendant, City of Sioux City, for nursing services provided to him by his wife and his daughter while in his home based upon the reasonable charges for a nurse's aide for an eight-hour day.

* * *

Claimant was injured in 1965. Following the injury, a colostomy and cystostomy were performed and he was fitted with leg braces. Except for periodic hospitalization, he has been housebound with monthly medical examinations being conducted in his home.

The questions here are whether or not defendant knew the disabling nature of claimant's injuries necessitated nursing services, if such services provided to claimant by his spouse and daughter are compensable and at what amount compensation should be paid.

Iowa Code §85.27 imposes an obligation upon the employer to furnish reasonable nursing care. Employer's first contention is that it had no notice of the necessity for such care.

Notice was the issue in *Stephens v. Crane Trucking, Inc.*, 446 S.W.2d 772 (Mo. 1969) which is factually very similar to the case here in that the claimant was permanently totally disabled and was seeking payment for nursing services provided by his spouse with the defendant employer contending it was unaware of claimant's need for nursing care. There, as here, defendant had not offered to supply nursing services. The Missouri Supreme Court at p. 77 found it was "certain that the employer and insurer knew of the disabling nature of the employer's injuries and his helpless condition through the diagnosis made and treatment given and reported by the doctors . . ." The court went on to find that defendant's failure, either through refusal or through neglect to provide nursing services made them liable for the provisions claimant made himself. The Idaho Supreme Court reached the same conclusion in regard to notice in *Hamilton v. Boise Cascade Corp.*, 370 P.2d 191 (Idaho 1962).

The absence of request by claimant or his spouse was also considered in *Stephens,* supra, p. 780 with the court disclosing that such absence was "not controlling because appellates [defendants] were found to have been aware of claimant's need of such services irrespective of such request from claimant or his wife. Such request would simply be additional evidence of knowledge."

The defendant in this case sub judice knew of the nature, character and extent of claimant's injuries and also through continuing doctors' reports of the type of treatment he was receiving. Defendant authorized payment for the doctors treating claimant, both of whom testified that nursing care was necessitated by claimant's condition, with one stating that such care had been needed since the time of the accident. The cumulative effect of these factors supplies employer with notice.

David F. Johnson, Jr., M.D., family practitioner, and Dwayne E. Howard, M.D., board certified urologist, testified as to the nature of the nursing care claimant would require. Dr. Johnson listed detection of pressure areas, irrigation of the catheter and care of the colostomy bag. Dr. Howard cited the latter two items and in addition, the need for help climbing in and out of bed, for assistance with walking, for aid in getting meals and for supplying transportation. The two physicians also saw a need for the person performing these tasks to have some training.

Iowa Code §85.27 places upon the employer an obligation to furnish reasonable nursing services. "Furnish" and "reasonable" were interpreted in Op. Atty. Gen. 1916 at p. 46 which states:

> The word "furnish" in this section has no legal or technical definition different from its ordinary use in commercial parlance, which is to supply with anything necessary or needful, and it is intended that the employer should act in furnishing of reasonable medical, surgical or hospital services.

> This section requires that services furnished be reasonable, but what is reasonable is a question of fact, and if there are peculiar circumstances making the medical services furnished by employer unreasonable, the employer should either provide reasonable services or permit employee to secure such services at employer's expense.

Claimant's wife and his daughter had both received training as nurse's aides by working in nursing homes. Testimony revealed that the care claimant had received was satisfactory and that if such care had not been supplied by his wife and his daughter, claimant would have needed institutional care or care provided by someone else coming to his home. Larson in 2 Larson, *Workmen's Compensation Law,* §61.13 (1976) summarized the current state of the law relating to nursing services provided by a spouse saying that earlier cases denied compensation because a spouse was only meeting marital obligations. However, the trend in recent cases is to allow payment to a spouse who performs the duties a nurse would ordinarily perform. *Graham v. City of Kosciusko,* 339 S.2d 60 (Mass. 1976); *Kashay v. Septon Dairy Co.,* 394 Mich. 69, 228 N.W.2d 205 (Mich. 1975); *Dunaj v. Harry Becker Co.,* 52 Mich. App. 354, 217 N.W.2d 297 (Ct. App. Mich. 1974). The services given to claimant by his wife and by his daughter in addition to those which Dr. Howard and Dr. Johnson saw as necessary included dressing, bathing, massaging, medicating, grooming and exercising claimant as well as doing cooking, cleaning and laundry and running errands for him. These services were rendered exclusively by claimant's wife from November 16, 1965 with the exception of a two week period when he was cared for by his daughter. The Supreme Court of Michigan in *Kashay,* supra, at p. 208, a case in which claimant's spouse had provided nursing care, held that the fact that "a 'conscientious' spouse may . . . perform these services [nursing care] does not diminish the employer's duty to compensate him or her as the person who discharges the employer's duty to provide them."

To determine the value of services provided by a spouse, a distinction is to be drawn between nursing tasks and household tasks with the focus on the nature of the task rather than on the status or devotion of the person doing those tasks. *Kashay,* supra, at p. 208. The Michigan Supreme Court very clearly established this distinction at p. 208 saying an employer was not responsible for payment for "[h]ouse cleaning, preparation of meals and washing and mending clothes, services required for the maintenance of persons who are not disabled," but that "[s]erving meals in bed and bathing, dressing, and escorting a disabled person are not ordinary household tasks." Another factor sometimes considered, but not controlling, is that the spouse by caring for another undergoes a loss of earnings because that person is no longer able to work outside the home. *Dolite Rock Co. v. Deese,* 134 So.2d 241 (Fla. 1961). Many of the duties undertaken by claimant's wife and by his daughter clearly fall into the category of those beyond ordinary household tasks.

Arriving at the number of hours per day during which nursing services were given is difficult in a case such as this where claimant's wife or his daughter was with him twenty-four hours a day with services being rendered intermittently throughout the period. Dr. Johnson characterized care required by claimant as less than twenty-four hours a day, but "several hours a day of nurses' aid [sic] type care" with "additional hours of other attention that may not be strictly classified as nurse aid [sic] or professional care." The deputy industrial commissioner found the reasonable number of hours per day to be eight. Claimant contends that since services were performed on a twenty-four hour basis that reimbursement should be on this basis. Claimant is obviously receiving greater care than he would be in a nursing home or hospital environment. This is largely because of his admittedly being demanding and his wife's apparent willingness to cater to his demands. Defendants, however, are only responsible for the *reasonable* and *necessary* nursing care services. Based upon the record as a whole, claimant is entitled to be reimbursed for reasonable and necessary nursing services of his wife and of his daughter on the basis of eight hours per day.

At the review-reopening proceeding, claimant presented verified statements by Lillie Matney, a nursing home manager, and Alice White, a counselor for an employment service, as to the reasonable wages paid and commanded in the community in general and in Plainview, Nebraska, in particular. Based on these statements, the hourly rates for nursing services received by claimant from an experienced nurse's aide were determined to be as follows:

1965	$1.05	1966	$1.10
1967	1.15	1968	1.25
1969	1.45	1970	1.55
1971	1.70	1972	1.70
1973	1.70	1974	2.00
1975	2.10	1976	2.30

The amount for 1969 based upon the record should properly be $1.40 per hour.

* * *

It is found and held that defendant knew of the nature, character and extent of claimant's injuries and also through continuing doctors' reports of the type of treatment he was receiving. It is further found that claimant is entitled to be reimbursed for the nursing services provided to him by his wife and his daughter. It is further found that the nursing services rendered to claimant by his wife and his daughter were reasonable and necessary as a result of claimant's injuries on November 16, 1965.

* * *

Signed and filed this 23 day of May, 1977.

ROBERT C. LANDESS
Industrial Commissioner

Appealed to District Court; Pending.

OCCUPATIONAL DISEASE –
CARPAL TUNNEL SYNDROME

FREDDIE L. JONES,

Claimant,

vs.

CATERPILLAR

Employer,
Self-Insured,
Defendant.

Arbitration Decision

This is a proceeding in arbitration brought by the claimant, Freddie L. Jones, against her employer, Caterpillar, self-insured, to recover benefits under the Iowa Workmen's Compensation Law, on account of an injury allegedly sustained in February, 1976, as well as times previous.

* * *

The issue to be determined in this matter is whether or not the claimant sustained an injury arising out of and in the course of her employment with the defendant. Claimant seeks benefits for a bilateral carpal tunnel syndrome, allegedly resulting from her work activity at defendant.

As the cause and effect of the carpal tunnel syndrome is of a complex medical nature, medical testimony is necessary to establish any entitlement of the claimant under the Workmen's Compensation Law, *Sondag v. Ferris Hardware,* 220 N.W.2d 903. Only three of the medical reports in evidence approach the issue of causation. A report of August 29, 1977, of Dr. Catalona, indicates claimant has complaints "which she relates to using an air gun at work during February of 1976." Such a phrase merely recites the history and thinking of the claimant and not that of the doctor. This is insufficient to establish causation. In the same report, Dr. Catalona also states, "Did it result from the use of the air gun or her diabetes. Assuming that there was a factor contributed by her diabetes, one could say that the air gun vibration was a factor of aggravation." Standing alone, this sentence would establish causation. However, a proper history and factual basis for such a relationship is necessary. This factor will be discussed infra. Dr. Catalona elaborates further in the report in saying, "In consideration of the aggravating or precipitating factor of her median neuritis related to using an air gun, there is reason to consider she might have a permanent impairment. It is not easy however, to determine this impairment." The doctor goes on in the following paragraph and places a permanent impairment rating on each extremity. Although such language barely establishes a prima facie case, assuming other factors in claimant's favor, a permanent impairment as a result of the injury is found. However, as will be noted infra, this deputy commissioner does not feel claimant has established a prima facie case by showing a relationship between the carpal tunnel syndrome and the claimant's employment.

After receiving the August 29, 1977, report of Dr. Catalona, counsel for the defendant wrote to Dr. Catalona on September 19, 1977, indicating only 16 working days of exposure to vibrating tools. The dates of work were specified, including the dates in February, 1976. In response to that letter from counsel, Dr. Catalona replied in a report of September 22, 1977, as follows: "If Ms. Jones used vibrating tools only 16 days, and on the spread of time which you describe, then, of course, I doubt very much that the use of vibrating tools contributed to any permanent impairment of this patient's hand. There would, of course, be the temporary aggravation of her symptoms by the use of vibrating tools, but I doubt that there would be a permanent impairment effect by this brief and widespread in time use of vibrating tools". Assuming the facts on which the doctor based his opinion are correct, this latter letter would negate any inference of a causal relationship in the opinion of Dr. Catalona present in his earlier letter. The record at this point would be void of any evidence, medically, showing a causal relationship.

It should be noted that the temporary aggravation commented upon by Dr. Catalona in his letter of September 22, 1977, does not indicate that the temporary aggravation would be so disabling as to allow entitlement to temporary total disability benefits. Such disability has thus not been established.

A great deal of testimony was offered at the hearing and by deposition as to the nature of work performed by claimant. Her exposure to vibrating tools was in issue. However, it is the finding of this deputy commissioner that the actual involvement with continuous operation of a vibrating tool, was limited. This was the understanding of Dr. Catalona and the basis for his opinion. There was considerable testimony as to other work activity of the claimant over a period of several years. This activity included using sand paper to smooth out rods and occasionally using some sort of an air gun to install nuts on the end of the rods. Claimant's complaints were minimal except when she was using the vibrating gun during the brief periods described to Dr. Catalona. Given the history of the other activity, it may well be the physicians would have related the other activity to the carpal tunnel syndrome. However, the doctor's opinion, based upon this other insignificantly different activity, was not solicited. Although some vibration may have occurred on an intermittent basis in claimant's other activity, it is the finding of this deputy commissioner that such vibration is to be considered distinct from that vibration to which claimant was exposed while operating the "air gun" on the "burr bench". It is the "burr bench" vibration that is the basis for the medical opinion. Accordingly, no medical evidence is given based upon the proper history so as to establish a causal relationship between the other activity and claimant's carpal tunnel syndrome, see *Sondag v. Ferris Hardware,* 220 N.W.2d 903; see *Bodish v. Fischer* 257 Iowa 516, 133 N.W.2d 867. The essentially correct history given Dr. Catalona resulted in an opinion negative to claimant. No relationship between claimant's carpal tunnel syndrome and work activity is thus established.

There is no indication in the medical reports that any surgery was necessitated by the work activity.

It should be noted that a report of Dr. Harry Honda, M.D., neurosurgeon, dated April 19, 1976, indicates that claimant's carpal tunnel syndrome could be due to "myxoedema" or diabetes. He indicates claimant should avoid usage of the hand gun. However, he does not indicate that the use of the hand gun would do any more than be an aggravation. This appears consistent with Dr. Catalona's opinion that the aggravation is temporary. Without more, no causation is shown by the report of Dr. Honda. The parties have indicated that such a report is not to be considered in determining causation. In view of the findings

in this decision, and the nature of the report, the consideration of whether or not such a limitation of the use of a narrative report by stipulation is effective need not be reached.

A caveat to the use of medical reports in workers' compensation cases is necessary. The use of reports is beneficial, economical and is encouraged by the Industrial Commissioner's Office. However, many equivocal phrases used by doctors appear in reports. On occasion, factual situations, especially ones where a conflict in the evidence appears, could be better explained by the use of testimony as opposed to medical reports, or at least written hypothetical based on alternative facts which can be a basis for a doctor's written opinion.

THEREFORE, the relief sought by the claimant in her application for arbitration is denied.

* * *

Signed and filed this 25 January, 1978.

ALAN R. GARDNER
Deputy Industrial Commissioner

No appeal.

OCCUPATIONAL DISEASE – CARPAL TUNNEL SYNDROME

MARY MAXINE BOYD,

Claimant,

vs.

AMERICAN ATHLETIC EQUIPMENT CO.,

Employer,

and

THE HARTFORD INSURANCE GROUP

Insurance Carrier,
Defendants.

Arbitration Decision

This is a proceeding in Arbitration brought by the claimant, Mary Maxine Boyd, against her employer, American Athletic Equipment Co., and its insurance carrier, The Hartford Insurance Group, on account of an injury on June 17, 1974.

* * *

The issue to be determined is whether Claimant sustained an injury arising out of and in the course of her employment on June 17, 1974, and resulting in compensable disability and medical expenses.

There is support in the record for the following statement of facts:

Defendant Employer is a manufacturer of various types of athletic equipment. Claimant began work for Defendant Employer on February 2, 1966 as a sewing machine operator.

During the spring of 1969, Claimant reported problems with her right wrist to Defendant Employer. Defendant Employer referred her to Robert Burke, M.D., a general surgeon. On August 27, 1969, Dr. Burke performed a division of the transverse carpal ligament on the right wrist. He diagnosed her condition as a carpal tunnel syndrome of the right wrist. Dr. Burke's last examination of her for this condition was September 11, 1969. Claimant noted some problems with her left wrist after the surgery but Dr. Burke considered these to be minor.

From October 2, 1969, until September 8, 1970, Claimant was treated by J. K. JOhnson, Jr., D.O. Dr. Johnson treated Claimant during this period of time on 64 occasions with osteopathic manipulative treatments. He was of the opinion that Claimant's symptoms were the result of " . . . a severe traumatic brochial neuritis in both arms with cervical muscular tension" and not a result of a carpal tunnel syndrome.

On June 17, 1974, Claimant sought treatment from Dr. Burke for complaints of pain in her left hand, wrist, and arm. She testified that the onset of her symptoms was gradual. Prior to seeing Dr. Burke, the symptoms began to interfere with her work. On June 21, 1974, Dr. Burke performed a division of the transverse carpal ligament on the left hand. He diagnosed her condition as a carpal tunnel syndrome of the left wrist. She returned to work on August 12, 1974.

Dr. Burke testified that the symptoms Claimant experienced in her left wrist in 1969 were minor and not sufficient to indicate surgery. By June of 1974, the condition in her left wrist had progressed to a point where surgery was indicated. Dr. Burke testified that Claimant's work was likely the cause of the carpal tunnel syndrome in her left wrist which necessitated surgery in June, 1974.

The 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 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 supreme court of Iowa 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 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.*** 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.****

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.

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. 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).

The testimony of Claimant and Dr. Burke sustained Claimant's burden of proof that on June 17, 1974, she suffered an injury arising out of and in the course of her employment and resulting in compensable disability. Dr. Burke causally connected the increased symptoms in Claimant's left wrist on June 17, 1974, with her work activity for Defendant Employer.

* * *

Signed and filed this 28 day of July, 1976.

DENNIS L. HANSSEN
Deputy Industrial Commissioner

No appeal.

OCCUPATIONAL DISEASE – LIMITATION – NOTICE

PHYLLIS M. TRACAS, Executor of the Estate of
John George Tracas and Phyllis M. Tracas,
Conservator of the property of
Michael John Tracas and Jo Dee Tracas, minors,
Claimants,

vs.

A. C. & S. INC.,
Employer,
AETNA CASUALTY & SURETY COMPANY,
Insurance Carrier,

and

A & M INSULATION COMPANY,
Employer,
CNA INSURANCE,
Insurance Carrier,

and

ASBESTOS PRODUCTS, INC.,
Employer,

and

BRAND INSULATIONS, INC.,
Employer,
COMMERCIAL UNION ASSURANCE CO.,
Insurance Carrier,

and

INSULATION SERVICES, INC.,
Employer,
CONTINENTAL INSURANCE COMPANIES,
Insurance Carrier,

and

SPRINKMAN SONS CORPORATION,
Employer,
EMPLOYERS INSURANCE OF WAUSAU,
Insurance Carrier,

and

SPRINKMAN SONS CORPORATION OF ILLINOIS,
Employer,
EMPLOYERS INSURANCE OF WAUSAU,
Insurance Carrier,

and

TAYLOR INSULATION,
Employer,
THE HARTFORD ACCIDENT & INDEMNITY COMPANY,
Insurance Carrier,
Defendants.

Order

BE IT REMEMBERED that various motions came on for ruling before the undersigned deputy industrial commissioner. These motions are as follows:

I. Defendants Taylor Insulation and Hartford Accident & Indemnity Company's Motion for Summary Judgment filed on October 31, 1977.

II. Defendant A & M Insulation Company and CNA Insurance's Motion for Summary Judgment filed on May 11, 1978.

III. Defendants API, Inc., and American Motorist Insurance Company's Motion to Dismiss filed May 8, 1978.

IV. Defendants Insulation Services, Inc., and Continental Insurance Companies' Motion for Summary Judgment filed May 11, 1978.

V. Defendants Sprinkman Sons Corporation of Illinois and Employers Insurance of Wausau's motion for Summary Judgment filed May 11, 1978.

VI. Defendants API, Inc., and American Motorists Insurance Company's Motion for Separate Adjudication of Law Points filed May 16, 1978.

VII. Defendants Brand Insulations, Inc., and Commercial Union Assurance Company's Motion for Summary Judgment filed May 15, 1978.

VIII. Defendant Sprinkman Sons Corporation and Employers Insurance of Wausau's Motion for Summary Judgment filed May 11, 1978.

Since Motions for Summary Judgment are based on undisputed facts, those facts should be set out.

Claimant filed an Application for Arbitration against these defendants on May 31, 1977. A predictable blizzard

of responsive pleadings were filed. Claimant's case is based on the allegation that the claimant's decedent contracted asbestosis as a result of his employment.

The claimant's decedent had been employed, at various times in the past, by each of the defendants. Some of these employments may seem rather remote in the temporal sense. The claimant died on March 7, 1977.

These motions are based, in the main, on the theory that the claimant's action is barred either by a statute of limitations or lack of notice. Relevant to the issues raised in these motions are the times of the claimant's decedent's employment by each defendant. Union records have been made available as part of several of the motions and they supply a rudimentary answer to the question of when the claimant was employed by certain defendants. The records do have a fault in that there are several overlaps in time contained in the records, which are based on the payment of pension funds to the claimant's decedent's union pension account by various employers.

These actions were commenced prior to July 1, 1977, having been filed in late May and early June of 1977. Therefore, the 1976 Code of Iowa applies. Section 85.26 in effect at that time provided:

> 85.26 Limitation of actions. No original proceedings for compensation shall be maintained in any case unless such proceedings shall be commenced within two years from the date of the *injury causing such death or disability* for which benefits are claimed. (Emphasis supplied)
>
> No claim or proceedings for benefits shall be maintained by any person other than the injured employee, his dependent or his legal representative, if entitled to benefits.

However, §85.61, the definition section of the workers' compensation law, states as follows:

> 85.61(5) The words "injury" or "personal injury" shall be construed as follows:
>
> a. They shall include death resulting from personal injury.
>
> b. They shall not include a disease unless it shall result from the injury and they shall not include an occupational disease as defined in section 85A.8.

Specifically, §85.61(5)(b) excludes an occupational disease in its definition of injury, thereby excluding it from §85.26. Section 85A.16 indicates that the provisions of the workers' compensation law so far as applicable and not inconsistent with, the occupational disease law shall apply in cases of compensable occupational diseases.

Section 85A.12 provides a statutory limitation at the time of the institution of the actions herein. It provides:

> 85A.12 Disablement or death following exposure---limitations. An employer shall not be liable for any compensation for an occupational disease unless such disease shall be due to the nature of an employment in which the hazards of such disease actually exist, and which hazards are characteristic thereof and peculiar to the trade, occupation, process, or employment, and, such disease actually arises out of the employment, and unless disablement or death results within three years in case of pneumoconiosis, or within one year in case of any other occupational disease, after the last injurious exposure to such disease in such employment, or in case of death, unless death follows continuous disability from such disease commencing within the period above limited for which compensation has been paid or awarded or timely claim made as provided by this chapter and results within seven years after such exposure.
>
> In any case where disablement or death was cuased by latent or delayed pathological conditions, blood, or other tissue changes or malignancies due to occupational exposure to X rays, radium, radioactive substances or machines, or ionizing radiation, the employer shall not be liable for any compensation unless claim is filed within ninety days after disablement or death or after the employee had knowledge or in the exercise of reasonable diligence should have known his disablement was caused by overexposure to ionizing radiation or radioactive substances, and its relation to employment.

This statute provides that an employer shall not be liable in the case of pneumoconiosis unless disablement or death results within three years in the case of pneumoconiosis after the last injurious exposure. In the case of death, a special provision allows recovery within seven years after exposure when compensation has been paid or awarded or timely claim made. In this case, compensation has not been paid, awarded or timely claim made prior to the institution of this action.

Section 85A.18 provides as follows:

> 85A.18 Notice of disability or death---filing of claims. Except as herein otherwise provided, procedure with respect to notice of disability or death, as to the filing of claims and determination of claims shall be the same as in cases of injury or death arising out of and in the course of employment under the workers' compensation law. Written notice shall be given to the employer of an occupational disease by the employee within ninety days after the first distinct manifestation thereof, and in the case of death from such an occupational disease, written notice of such claim shall also be given to the employer within ninety days thereafter.

It would thus appear that the filing of claim must be made within two years of the disability or death. Thus it would appear that §85.26 would bar an action for death within two years of the date of death provided that the death occurred within three years of the last exposure unless a prior claim had been made and awarded.

This case is based on asbestosis exposure which resulted in the death of claimant's decedent on March 7, 1977. Therefore, exposure would have had to occur after March 7, 1974. This case is not barred by §85.26, since the action was filed within two years of the date of death. The case may fail, however, on the fact that the death did not occur within three years of the date of last exposure. Section 85A.12 operates as a condition precedent to the operation of §85A.18, which brings the general provision of §85.26 into operation.

Also, a number of these motions are based on the issue of lack of notice. In *Jacques v. Farmers Lumber & Supply Company,* 242 Iowa 548, 47 N.W.2d 236, the court discussed the meaning of "occurrence of injury" within the notice statute in subjective terms, indicating that the operative time for the running of notice is when the claimant knew or should have known that a claim was had. This, of course, generates a fact issue.

I.

Defendant Taylor Insulation Company filed a Motion for Summary Judgment admitting that the claimant had been employed during the months of December 1974 and January 1975, a period of less than sixty days, by that concern. This is within three years of the death of claimant's decedent, and therefore, any claim that said action is barred either by operation of §85A.12 or 85.26, Code of Iowa, must fail.

Defendant Taylor Insulation further indicates that §85A.10 of the Code of Iowa applies to this case in that it was not the last employer who exposed the claimant to the hazards of such disease. The section further has the qualification that there must be exposure for a period of not less than sixty days. Since the claimant's decedent was not exposed during a period of sixty days, defendants cannot be held liable. Wherefore, Defendant Taylor Insulation and Hartford Accident Indemnity Company's Motion for Summary Judgment filed on October 31, 1977 must be sustained.

II.

Defendant A & M Insulation Company and CNA Insurance filed a Motion for Summary Judgment on May 11, 1978. A Resistance thereto was filed on May 22, 1978. Defendant employer A & M Insulation Company indicates that the claimant was employed from January 6, 1975 through February 4, 1975 by this employer. However, the union employment records indicate that the claimant was employed from December 30, 1974 through March 2, 1975, which represented a period of greater than sixty days as called for in §85A.10. There is a variance between the union records and the allegation of the defendant employer, any defense pursuant to §85A.10 at this time must fail.

Defendant A & M Insulation Company further alleges that this claim is barred on the claim of notice. As was stated above, the issue of notice is a subjective standard and this generates a fact question.

No allegation was made herein that this action was barred by operation of any statutory period of limitations, and therefore no ruling will be made on that point.

WHEREFORE, defendant A & M Insulation Company and CNA Insurance's Motion for Summary Judgment filed herein on May 11, 1978 is overruled.

III.

Defendant A.P.I., Inc., and American Motorist Insurance Company filed a Motion to Dismiss on May 8, 1978. This motion is based on the operation of §85A.18 of the Code of Iowa, which deals with the notice provisions. As was stated earlier, the notice provision generates a fact issue and this is the sole basis of the Motion to Dismiss. The motion of itself cannot be granted on its face because of this.

WHEREFORE, defendant A.P.I., Inc., and American Motorist Insurance Company's Motion to Dismiss filed on May 8, 1978 is overruled.

IV.

Defendants Insulation Services, Inc., and Continental Insurance Companies filed a Motion for Summary Judgment on May 11, 1978. This motion is based on the allegation that claimant's decedent was employed from January 7, 1973 through November 11, 1973 and from January 13, 1974 through March 3, 1974. For the reason that the claimant's death occurred more than three years subsequent to the last possible exposure, defendants Insulation Services, Inc., and Continental Insurance Companies cannot be held liable.

WHEREFORE, defendants Insulation Services, Inc., and Continental Insurance Companies' Motion for Summary Judgment filed on May 11, 1978 is sustained.

V.

Defendants Sprinkman Sons Corporation of Illinois and Employers Insurance of Wausau filed a Motion for Summary Judgment on May 11, 1978, and a Reply to Motion for Summary Judgment was filed on May 22, 1978. The Motion for Summary Judgment is based on the provisions of §85.26 in that the action was not filed within two years of the claimant's alleged exposure with this defendant. A general discussion of §85.26 was presented above. The memorandum in support of the Motion for Summary Judgment indicates that the claimant was employed from May 23, 1974 through June 14, 1974, a time period which is less than three years prior to the claimant's death. The union records indicate that the payroll periods for which Sprinkman Sons Corporation of Illinois paid monies to the union pension fund were from April 29, 1974 through May 31, 1974, and from June 3, 1974 through June 30, 1974. The period of April 29, 1974 through June 30, 1974 is a period slightly in excess of sixty days and therefore defendant employer's contention that the claimant was not employed for sixty days must fail at this time, since a significant fact issue is generated thereby.

WHEREFORE, defendants Sprinkman Sons Corporation of Illinois and Employers Insurance of Wausau's Motion for Summary Judgment filed on May 11, 1978 is overruled.

VI.

Defendants A.P.I., Inc., and American Motorists Insurance Company filed a Motion for Separate Adjudication of Law Points on May 16, 1978. This motion was based upon the limitation imposed by §85A.13(3), Code of Iowa. The claimant's response was filed on May 22, 1978, which in essence, consented to the adjudication so desired.

WHEREFORE, defendant employer A.P.I., Inc., and American Motorists Insurance Company's Motion for Separate Adjudication of Law Points filed herein on May 16, 1978 is sustained.

VII.

Defendants Brand Insulations, Inc., and Commercial Union Assurance Co. filed a Motion for Summary Judgment on May 15, 1978. In its statement of facts,

defendants indicate that the claimant's decedent was employed by this defendant employer from July 1974 to December 31, 1974, a period in excess of sixty days, which is within three years of the claimant's death. The motion also indicates that the claimant was notified of his condition in 1972. This, or course, generates a fact issue.

Brand Insulations, Inc., motion is further based on the operation of §85A.10, which states that the last employer who injuriously exposed the claimant to the hazards of such disease shall be liable therefor. However, the employer in whose employment the employee was last injuriously exposed is unknown and generates a fact issue, as the claimant may have been employed by the said employer but not have been injuriously exposed.

WHEREFORE, defendants Brand Insulations, Inc., and Commercial Union Assurance Company's Motion for Summary Judgment filed on May 15, 1978 is overruled.

VIII.

Defendants Sprinkman Sons Corporation and Employers Insurance of Wausau filed a Motion for Summary Judgment on May 11, 1978. This motion is based on the allegation that the claimant was employed from September 13, 1970 through December 31, 1972 and from March 11, 1974 through April 12, 1974. The former period was prior to three years preceding death, and too remote to be considered as part of the sixty day period. The union records which were submitted as a part of several other motions indicate that the claimant's decedent may have been employed from March 4, 1974 through April 26, 1974. This is still a period of less than sixty days, which indicates by operation of §85A.10 that the defendants' motion should be granted. The exposure can be seen not to be over sixty days in duration.

WHEREFORE, defendants Sprinkman Sons Corporation and Employers Insurance of Wausau's Motion for Summary Judgment filed May 11, 1978 is sustained.

* * *

Signed and filed this 14th day of June, 1978.

JOSEPH M. BAUER
Deputy Industrial Commissioner

No appeal.

OCCUPATIONAL DISEASE
PNEUMOCONIOSIS

DELNO G. BRINGMAN,

Claimant,

vs.

BIG BEN COAL COMPANY,

EMPLOYER,

and

OLD REPUBLIC INSURANCE CO.,

Insurance Carrier,
Defendants.

Arbitration Decision

This is a proceeding in Arbitration brought by Delno O. Bringman, the claimant, against Big Ben Coal Company, his employer, and Old Republic Insurance Co., the insurance carrier, to recover benefits under the Iowa Occupational Disease Law, by virtue of an alleged occupational disease which became disabling on February 2, 1976.

* * *

The defendant employer was found to be in default, and pursuant to such a finding on July 8, 1976, an order was entered which reads as follows:

> BE IT REMEMBERED that on this 30th day of June, 1976, pursuant to dueand (sic) timely service of notice and assignment, the Claimant and his attorney being personally present and the Big Ben Coal Company, Employer by its Secretary-Treasurer David Lewis being personally present and Old Republic Insurance Company, Insurance Carrier, both said Defendants being represented by Harry Dahl who was personally present as their attorney, the matter of Claimant's demand for entry of default judgment was duly presented and after reviewing the matters of record and on file, hearing statements and argument of counsel and being fully advised:
>
> THE COURT FINDS that Defendants were personally served with the Original Notice and Petition on the form duly provided by delivery of a copy thereof at Employer's regular place of business where this action arose to their Operating Manager then in charge thereof, Mr. Gail Rowland, as certified by the return of the Deputy Sheriff and filed herein April 2, 1972.
>
> THE COURT FURTHER FINDS that under date of May 28, 1976, Claimant demanded default herein with notification by certified mail duly receipted by David Lewis on behalf of Employer and that there was no appearance, pleading or other response thereto from said Defendants until the Special Appearance filed June 11, 1976, and the Amended Special Appearance filed June 29, 1976, by Defendants' attorney Harry W. Dahl.
>
> NOW THEREFORE IT IS ORDERED AND ADJUDGED that Defendants be and are hereby declared in Default and Judgment is entered against said Defendants in favor of Claimant for the benefits to which he is entitled under the laws claimed in his Petition.
>
> IT IS FURTHER ORDERED that Defendants on oral application are given until August 1, 1976, to arrange and file herein depositions of medical proof by cross-examination of doctors and technicians pertaining to the medical reports offered and received as testimony in support of Claimant's Petition herein.
>
> To all of which the parties are granted exceptions.

The claimant, age 64 testified he is married and had been employed as a coal miner for 41 years. He also testified he had been employed by the defendant employer herein for the last twenty years, and his wages were $3.50 per hour, plus overtime for a normal fifty-five hour work week. He

has not worked since February 2, 1976, saying that he now has shortness of breath.

On June 7, 1976, a pulmonary function study was done by Richard Schults, a clinical technician II, employed by University Hospitals at Iowa City. This study was done at the request of Dr. Garton of Chariton, Iowa.

The medical report of R. W. Honeywell, D.O. read in part as follows:

> This patient, Mr. Bringman was seen in our office June 3, 1976 with chief complaint of shortness of breath, most marked on exertion. He presents a history of previous rib fracture and clavicle fracture a few years ago. Physical examination reveals decreased breath sounds with expiratory wheezes, pulse of 80 per minute. Heart examination reveals systolic ejection click and some irregularity in character. He was scheduled for a pulmonary function test in Iowa City, June 7, 1976 and the results showed decreased vital capacity, as well as decreased flow of measurements.
>
> On December 5, 1973 Mr. Bringman received a chest x-ray per order of Dr. Sage and at this time patient's chest x-ray reveals pneumoconiosis with emphysema.
>
> With all of the above findings noted, I feel Mr. Bringman should be classified as 100% disabled for any type of strenuous work. I also feel that this cardiac and respiratory condition is irreversible and would only progress to a worse degree.

In applying the provisions of Section 85A.13(3), Code of Iowa, which reads as follows:

> Compensation payable. Except as in this chapter otherwise provided, compensation for disability from uncomplicated pneumoconiosis shall be payable in accordance with the provisions hereof; provided, however, that no compensation shall be payable for disability from pneumoconiosis of less than thirty-three and one-third percent of total, and provided further that, during the transitory period, the aggregate compensation payable to employees and their dependents for disability and death for uncomplicated pneumoconiosis shall be limited as follows: If diablement occurs or in case of no claim for prior disablement, if death occurs in the third calendar month after October 1, 1947, the total compensation and death benefits payable shall not exceed the sum of five hundred dollars. If disablement occurs or in case of no claim for prior disablement, if death occurs during the next calendar month, the total compensation and death benefits payable shall not exceed five hundred fifty dollars. Thereafter, the total amount or limit of the compensation and death benefits payable for disability and death shall be increased at the rate of fifty dollars per month the aggregate payable in each case to be limited according to the foregoing formula for the month in which disability occurs, or, in case of no claim for prior disablement, in which death occurs. Such progressive increase in the limits of the aggregate compensation and benefits for disability and death shall continue until the limit upon such benefits fixed in the workmen's compensation law is reached, and thereafter the total aggregate of such compensation and benefits shall be the total compensation and benefits otherwise provided in the workmen's compensation law.

It is held that the maximum amount to which the claimant is entitled is $17,350.

The claimant testified that his normal work week consisted of 55 hours.

The record supports a finding that the claimant's normal work week consisted of 55 hours. His gross earnings for compensation purposes therefore are found to be $192.50. With just one dependent, the claimant is entitled to weekly compensation of $121.94 per week.

* * *

Signed and filed this 20 day of August, 1976.

HELMUT MUELLER
Deputy Industrial Commissioner

No appeal.

OCCUPATIONAL DISEASE – RAYNAUD'S PHENOMENON

STEVEN HAYNES,

Claimant,

vs.

JOHN DEERE WATERLOO TRACTOR WORKS,

Employer
Self-Insured,
Defendant.

Arbitration Decision

This is a proceeding in arbitration brought by the claimant, Steven Haynes, against John Deere Waterloo Tractor Works, his employer, an authorized self-insurer, to recover benefits under the Iowa Workmen's Compensation Act by virtue of an injury alleged to have occurred between June of 1973 and May of 1976.

* * *

Claimant, age thirty-one, has been employed at John Deere Waterloo Tractor Works since November 1, 1972. From that date until June 16, 1976, he was employed as a "shipper-grinder intricate." In this job he would take the excess metal off castings and trim it down by using pneumatic airguns and chisels. An airgun was held in the right hand and a chisel was held in the left hand. The pneumatic airgun weighed about six to seven pounds and was eight to ten inches long; the chisels would vary from six inches to three feet in length. The claimant noted vibration affecting his hands and forearms while performing this duty.

In late summer or early fall of 1975, the claimant started noting that his left hand was discoloring and "falling asleep." The claimant noted that it took longer for him to limber up and to perform his duties. He went to the medical department and was given padded gloves. In the fall

of 1975, with winter approaching, the claimant noted that his hands started turning white. His fingers would ache, burn and throb. The main center of pain was in the index finger and long finger of the left hand. The claimant also noted some problems with his right hand. On November 7, 1975 the claimant was seen by Hester J. Hursh, M.D., of the medical department of defendant employer. Dr. Hursh's report indicates that the claimant had intermittent episodes of white fingers of the left hand of a five to ten minute duration, occurring after exposure to cold. The ring and long fingers became white first at the tips and then the index and small fingers became white the whiteness progressed approximately to the MP flexion crease. Examination revealed good color and warmth in both hands. Examination of the arteries and tendons showed them to be within normal limits. The claimant continued to work until February, 1976, when he hurt his back while moving a freezer at home. He returned to work in March of 1976 and again saw Dr. Hursh, reporting that he was still having intermittent episodes of "white finger" in the left hand following exposure to cold. Dr. Hursh performed the five minute exposure in a 59 degree water bath on the claimant's left hand, and observed that the left index, long and ring fingers became blanched and remained blanched for ten minutes after removal from the cold bath. The little finger and the thumb were entirely unaffected. The claimant was given a padded glove and returned to normal duties.

The claimant then went to be treated by Donald J. Ahrenholz, M.D., a specialist in plastic and reconstructive surgery, on November 5, 1976. Dr. Ahrenholz cautioned the claimant about the effect of smoking upon his condition and the claimant quit smoking from around Thanksgiving of 1976 until August of 1977. Dr. Ahrenholz testified that smoking has an effect on the blood vessels and it was his feeling that it was a contributory factor to the claimant's condition. Dr. Ahrenholz referred the claimant to the University Hospitals and Clinics in Iowa City.

The claimant was seen by Adrian Flatt, M.D., of the University of Iowa Hospitals and Clinics, on December 6, 1976. Physical examination of the left arm and hand were completely within normal limits except for a sluggish ulnar and radial filling of the left hand. A two-point discrimination was 2mm. in all fingers of both hands. Dr. Flatt's impression was that the claimant had isolated Raynaud's phenomenon. On December 27, 1976, he was seen by a Dr. Abboud, who felt that the claimant had Raynaud's phenomenon with no evidence of outlet obstruction. They recommended that the claimant return to the University of Iowa Hospitals and Clinics in Iowa City in about six months.

On June 2, 1977 the claimant returned to the medical department at John Deere and reported that Raynaud's phenomenon had been diagnosed at Iowa City and that a sympathectomy was advised, but that he refused to have the surgery. The claimant at that time had resumed smoking. The claimant reported that he had been switched to a loader and unloader on the paint line and was no longer exposed to the vibration. However, he did report frequent episodes of whiteness and numbness of all the fingers of his left hand, and stated that he was unable to work outdoors during the winter, despite supplying himself with gloves. The claimant apparently was involved in a "moonlight" farming operation and was unable to work outdoors, suffering financial loss. Examination by Dr. Hursh revealed that the claimant had trace coolness of the fingertips in both hands but no evidence of blanching or numbness. The claimant had normal sensation and normal skin turgor. He had a full range of motion of the fingers of both hands. No evidence of edema or discloration was evident. The Allen's test was done and showed moderate blood flow returned bilaterally. The patient seemed to have sharp linear vascular flow demarcation during firm pressure in the palm. The claimant was advised to seek biofeedback training.

On September 26, 1977, the claimant reported that he had an episode of "white finger" in all the fingers of the left hand when he was exposed to cold weather in the morning. On November 16, 1977, the claimant reported that he was trying to help repair a car in cold weather, and then after a fifteen minute exposure to 20 degree temperatures, his fingers on his left hand and the two middle fingers of his right hand turned white. He stated that the fingers remained white for about an hour during which time he ran them under water trying to rewarm them.

The claimant was referred to Gerald A. Strag, Ed.D., a psychologist, who reported that the claimant had received biofeedback training, which teaches the patient to control poor vasoconstriction associated with his Raynaud's phenomenon. The results of the biofeedback training are not known at this time but apparently have not been as successful as anticipated. The claimant has taken sporadic days off to complete his biofeedback training.

To be compensable an employee's injury must occur in the course of and also arise out of his employment. The burden rests upon the claimant to establish these factors by a preponderance of the evidence. *Musselman v. Central Telephone Co.,* 261 Iowa 352, 154 N.W.2d 128. *Almquist v. Shenandoah Nurseries,* 218 Iowa 724, 254 N.W. 35. The claimant has the burden of proving by a preponderance of the evidence that the injury is the cause of the health impairment on which he now bases his claim. *Lindahl v. Boggs,* 236 Iowa 296, 18 N.W.2d 607. *Bodish v. Fischer, Inc.,* 257 Iowa 516, 133 N.W.2d 867. Based on the foregoing principles, it is found that the claimant has established his claim by a requisite preponderance of the evidence.

Dr. Arenholz testified that by way of deposition in this case that he saw the claimant on November 5, 1976 and March 8, 1978. On March 8, 1978, he noted right hand involvement.

He was asked the following question:

> BY MR. FULTON:
> Q. Would you agree or disagree with her testimony that based upon Mr. Haynes' history of not having any problems with Raynaud's phenomenon up to the time that he work [sic], began shipping and grinding at Deere & Company, even though he had smoked previously for quite a few years and had been in and out of the cold and had undergone stress and lived a normal life without any problems and then after chipping and grinding and using a pneumatic tool

especially with his left hand where he had to hold the chisel into the tool just with the strength of his hand and after doing that for a couple of years that this condition started, she said that based upon those facts she would assume there was a relationship between his job at John Deere and his disease, would you agree with that?

MR. HOXIE: That's objected to as not being an accurate statement of the record.

Q. You may answer.

A. I would say in my opinion there is a good probability.

Dr. Hursh testified at the hearing and noted that the claimant's condition gives the physical appearance of the finger losing its blood flow entirely, and as a result there is some decrease in the ability of the nerves to respond. As the blood flow returns in a period of time, the return blood flow may be uncomfortable and may result in a tingling or aching sensation. Dr. Hursh agreed that Raynaud's phenomenon was often associated with the use of pneumatic tools and that the use of these tools could be a cause or aggravation of Raynaud's phenomenon.

Dr. Flatt's letters were of little value with regard to both apportionment of disability and causation of thereof, but gave excellent physical symptoms and history.

Defendant attempted to cloud the causation issue of the case by indicating that the claimant had used a hand saw in the past. The claimant testified that his use of a hand saw was infrequent, and therefore provided such a small fraction of any vibratory exposure that it is indeed innocuous. The defendant further tried to show that the claimant, by driving a motorcycle, would also expose himself to vibration. However, the claimant did not ride a motorcycle frequently, although the physicians testified that this could aggravate the problem somewhat. Evidence submitted at the hearing of this issue indicates that smoking may exaggerate the Raynaud's phenomenon in causing temperature changes in the hands, which in itself would cause a manifestation of Raynaud's phenomenon. However, the smoking itself was not the cause of the condition. The last apparent defense was based on the claimant's temperament. Much of the lay testimony at the hearing seemed to indicate that the claimant was an intense individual who tried to over-achieve and sometimes became angry at himself and with material objects. This would cause some vascular constriction which would again start the Raynaud's phenomenon. However, the temperament itself was not seen as a cause of the claimant's condition.

The claimant brought this action within two years of June, 1976, and therefore it is held that the case herein is not barred by any statutory period of limitation.

The next problem which must be discussed is the degree of disability from which the claimant suffers. Specifically, it must be decided whether this injury is confined to the left hand or involves both the left and right hand. If it is confined to the left hand, it is to be determined under §85.34(2)(1), which limits compensation for the loss of the entire hand to 175 weeks. If it is found to be to both hands, compensation is to be determined by §85.34(2)(s). Although at the hearing there were indications that this case did not involve a claim for industrial disability under the doctrine in *Olson v. Goodyear Service Stores,* 255 Iowa 1112, 125 N.W.2d 251, it is the duty of the deputy industrial commissioner when deciding the case to ascertain the facts and apply the correct law to those facts. Not to do so would be error.

The question herein can be resolved by looking at the questions cited above indicating that the injury to both hands was probably caused by the employment. It is therefore found that this case falls within the confines of §85.34(2)(s). Since the claimant has a disability to both members and therefore to the body as a whole, he is entitled to have his disability 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,* supra.

Claimant, presently age thirty-one, has been employed by John Deere Waterloo Tractor Works since November 1, 1972. Until June 16, 1976, he was involved in the work of chipping and grinding excess stock off steel castings. Since that time he has been involved in other employment at the John Deere Waterloo plant and has apparently been doing well and making as much income as he did when he was working with the pneumatic chisels.

He is a high school graduate and was an electrician in the United States Navy. He worked as an assembler for Western Electric in San Francisco, as a repair service technician in washers and dryers for Sears Roebuck, and as an employee of the sewer department of the City of Waterloo prior to his employment with defendant employer. Testimony on behalf of the defendant indicated that the claimant is doing quite well in his present job.

Dr. Hursh testified that the claimant has a six percent disability to the left hand and three percent of the right hand, which in total converts to five percent of the body as a whole. Dr. Ahrenholz testified that the claimant has a disability of fifteen percent to the left hand and eight percent to the right hand. He did not give any disability to his body as a whole. A careful reading of the American Medical Association Guides would indicate that this figure given by Dr. Ahrenholz would convert to twelve percent of the body as a whole. Both physicians are well qualified, of course, to give an opinion with regard to the claimant's disability in this case. It is hereby found that the claimant has suffered a disability to the body as a whole of ten percent. This entitles the claimant to 50 weeks of permanent partial disability compensation.

* * *

[No healing period was awarded.]

The claimant apparently took "casual" time to have his condition examined in Iowa City and three trips to Iowa City were apparently on his own time. The payment for the medical care at Iowa City and also from Dr. Ahrenholz has been said to be unauthorized. The defendant insists that this payment was not authorized and therefore should be excluded under the provisions of §85.27. However, in order to avail oneself of the protection afforded by §85.27, the defendant itself must offer medical care. The medical care in this case was primarily offered by Dr. Hursh, but no clear

diagnosis was given and the claim was being denied. One cannot deny a claim on the one hand and insist on the right to have the medical care controlled while on the other hand deny that the claim was compensable. Therefore, the payment for Dr. Ahrenholz' and Dr. Flatt's services will be allowed in addition to the incident transportation costs incurred therewith.

* * *

Signed and filed this 30th day of June, 1978.

JOSEPH M. BAUER
Deputy Industrial Commissioner

No appeal.

**OCCUPATIONAL DISEASE –
RAYNAUD'S PHENOMENON**

DONALD R. HEMMER,

Claimant,

vs.

JOHN DEERE WATERLOO
TRACTOR WORKS,

Employer,
Self-Insured,
Defendant.

Arbitration Decision

This is a proceeding in arbitration brought by the claimant, Donald R. Hemmer, against John Deere Waterloo Tractor Works, his employer and authorized self-insurer, to recover benefits under the Iowa Workmen's Compensation Act by virtue of an alleged industrial injury in March, 1975.

* * *

The record supports the following findings of fact, to wit:

Claimant, age 32, has been employed at John Deere Waterloo Tractors Works since September 24, 1972. He was first employed as a forklift driver. In March, 1973, he became employed in the mill room and was required to take the excess metal off castings. This was achieved by use of an air gun and a chisel. The air gun was held in the right hand and the chisel was held in the left hand. The claimant noted vibrations while performing his duty.

Sometime in early 1974, the claimant noted that his left arm was becoming numb. At the insistence of his wife he sought medical attention. He consulted Louis T. Winniger, M.D., his family physician, and Richard D. Waldorf, M.D., an associate of Dr. Winniger. He also notified his employer at this time.

Dr. Waldorf hospitalized the claimant and performed an excision of the scalene muscle and removal of a portion of the cervical rib. He progressed well until November, 1975, when he went to the Mayo Clinic in Rochester, Minnesota, under the primary care of J. L. Juergens, M.D.

The claimant has since been removed from his employment, and since January, 1974, has been involved in different employment. He was off work for about four weeks because of the injury.

To be compensable, an employee's injury must occur both "in the course of" and also "arise out of" his employment. The burden rests upon the claimant to establish these factors by a preponderance of the evidence. *Musselman v. Central Telephone Co.,* 261 Iowa 352, 154 N.W.2d 128. *Almquist v. Shenandoah Nurseries,* 218 Iowa 724, 254 N.W. 35.

The claimant has the burden of proving by a preponderance of the evidence that the injury of March, 1975, 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 medical testimony. *Bradshaw v. Iowa Methodist Hospital,* 251 Iowa 375, 101 N.W.2d 167.

Based on the foregoing principles, it can be seen that the claimant has established his claim.

Medical evidence was offered in the form of testimony of Hester Hursh, M.D., J. L. Juergens, M.D., and letters from Richard D. Waldorf, M.D.

Dr. Waldorf performed surgery as noted previously, apparently thinking that this would alleviate the problem. He last saw the claimant prior to his visits to the Mayo clinic.

Dr. Juergens testified by way of deposition in this case. He testified that the claimant has a condition known as Raynaud's phenomenon which manifests itself in numbness in the hand and digits. In regard to causation he testified as follows:

> By Mr. Hoxie:
>
> Q. Now, as I understand it, Mr. Hemmer does not have Raynaud's disease, is that correct?
>
> A. Not as we ordinarily define it.
>
> Q. The condition he has is described as Raynaud's phenomenon, is that right?
>
> A. That's right, secondary to something else, presumably.
>
> Q. Do you know to what it is secondary?
>
> A. I think I do.
>
> Q. What is that?
>
> A. I think it is due to the use of an air hammer in his work or percussion tool of some sort.

The defendant apparently felt that the claimant's activities in riding a motorcycle may have had an impact on the causation of the claimant's condition. The following testimony is revealing in regard to this point:

> By Mr. Hoxie:
>
> Q. Now, would motorcycle riding have anything to do with the causation of his Raynaud's phenomenon?
>
> A. I don't think so. At any rate I have never seen a case of Raynaud's phenomenon which I would say was due to the vibration of a motorcycle handle.

Dr. Hursh is associated with the defendant as a full-time physician. She specializes in hand surgery. She testified that the claimant's arterial abnormalities in his left hand are "probably congenital." Her direct testimony was at conflict with Dr. Juergens' in that she considered the disease

inherited.

The testimony of Dr. Juergens will be followed because of his expertise and his status as a treating physician. This is not intended to cast aspersions on the testimony of Dr. Hursh. The statement of Dr. Hursh with regard to the proposed use of biofeedback was quite enlightening.

The next problem which must be approchaed is the nature and extent of the claimant's disability. Where the result of an injury causes the loss of a scheduled member, such loss, together with its ensuing natural results upon the body, is declared to be a permanent partial disability and entitled only to the prescribed compensation. In such a case the ability to earn wages is not a factor to be considered. *Barton v. Nevada Poultry Co.,* 253 Iowa 285, 110 N.W.2d 660.

Dr. Juergens' testimony indicates that the removal of the cervical rib leaves no disability.

Dr. Juergens' letter gives a permanent disability of 20% of the hand. This allows for payment of permanent partial disability compensation for a period of 35 weeks.

* * *

No evidence was submitted at the hearing to allow the undersigned to make a valid finding of fact as to the time which the claimant was entitled to healing period benefits. It was of record, however, that the claimant was compensated under a disability plan which paid him amounts which were in excess of compensation benefits. The claimant should be paid for those periods which he was off work pursuant to the injury pursuant to Section 85.34(1) and the defendant should receive credit pursuant to Section 85.38, Code of Iowa.

If further treatment is required in the matter of biofeedback, it should be conducted in accordance with the workmen's compensation law.

* * *

Signed and filed this 26th day of January, 1977.

JOSEPH M. BAUER
Deputy Industrial Commissioner

No appeal.

PERMANENT TOTAL DISABILITY

REX O. VITERA,

Claimant,

vs.

JOHN G. MILLER CONSTRUCTION CO., INC.

Employer,

and

HAWKEYE-SECURITY INSURANCE CO.,

Insurance Carrier,
Defendants.

Review-Reopening Decision

This is a proceeding in Review-Reopening brought by the claimant, Rex O. Vitera, against his employer, John G. Miller Construction Company, Inc., and Hawkeye-Security Insurance Company, the insurance carrier, to recover additional benefits under the Iowa Workmen's Compensation Law by reason of an industrial injury that occurred on May 3, 1974.

* * *

Claimant, age 55 at the date of the hearing, was employed by defendant-employer on May 3, 1974. On that date, he was assisting in loading a masonry saw onto a truck when he noted that his back "snapped." The claimant continued to work for the remainder of the day.

That night the pain became worse so that he went to the emergency room of Schoitz Memorial Hospital in Waterloo, Iowa. He was hospitalized for two weeks. When he was released from the hospital, he eventually was treated by John R. Walker, M.D., an orthopedic surgeon, who hospitalized him for 45 days. Surgery was performed during this hospitalization and he was catheterized. He was released from the hospital and after about two weeks noticed blood in his urine and was rehospitalized for about a week.

In September, 1974, he was again hospitalized and had his left testicle removed. His back continued to hurt. In December of 1974, the claimant noted that his shoulders were also causing pain and manipulation was performed under anesthesia.

No improvement was noted and the claimant was eventually referred to the Comprehensive Evaluation and Rehabilitation Center in Oakdale, Iowa, for evaluation under the aegis of Carroll B. Larson, M.D.

During this period, the temporary total/healing period compensation continued and has continued at least to the date of the hearing.

The claimant's condition did not improve and upon order of Deputy Industrial Commissioner Dennis L. Hanssen, the claimant was sent to St. Luke's Methodist Hospital Rehabilitation Center for evaluation.

The claimant has not worked since the date of the accident.

The issues for determination at this time are: (1) the nature and extent of the claimant's disability; and (2) the entitlement to additional benefits under Section 85.27, Code of Iowa, for the hospitalization and treatment for the bladder infection.

The claimant has the burden of proving by a preponderance of the evidence that the injury of May 3, 1974, is the cause of the disability upon which he 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. However, the opinion of experts need not be couched in definite, positive or equivocal language. *Dickinson v. Mailliard,* 175 N.W.2d 588. 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.

The medical evidence in this case is rather brief in comparison to the complexity of the case.

The injuries suffered by the claimant are severe. The initial diagnosis was of significant spondylolisthesis with slipping of the 5th lumbar vertebra. In July, 1974, the claimant underwent a surgical procedure with resection of the posterior elements of L-5, decompression and lateral fusion. Also in 1974 he had a prominent left epididymitis and a left orchiectomy was required. In December of 1974 the pain and tightness in the shoulders was noted.

Dr. Weir's comprehensive report is the most detailed and his report (Claimant's exhibit B) will be followed. Dr. Larson's report (Claimant's exhibit A) is much less detailed and does not speak in terms of impairment and deals more in generalities than in specifics.

The findings of Dr. Weir indicate that the claimant is a man of somewhat less-than-average intelligence. Both the report of Dr. Weir and the observations of the undersigned indicate that the claimant has a persistent curvature of the spine causing him to lean severely to the right on a constant basis.

Dr. Weir evaluates the claimant's impairment as follows:

DISABILITY EVALUATION:

Spondylolisthesis, status post-spinal fusion, 15% impairment of whole man.

Impaired spinal flexion, 6%; impaired lateral bending, 4%; combined 10% impairment of whole man.

Depressive reaction and psychophysiological reaction musculoskeletal system with 30 degree persistent lateral side-bending of the spine, 50% impairment of the whole man.

Adhesive capsulitis of shoulders, impaired mobility left shoulder, 21% impairment of upper extremity. Combined: 31% impairment of upper extremity or 19% impairment of whole man.

It is estimated that the patient certainly has approximately 95% disability of whole man.

Dr. Weir recommends treatment of the psychological and psychophysiological dysfunction by means of a concerted period of rehabilitative therapy. The defendants have tendered an offer of rehabilitation. The claimant is unwilling to participate, because of the pain involved in the physical therapy incident, to the tender of evaluation and treatment. A recommendation that the claimant present himself for care of his psychological difficulties would be in order. It would seem that a progressive system of rehabilitative efforts, both physical and psychological, could be offered provided that the claimant and the defendant cooperate and coordinate their efforts with Dr. Weir. An appropriate order will be entered herewith to effectuate this effort of rehabilitation.

Since the injury here is to the body as a whole, the resultant injury must be evaluated industrially and not merely functionally. In determining industrial disability, consideration may be given to the injured employee's age, education, 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 660.

The claimant, presently age 55, has always been involved in physical labor. He has a fourth-grade education with no further vocational or specialized education. The evidence, both in the form of reports and observations of the undersigned, indicates that the claimant is non-verbally oriented. His prospects of reemployment are poor. For this reason it is hereby found that the claimant is permanently totally disabled within the meaning of the Workmen's Compensation Law.

Section 85.34(3), Code of Iowa, as in effect at the time of the injury, provides:

> 3. Permanent total disability. Compensation for an injury causing permanent total disability shall be upon the basis of eighty percent per week of the employee's average weekly spendable earnings, but not more than a weekly benefit amount, rounded to the nearest dollar, equal to sixty-six and two-thirds percent of the state average weekly wage paid employees as determined by the Iowa employment security commission under the provisions of section 96.3 and in effect at the time of the injury provided that as of July 1, 1975; July 1, 1977; July 1, 1979; and July 1, 1981, the maximum weekly benefit amount rounded to the nearest dollar shall be increased so that it shall equal one hundred percent, one hundred thirty-three and one-third percent, one hundred sixty-six and two-thirds percent and two hundred percent, respectively, of the state average weekly wage as determined above. No employee shall receive as compensation less than eighteen dollars per week, except if at the time of his injury his earnings are less than eighteen dollars per week, then the weekly compensation shall be a sum equal to the full amount of his weekly earnings; said weekly compensation shall be payable during the period of his disability.
>
> Such compensation shall be in addition to the benefits provided in sections 85.27 and 85.28. No compensation shall be payable under this subsection for any injury for which compensation is payable under subsection 2 of this section. In the event compensation has been paid to any person under any provisions of this chapter or chapter 85A for the same injury producing a total permanent disability, any such amounts so paid shall be deducted from the total amount of compensation payable for such permanent total disability.

The next issue which must be addressed is that of payment of certain medical expenses incident to the bladder infection suffered by the claimant.

No medical evidence was directly offered to supplement this point.

The record indicates that the bladder infection first started during or shortly after the catheterization which was incident to the claimant's injury. Claimant had never had a bladder infection before and the apparent normalcy of his urogenital tract prior to the accident is reflected by the fact that he fathered eight children.

The Workmen's Compensation Act should be liberally construed. *Sister M. Benedict v. St. Mary's Corporation,* 255 Iowa 847, 124 N.W.2d 548. It is therefore found that payment for medical services for the bladder infection should be paid by the defendants. Not all medical disability

and the causation thereof need be supported by medical evidence, although it is necessary in the vast majority of cases. In short, the bladder infection herein is directly traceable to the catheterization given in treatment. See *Langford,* supra. Therefore, the payment of $648.00 to Schoitz Memorial Hospital should be made by the defendants. The evidence shows that the bill for removal of the testicle may have been paid by the defendants herein.

* * *

Signed and filed this 29th day of March, 1977.

JOSEPH M. BAUER
Deputy Industrial Commissioner

No appeal.

PHYSICAL REHABILITATION

ROBERT H. JAMISON,

Claimant,

vs.

WILSON & COMPANY, INC.

Employer,
Self-Insured,
Defendant.

Decision on Appeal

PART I

This is a proceeding filed October 18, 1976 by defendants, self-insured employer, Wilson & Company, Inc., pursuant to Rule 500-4.27 appealing a review-reopening decision filed September 28, 1976 wherein the claimant, Robert Jamison, was awarded healing period and permanent partial disability benefits. The matter was submitted on a transcript of the review-reopening proceeding with its accompanying exhibits.

On June 27, 1973 claimant, who was employed by defendant as a mechanic, was injured when the roof of the machine on which he was standing caved in. Claimant was hospitalized with a shoulder injury and has not been gainfully employed since that incident. Although he has seen a number of physicians, claimant testified that none of them had released him to return to work. Claimant complains of continuing and worsening pain in his left shoulder, back and head; numbness in his left hand; and difficulty in breathing. These complaints are relieved by aspirin.

Claimant's spouse stated that prior to his injury of June 27, he had not had any of the symptoms of which he currently complains. She also said that claimant was nervous and unable to sleep at night.

Testifying at the hearing of the case, Carroll B. Larson, M.D., orthopedic surgeon, whose examination conducted in May, 1976 was restricted to the left arm, indicated that he had examined Jamison in an attempt to determine whether or not there was a rotator cuff tendon tear in the left shoulder. He looked to three objective signs in making this determination.

> One sign is that, in the use of the muscle, there should be no activity on the part of the limb when the muscle acts in the direction that it is supposed to move the limb. This test, in the case of Mr. Jamison, indicated that his muscle was intact and the arm did, in fact, function the way it should have for the use of that particular muscle.
>
> The second thing was that there should be, in the case of a rotator cuff tear, considerable amount of atrophy of muscle, of the torn tendon on a specific muscle, namely, the supraspinatus muscle, if that's the tear area, and there was not a comparable amount of atrophy present compared to the opposite side.
>
> The third thing that we looked for is the mechanism by which an injury occurrs. A rotator cuff tear ordinarily occurs when the muscle is under contraction and an outside force, such as falling on an extended arm, tends to act in the opposite direction, and there is a tremendous amount of force which is that force which ruptures the tendon. In the case of the mechanism of Mr. Jamison, this mechanism did not hold. It was direct blow injury to the shoulder, and that is not the type of mechanism that is ordinarily -- ordinarily will produce a rotator cuff tear.

Based on evidence provided by x-rays, the doctor believed there had been a fracture of the neck of glenoid and a shift in its position and a soft tissue contracture which reduced the flexibility in the shoulder by 50%. The effect of the fracture was "a loss in the angle at which the arm will be functional thereafter, and this is now a fixed point and will not alter." Dr. Larson anticipated the same "loss of abduction as the loss of the angle of the glenoid, which [he estimated] to be . . . looking at the X ray, about 15 degrees . . . ." Neither of these conditions could be changed by therapy. Regarding the soft tissue contracture, the doctor stated that:

> . . . because it has been present a long time, [it] will certainly not have a new collagen laydown that is going to get back to normal. There will always be some restriction as a result, also, of the contracture. But I would think that it is very possible, based on a lot of average results of similar problems, that it could be reduced at least 50 per cent.

Dr. Larson measured claimant's ability to move his arm from his side in two ways. By one method, active, with the claimant himself accomplishing the movement, the arm moved 35 degrees. By the second method, passive, with the claimant being assisted to move, the arm moved 45 degrees. The doctor had recommended that these motions be evaluated while the claimant was under anesthesia because movement stopped at the point pain began; he "was, therefore, unable to say that [the degree of motion achieved] was the complete and full range of motion and not limited by the reflex of pain. In Dr. Larson's opinion, claimant could do a job requiring movement within his limited range of motion as his strength was excellent. Claimant's pain was found inexplicable by the doctor who

discovered no degenerative changes or atrophy in the left arm and shoulder. Physical rehabilitation was seen as appropriate by the doctor who felt surgery was contraindicated. His rating was 20% disability to the body as a whole.

David C. Naden, M.D., orthopedic surgeon, first saw claimant August 15, 1973 and at that time based on examination and x-ray felt that claimant "had a fracture of the greater tuberosity of the left humeral head, and probable rupture of the supraspinatus tendon." Dr. Naden gave a "10% permanent physical impairment, loss of physical function to his left upper limb. . . ."

Claimant was seen in the University of Iowa Orthopedic Clinic by E. Stanley Willett, M.D. on October 3, 1973 who assessed active abduction of the shoulder at 30 degrees and passive abduction within normal limits. X-rays were interpreted as showing disuse osteoporosis. Dr. Willett's impression was "[r] otator cuff and bicipital tendenitis secondary to trauma with pain in the supporting musculature of the left shoulder, probably secondary to spasms."

In a letter dated January 10, 1974 R. M. Wray, M.D., orthopedist, found an injury to the rotator cuff of claimant's shoulder which was not a complete rupture for which "surgery would be of too much value." Dr. Wray suggested a permanent partial disability "probably in the neighborhood of 20 percent of the left upper extremity."

In January, 1974 D. G. Reque, M.D., hospitalized claimant who was suffering from a six week history of malaise, fatigue, anorexia, weight loss, anxiety and depression. The doctor thought there might have been hepatocellular damage in the past which was secondary to questionable alcohol intake.

An April 3, 1974 report by John S. Koch, M.D., orthopedic surgeon, who examined claimant at defendant's request, related "chronic tendonitis of the left shoulder secondary to trauma" with claimant being "a candidate for arthrotomy in the shoulder, acromioplasty and repair of the rotator cuff if identified at the time of surgery." The doctor seemed to assume from claimant's appearance that he "had considerable consumption of alcohol in the past." Although his report found claimant "apparently totally incapacitated at his present level of function, Dr. Koch's cover letter to claimant's attorney, N. E. Lillios, stated "a 10% permanent impairment loss of physical function to his left upper limb. . . ."

Donald D. Weir, M.D., examined Jamison in May, 1974. He established "[s] houlder abduction to about 70°; limitation of internal and external rotation moderate, with local tenderness. Forward flexion completed to about 100°; extension limited to about 15-20°." Dr. Weir's impression was "[p] robable early degenerative joint disease, left shoulder, adhesive capsulitis of the shoulder, [and] myofascial pain syndrome in the shoulder girdle muscles." Physical therapy was suggested as well as localized heat, aspirin, perhaps anti-depressants and injection of trigger points. The doctor suspected "some problems related to excessive ingestion of alcohol. . . ."

On August 2, 1974 W. John Robb, M.D., orthopedist, examined Jamison and made the following diagnosis: "1. degenerative changes, rotator cuff, left shoulder, minimal 2. disuse atrophy left shoulder muscles, minimal." Dr. Robb emphasized "that his [claimant's] impairment of function could be in part contributed [to] by peripheral neuropathy which could be due to generalized health and not necessarily related to any injury sustained in the past." Recommended treatment included attention to diet, abstinence from alcohol and an exercise program.

A report by Jean Laing, clinical psychologist at Oakdale Comprehensive Evaluation and Rehabilitation Center stated that Jamison's scores on a personality inventory administered in May, 1976 betokened "moderate depression, some immaturity and suggestibility, a slightly above-average number of physical complaints, nonconformity, and some dissatisfaction with his current life style." Laing proposed that a return to work would probably reduce claimant's depression and anxiety. Jamison's profile was likened to that of psychiatric patients most of whom were alcoholics.

Claimant must provide by a preponderance of the evidence that the disability he suffers arose out of and in the course of his employment. *Lindahl v. L. O. Boggs,* 236 Iowa 296, 18 N.W.2d 607 (1945). A possibility is insufficient; a probability is necessary. *Burt v. John Deere Waterloo Tractor Works,* 247 Iowa 691, 73 N.W.2d 732 (1956). Establishing causal connection is within the domain of expert testimony. *Bradshaw v. Iowa Methodist Hospital,* 251 Iowa 375, 101 N.W.2d 167 (1960). The evidence presented by claimant sustains claimant's current condition arose out of and in the course of the employment.

Because claimant's injury is to the body as a whole, the injury must be evaluated industrially as well as functionally. Factors considered in ascertaining industrial disability include age, education, 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 (1963). The disability is that which reduces earning capacity, not merely bodily functions. *Olson v. Goodyear Service Stores,* supra.

Married claimant, age 51, a high school graduate, was in the air force where he attended aircraft mechanics school. He worked with experimental aircraft for twelve years and had been a mechanic at defendant employer for fifteen years doing work requiring the use of both arms to use sledgehammers and pipe wrenches to perform tasks requiring both physical strength and manual dexterity. Claimant, who has been unemployed since the time of the accident, underwent a battery of intelligence tests at the Oakdale Center which showed him to be in the top of the average range. The deputy industrial commissioner noted that "[t] he claimant's intelligence, although high, has been directed to the performance of duties which require the implementation of that intelligence in tasks which involve physical strength and dexterity." He further suggested that, based on Dr. Larson's recommendations that claimant was "capable of retraining in a field wherein that intelligence is utilized." The deputy industrial commissioner made an award of 50% industrial disability. Evidence that claimant's wife was employed making $6.25 per hour, that the claimant was receiving social security benefits and that the couple had income property was allowed in the record. The source and amount of claimant's earnings or other income was not pursued, however. Such evidence would have a benefit not only in showing claimant's present earning capacity (excluding, of course, the social security benefits)

but also his motivation to seek gainful employment. The record as a whole indicates some lack of motivation on the part of claimant to pursue active employment. Viewed as a whole, the present state of the record certainly does not support the high degree of disability claimant would have us believe nor one as low as defendants contend. There is sufficient evidence in the record to support the award of the deputy as to claimant's disability [50% of the body as a whole] at the time of the review-reopening proceeding.

* * *

It is further ordered that interest on this award shall accrue pursuant to Iowa Code §85.30.

PART II

On October 27, 1976 defendant employer, Wilson & Company, Inc. filed an application for an order.

> A. That Claimant be ordered to appear for his appointment with Dr. Carroll Larsen [sic], fully submit and cooperate with Dr. Larsen [sic] in his examination, evaluation, and in his arrangements for physical therapy, and thereafter fully participate in all such programs of physical therapy as Dr. Carroll Larsen [sic] and those under his supervision and control may order and direct.
>
> b. That Claimant forthwith contact Owen Julius for the purpose of participation and cooperation in a program of vocational rehabilitation and submit and give his full cooperation in such programs and testing as Owen Julius and others in said department may direct and recommend.
>
> c. That the Commission enter an Order staying the effect and operation of the review-reopening decision by the Deputy Industrial Commissioner on September 28, 1976, and the appeal therefrom, for a period of two months without prejudice to the Claimant or the Employer in order to enable the Claimant to begin full participation and involvement in the physical and vocational rehabilitation programs set out herein.

Claimant responded with a motion to strike filed October 29, 1976 and with a resistance to application for order regarding rehabilitation filed December 3, 1976.

A ruling by the deputy industrial commissioner was filed December 14, 1976, denying defendant's application for an order based upon the theory that the application was a request for a stay order after the appeal had already been taken. The ruling of the deputy was appealed by defendant December 23, 1976.

The deputy industrial commissioner in his review-reopening decision, suggested the importance of rehabilitation to this particular claimant.

Shortly after his injury Jamison saw a physical therapist who applied heat and on the first visit manipulated the arm. On later visits heat was applied, but no manipulation was attempted. Claimant testified to exercising his arm by swinging it "about every night". He also claimed to use massage and other exercises to relieve pain.

Carroll Larson, M.D. told how a physical therapy program be effective in a case such as Jamison's.

> If you start from a point of scratch, where there is contracture of scar tissue, of fibrous tissue, what we call collagen tissue, if that collagen tissue is properly stimulated by a stretch stimulation over a period of anywhere from one to two years from the time of the original inception of the injury, this scar will have replaced the collagen completely. Our body turns over totally its content of collagen every two years, approximately. And if the collagen, while it is in this turnover state of taking away the old and replacing with new, is properly stimulated, it will gain and regain the length that it should have normally and thereby remove contracture or restriction, if you will.

Dr. Larson also said what therapy would not do for claimant.

> So far as the fracture of the neck of the glenoid is concerned, with a tilting of the glenoid, there is a loss in the angle at which the arm will be functional thereafter, and this is now a fixed point and will not alter. I don't believe any therapy can change that, so that there will be -- there should be the same anticipated loss of abduction as the loss of the angle of the glenoid, which I would estimate to be in the -- looking at the X ray, about 15 degrees that is not recoverable by any therapy.
>
> The soft tissue contracture, because it has been present a long time, will certainly not have a new collagen laydown that is going to get back to normal. There will always be some restriction as a result, also, of the contracture. But I would think that it is very possible, based on a lot of average results of similar problems, that it could be reduced at least 50 per cent.

The doctor acknowledged that "overindulgent therapy" could worsen claimant's condition.

Dr. Larson stated in his report that by a

> . . . simple pendulum exercise, if done persistently without active muscle use, . . . [the] contracture could be eradicated in a period of 3 to 6 months and the shoulder would then be suitable for return to work with a very minimum permanent residual disability except for the chronic scarring of injury plus disuse that has occurred in the interim.

Dr. Larson believed claimant "should be encouraged to perform in the presence of pain unless medically contraindicated and informed of self help techniques, which other patients have found to be effective."

Additionally, the doctor felt that "with proper counselling and proper guidance in rehabilitation that this could be considerably diminished to the point of 10% of total body which would allow him the opportunity of a return to his former occupation."

A report dated January 10, 1975 by R. M. Wray, M.D. stated that doctor's feeling that claimant "should be doing exercises of the swinging type". Dr. Wray reported having encouraged Jamison to get back to work.

Donald D. Weir, M.D., a specialist in rehabilitation medicine, recommended, following a May 1, 1974 examination that Jamison begin outpatient physical therapy with emphasis on exercises to improve the functioning of the shoulder.

Owen Julius, who is a rehabilitation counselor with Rehabilitation Education and Services Branch of the Department of Public Instruction, testified that the claimant preferred to have his compensation claim settled before beginning vocational rehabilitation.

At least three examining physicians in their reports indicated that either an exercise or a physical therapy program would probably improve the functioning the shoulder. None of these suggestions were apparently implemented other than the indication that the claimant did see a physical therapist shortly after the injury, who applied heat and performed some arm manipulations and claimant's testimony that he continued to exercise his arm every night.

A caveat seems appropriate. It may be interesting to note that only four days after the claimant suffered the initial injury, the words "physical rehabilitation" became part of the wording in §85.27 of the Iowa Code. We may presume that the intent of the legislature, in adding these words to the Code, was to call attention to the fact that the use of physical rehabilitation was being overlooked and that it was not being recognized as an integral part of the restoration process. Many physicians were not taking advantage of their medical prerogative to prescribe physical rehabilitation.

During recent years the "return to work" objective of workers' compensation has placed greater emphasis on physical rehabilitation. It is axiomatic in workers' compensation that the return-to-work objective, returning the injured employee to work as soon as possible consistent with good medical judgment, is inherent in quality medical care and rehabilitation.

When planned medical care which includes a rehabilitation return-to-work program is not implemented, very frequently the evil sequelae of enforced idleness, as demonstrated in this case, appear. The longer the delay between recognition of the need for physical rehabilitation and its implementation, the less optimistic can be the prognosis for success. The false notion exists among many laymen and some physicians, that the routine application of local heat and moderate exercise constitutes a rehabilitation program. It is completely inconsistent with the return-to-work objective in workers' compensation cases. If an injured person is to be returned to gainful employment, there is an implication of a need for physical reconditioning, commensurate with the physical requirements of his job, treating the whole person, rather than just the instant injury. Rehabilitation implies prevention perhaps even more strongly than it does the restoration. Physical rehabilitation needs to be prescribed, implemented and its effectiveness evaluated early in the course of treatment and not instituted *after* all other care has not achieved the anticipated results.

* * *

THEREFORE, the claimant is ordered to submit to a reexamination at defendant's expense by Carroll B. Larson, M.D., for an assessment of claimant's current potential for physical rehabilitation.

It is further ordered that a report of this examination be sent to both parties and to the Iowa Industrial Commissioner. If, upon receipt of the report, the parties cannot agree upon appropriate rehabilitation, either may ask for a hearing regarding the reasonableness and necessity of the prescribed treatment if any is recommended.

It is further ordered assuming Dr. Larson finds rehabilitation will be beneficial in diminishing claimant's disability and claimant unreasonably refuses treatment, that upon further hearing, benefits previously ordered may be suspended pursuant to Iowa Code §85.39.

Signed and filed this 17th day of August, 1977.

ROBERT C. LANDESS
Industrial Commissioner

Appealed to District Court; Remanded.

PHYSICAL REHABILITATION

ROBERT H. JAMISON,

Claimant,

vs.

WILSON & COMPANY, INC.,

Employer,
Self-Insured,
Defendant.

Order

On August 17, 1977, a final decision of the Iowa Industrial Commissioner was entered in this case. That decision ordered the claimant "to submit to a reexamination at defendant's expense by Carroll B. Larson, M.D., for an assessment of claimant's current potential for physical rehabilitation." Defendants appealed on September 14, 1977. On January 19, 1978, Judge Ansel J. Chapman of the Sixth Judicial District of Iowa entered an order requiring among other things "[t]hat the claimant shall submit to a re-examination at defendant's expense by Dr. Carroll B. Larson, M.D. for an assessment of claimant's current potential for physical rehabilitation, all as ordered in Division II of the ruling filed by Robert C. Landess, Industrial Commissioner, on August 17, 1977." On March 20, 1978, claimant filed an "Application For Order Modifying Direction For Physical Examination And Rehabilitation." Defendant, on the same date, filed a "Response And Resistance To Claimant's Application For Order Seeking Modification". A "Request For Amendment To Order" was filed by defendant on April 3, 1978. Judge Chapman on April 3, 1978, then ordered "that the Industrial Commissioner designate a new physician to conduct the examination previously ordered to be conducted by Carroll B. Larson and after said examination shall thereafter comply with all other provisions of the order entered by this Court on January 19, 1978."

A letter was sent to the parties which said:

> The parties are requested to agree upon the name of an alternative physician with credentials in physical rehabilitation who may be substituted for Dr. Carroll B. Larson, thereby enabling me to comply with the

court order entered by the judge of the District Court for Linn County. If the parties are unable to agree, each are directed to submit the name of three physicians with credentials in physical rehabilitation for consideration. Your compliance with this request should be received by April 28, 1978.

Suggestions were received from defendant on April 28 at which time defendant's attorney indicated that no agreement could be reached with claimant's attorney. An additional suggestion was submitted on May 2, 1978. No communications have been received from claimant's attorney.

THEREFORE, the order entered in the appeal decision of August 17, 1977, is amended to read "the claimant is ordered to submit to a reexamination at defendant's expense by the Industrial Injury Clinic, Neenah, Wisconsin, for an assessment of claimant's current potential for physical rehabilitation."

Signed and filed this 16th day of May, 1978.

ROBERT C. LANDESS
Industrial Commissioner

No Appeal.

PHYSICIAN'S SERVICES – CHANGE

SANDRA NILES

Claimant,

vs.

ROYAL INDUSTRIES

Employer,

and

CHUBB PACIFIC INDEMNITY GROUP

Insurance Carrier,
Defendants.

Ruling

Now on this 22nd day of November, 1977, the matter of certain pleadings comes on for determination. The Industrial Commissioner's file shows that on October 25, 1977 Claimant made application asking the Industrial Commissioner to "grant the expenses of the employer the employee claimant's right to seek treatment and assistance at the Industrial Injury Clinic, Neenah, Wisconsin." The application stated that Claimant was "in need of special treatment and assistance" of the type that could be provided at the Vada (sic) Clark Memorial Hospital in Neenah, Wisconsin.

On November 14, 1977, Claimant filed another pleading which made a reference to an examination to be conducted at the Industrial Injury Clinic.

The wording of the application is such that the Claimant asks for a change of doctor under the provisions of Section 85.27, Code of Iowa. There is no showing that the employer was requested to authorize a change of doctor. Since the requirements of the subject code section have not been met, the requested relief cannot be granted.

WHEREFORE Claimant's application filed October 25, 1977, is hereby overruled.

Signed and filed at Des Moines, Iowa this 22nd day of November, 1977.

BARRY MORANVILLE
Deputy Industrial Commissioner

No Appeal.

PLEADINGS – AMENDMENT

EDWARD WOMACK,

Claimant,

vs.

ARROW-ACME CORPORATION,

Employer,

and

LIBERTY MUTUAL INSURANCE CO.,

Insurance Carrier,
Defendants.

Arbitration Decision

This is a proceeding in arbitration by Edward J. Womack, claimant, against Arrow-Acme Corporation, employer, and Liberty Mutual Insurance Company, insurance carrier, for the recovery of benefits as a result of an injury on July 23, 1975. A hearing was held on December 1, 1977.

* * *

The first issue to be determined is whether defendants should be permitted to amend its answer.

Following the hearing on December 1, 1977, defendants' filed on December 2, 1977 an Application for Leave to Amend. The amendment proposed by defendants was to add the following paragraphs to its answer:

> 5. Defendants affirmatively state that claimant failed to notify his employer of the injury within ninety (90) days of its occurrence, or the date in which he learned of its occurrence, as required by Iowa Code Section 85.23, and that as a result, Claimant should be denied benefits.
>
> 6. Defendants affirmatively state that Claimant unduly and unreasonably delayed from seeking medical attention which would have discovered any causal connection between his loss of hearing and his employment in that Claimant first experienced hearing difficulties [sic] in 1971 and failed to consult a physician until 1975 and that said delay is unreasonable and should constitute a running of the statute of limitations prior to July 23, 1977.

A resistance to the application was filed by claimant.

Neither the Iowa Workers' Compensation Law nor the Industrial Commissioner's Rules in effect at the time of the hearing specifically stated which defenses must be pleaded

or when a party may amend. Industrial Commissioner Rule 500-4.35 provided that the "rules of civil procedure shall govern the contested case proceedings before the industrial commissioner unless the provisions are in conflict with these rules and chapter 85, 85A, 86, 87, and 17A . . . ." Since Rules 88 and 103 of the Rules of Civil Procedure do not conflict with the Industrial Commissioner Rules and chapters 85, 85A, 86, 87 and 17A, defendants' amendment is governed by these rules.

Rule 103 states that defenses shall be pleaded as follows:

> Every defense in bar or abatement, or to the jurisdiction after a general appearance, shall be made in the answer or reply, save as allowed by rule 104. No such defense shall overrule any other. But a party who presents and tries a defense in abatement alone, shall not thereafter be allowed to plead in bar.

Rule 88 provides for amendments to pleadings. It states:

> A party may amend a pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is required and the action has not been placed upon the trial calendar, the party may so amend it at any time within twenty days after it is served. Otherwise, a party may amend a pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires.

The application to amend filed by defendants is untimely and is denied. The amendments set forth in paragraphs 5 and 6 were not amendments to conform to proof but amendments raising defenses which defendants knew or should have known prior to the hearing. The answer of claimant to interrogatories proposed by defendants contain essentially the same information that defendants use to support its amendments to conform to proof. Additionally, if inquiry was made prior to the hearing, the representatives of defendant employer should have been able to state whether or not notice was received in accordance with §85.23, Code of Iowa.

The next issue to be determined is whether claimant sustained an injury on July 23, 1975 which arose out of and in the course of his employment and resulted in compensable disability.

Claimant was hired by defendant employer in 1965 and worked until February, 1976. His job titles during this period were production worker, drill press operator, mill lathe operator, and segment mold supervisor.

In 1971, claimant noticed a ringing in his ears and headaches after being at work one or two hours. These complaints continued until July 23, 1975. On this date, he sought treatment for his complaints from Roger Murken, M.D. of the McFarland Clinic.

Dr. Murken's history at this time was as follows:

> . . . Mr. Womack entered with the complaint of difficulty hearing. This had been noticed for the previous two to three years, and had been rather gradual in onset. He at that time worked in a foundry, and also complained of ringing in both ears, in addition to the hearing loss.

His examination was essentially normal. After obtaining an audiogram, Dr. Murken's impression was that claimant sustained a sensory-neuro hearing loss secondary to noise. He advised claimant to avoid future noise exposure by the use of earplugs and to obtain a follow-up audiogram in one year.

On February 20, 1976, the last day claimant worked for defendant employer, he discussed his hearing loss with defendant employer. A first report of injury was completed by defendant employer on February 23, 1976.

On August 7, 1976 claimant was examined at the McFarland Clinic by Charles Douglas Jons, M.D., an otolaryngologist. Dr. Jons repeated the audiogram and made the same recommendations as Dr. Murken. An additional follow-up examination and audiogram were conducted by Dr. Jons on November 19, 1977.

Dr. Jons testified that claimant's hearing loss according to AMA standards was zero disability in both ears and according to NIOSH standards was zero disability in the right ear and 7.5 percent in the left ear. Both of these standards were considered to be inadequate by Dr. Jons because of their failure to take into account a hearing loss at higher frequencies. Although no guidelines are currently available to support his opinion, Dr. Jons estimated claimant's hearing loss to be 15-25 percent of both ears. He attributed this loss to claimant's employment for defendant employer.

Noise level surveys were conducted at defendant employer's plant on October 16, 1974 by defendant insurance carrier; July 17, 1975 by Bureau of Labor; and October 8, 1976 by Bureau of Labor. No gross abnormalities were noted in these surveys.

The claimant has the burden of proving by a preponderance of the evidence that some employment incident or activity brought abut the cause of 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 question of causal connection is essentially within the domain of expert medical testimony. *Bradshaw v. Iowa Methodist,* 251 Iowa 375, 101 N.W.2d 167.

Claimant sustained his burden of proof of a causal connection between the hearing loss detected on July 23, 1975 and his employment with defendant employer. Causal connection was established by the testimony of Dr. Jons. The amount of permanent partial disability is determined to be 20 percent of both ears. The rating of Dr. Jons was not rebutted by defendants.

* * *

WHEREFORE, it is found that claimant sustained a twenty percent (20%) hearing loss in both ears as a result of the injury on July 23, 1975.

THEREFORE, defendants are ordered to pay claimant thirty-five (35) weeks of permanent partial disability compensation at the rate of one hundred forty-three and 18/100 dollars ($143.18).

* * *

Signed and filed this 28th day of March, 1978.

DENNIS L. HANSSEN
Deputy Industrial Commissioner

No Appeal.

PLEADINGS – AMENDMENT

DELORES/BOBBIE CARTER,

Claimant,

vs.

MAYTAG COMPANY

Employer,

and

THE TRAVELERS INSURANCE CO.,

Insurance Carrier,
Defendants.

Review Decision

This is a proceeding brought by the claimant, Delores/Bobbie Carter, seeking a review of an order entered October 12, 1976 amended by an order dated October 13, 1976, wherein claimant's request to amend by paragraphs b.–f., paragraph 26, of her original notice and petition was denied.

Claimant's initial petition for arbitration filed April 9, 1976 alleged in paragraphs 27 and 26 that an injury to claimant's decedent's heart happened on April 24, 1974 while decedent was "operating and driving" a forklift. The issue as stated in paragraph 33 was "whether [the] injury arose out of work for [the] employer."

On May 20, 1976, defendants' filed an answer that, while admitting decedent had died as a result of a heart condition, denied both that decedent's heart condition and death arose out of his employment and that decedent's heart condition and death occurred in the course of his employment.

On June 25, 1976, claimant filed a "Motion for Leave to File Amendment to Petition" and an "Amended and Substituted Paragraph to Petition" consisting of four paragraphs set forth below:

> 26. a. That Claimant's husband was operating and driving a forklift when he suffered an injury arising out of and in the course of his employment.
>
> b. That Claimant's husband received the authorization of his foreman to obtain medical care and treatment at the medical facility located in Plant No. 2 at Newton, Iowa.
>
> c. That the medical facility located in Plant No. 2 at Newton, Iowa is owned by Maytag, staffed by its employees and is available to treat Maytag employees, that no charge is made by Maytag to any employees for treatment received, and that the nursing and medical care provided at the medical facility is furnished as part of and incidental to the employment relationship of Maytag employees and results in the direct benefit of Maytag.
>
> d. That Claimant's husband, while seeking nursing and medical care at said medical facility provided by Claimant's employer, suffered a further injury arising out of and in the course of his employment as a result of the negligent care and treatment provided by the Employer's medical facility.

These documents were followed by one filed July 8, 1976 entitled a "More Specific Amendment to Amended and Substituted Paragraph to Petition" consisting of paragraphs e and f as follows:

> e. That the Claimants allege that the injury set forth in paragraph 26(a) through 26(d) is a compensable injury as a course of events and/or an aggravation of a compensable injury arising out of and in the course of claimant's employment.
>
> f. That the Claimants allege that the negligent care and treatment of Bobby Carter's injury, (whether said initial injury was compensable or not) is in and of itself a compensable injury arising out of and in the course of claimant's employment.

On August 6, 1976, defendants filed a resistance to the latter two documents. Defendants alleged that allowing the amendments would materially change the issues, creating a hardship on defendants and would substantially change the claim by seeking compensation because of "negligent care and treatment of Bobby Carter's injury, (whether said initial injury was compensable or not) . . . . " Additionally, defendants submit that claimant's filing of an action in district court against Maytag Company was an election of a remedy for proceeding against defendants for "allegedly improper medical care."

The issue to be reviewed is whether or not the order of the deputy industrial commissioner denying amendments to pleadings was based on erroneous rulings of law and fact. The case is submitted for review on the aforementioned documents and on briefs by both parties.

Unless the provisions conflict with code sections governing the industrial commissioner or are inapplicable to this agency, the Iowa Rules of Civil Procedure are to govern contested cases. The case of *Roby v. John Deere Waterloo Tractor Works,* 31st Biennial Report Iowa Industrial Commissioner, p. 95, which was affirmed by the district court and the court of appeals stands for the principle that the commissioner has authority to prescribe rules limiting time for amendments in contested cases and is therefore cloaked with discretion to refuse to permit amendments not made within the time provided in said rules. As there is no specific rule of the industrial commissioner concerning amendments then the rules of civil procedure apply. Section 17A.22, Code of Iowa. Rule 500 - 4.35 Iowa Administrative Code. Relevant to this case is Iowa Rule of Civil Procedure 88 which provides in part that "[t]he court, in the furtherance of justice, may allow later amendments including those to conform to the proof and which do not substantially change the claim or defense." The Iowa Supreme Court has repeatedly held that allowing amendment to pleadings will be the general rule; denying them, the exception. *Galbraith v. George,* 217 N.W.2d 598 (Iowa 1974). Claimant cites *Cross v. Hermanson Bros.,* 235 Iowa 739, 16 N.W.2d 616 (1944) for the proposition that informal procedure is allowed before the agency. Claimant at another point indicates that the forms provided by this agency are not conducive to detailed pleading. Formality or informality is not the essence of the pleading problem here.

The problem is with substance.

Amendment will not be allowed if it materially changes the issue involved. *Akkerman v. Gersema,* 260 Iowa 432, 149 N.W.2d 856 (1967). A court---the deputy industrial commissioner here---is given "considerable discretion as to whether an appropriate request for leave to amend should be granted or denied" with reversal by a higher court occurring "only where a clear abuse of discretion is shown. *Atlantic Veneer Corporation v. Sears,* 232 N.W.2d 499 (Iowa 1975). Claimant, here, alleges no abuse of discretion.

Iowa Code section 85.26 provides in part that "[n]o 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 benefits are claimed." Injury to claimant's decedent is alleged to have happened April 24, 1974, meaning that the statute of limitations had passed prior to the filing of claimant's amendments on June 25, 1976. The supreme court of Iowa examined its decisions permitting amendments after the running of the statute of limitations in *Swartz v. Bly,* 183 N.W.2d 733 (Iowa 1971) and found at page 737 amendments permissible to insert "allegations inadvertently omitted, . . . claim[s] for additional damages arising from the tort relied on in the original pleading and . . . [allegations] which otherwise amplify and are germane to the *grounds previously stated."* (emphasis added) The court then goes on to relate the general interpretation of Iowa Rule of Civil Procedure 88 to actions involving the statute of limitations, saying that

> amendment to the pleadings which sets forth a new and distinct cause of action based on a wholly different legal theory of liability or obligation does not relate back to date of original pleading and date of filing amendment is regarded as date of commencement of action and if bar of statute of limitations or bar to the right to maintain new cause of action has intervened, new cause of action cannot be maintained.

The deputy commissioner held that claimant here was asserting a new cause of action. Although claimant's initial pleading and proposed amendments deal with the same ultimate injury---death by heart attack---the allegations of causation are very different. Claimant's first pleading suggests a causal connection with decedent's driving a forklift; the amendments, with improper treatment in defendant employer's medical facility. It is important to note that negligent treatment of a compensable injury is considered a continuation of the original injury. *Bradshaw v. Iowa Methodist Hospital,* 251 Iowa 375, 101 N.W.2d 167 (1960). However, when emphasis is placed on the treatment as it is by claimant's amendments, an independent issue is raised. As the deputy commissioner points out at page 3 of his opinion, his ruling "does not prevent the claimant from introducing evidence of the treatment and its result upon the original injury alleged in the petition filed April 9, 1976, and paragraph a. of the subsequent amendment, if that injury is found to be compensable."

In *Coghlan v. Quinn Wire & Iron Works,* 164 N.W.2d 848 (Iowa 1969), a case on which claimant seeks to rely and in which reception of evidence of a psychotic condition was allowed in a review-reopening proceeding, a different situation existed. In *Coghlan,* unlike the case sub judice, the proceeding was a review-reopening; no attempt to amend was made; and only one injury was alleged which produced both physical and psychological effects.

In support of his decision to deny the amendments, the deputy commissioner cites *DeShaw v. Energy Manufacturing Co.,* 192 N.W.2d 777 (Iowa 1971). The claimant in *DeShaw* had suffered two injuries, but his petition for review-reopening alleged permanency from the first injury only. The dissenting opinion at 782 reveals that during this hearing before the deputy commissioner, claimant attempted to amend his claim to include the second injury. Amendment was not allowed by the deputy as the statute of limitations had run on the second claim and the deputy had confined himself to the after-effects of the first injury only. This action was not questioned by either the district court or the supreme court.

THEREFORE, the order of October 12, 1976 and its October 13, 1976 amendment is hereby affirmed. Claimant's request for an amendment is denied. Amendments in paragraph b.-f. filed June 25, 1976 and July 8, 1976 are stricken.

Signed and filed this 6 day of June, 1977.

ROBERT C. LANDESS
Industrial Commissioner

Appeal to District Court; Pending.

PLEADINGS – ANSWER

DONALD COOK

Claimant,

vs.

SAFEWAY STORES, INC.

Employer,

and

TRAVELERS INSURANCE COMPANY

Insurance Carrier,
Defendants.

Ruling

Now on this 7 day of April 1978, the matter of Defendant's Motion To Dismiss comes on for determination.

The Industrial Commissioner's file contains the following items:

1. A Motion To Dismiss, filed by the Defendants on March 15, 1978.
2. A separate answer by Safeway Stores, Inc. filed March 15, 1978.
3. Interrogatorries To Claimant by Defendants, filed March 17, 1978.
4. A Memorandum At Law filed by Gallner & Gallner, attorneys for Claimant, filed March 20, 1978.

It ocasionally happens in workmen's compensation cases that Defendants file an answer or other pleading prior to time that the Industrial Commissioner's office actually receives the petition. In those cases, the Industrial Commissioner's docket clerk reserves the material and awaits the filing of the petition. These instances arise where the Claimant informally gives the Defendant a copy of the original notice and petition. We presume that such was the case here.

In this instance, with no original notice and petition, one cannot rule upon the Motion To Dismiss.

WHEREFORE no ruling on Defendant's Motion To Dismiss is made at this time. The docket clerk will continue to reserve the material filed thus far.

Signed and filed at Des Moines, Iowa this 7 day of April, 1978.

BARRY MORANVILLE
Deputy Industrial Commissioner

No appeal.

PRIVILEGED INFORMATION

CHARLOTTE MARIE BARNES,

Claimant,

vs.

GLOBE UNION, INC.,

Employer,

and

EMPLOYERS INSURANCE OF WAUSAU,

Insurance Carrier,
Defendants.

Ruling

NOW ON THIS 6 day of April, 1977 the matter of claimant's appeal to the industrial commissioner from an order of the deputy industrial commissioner comes on for determination.

On December 3, 1976 claimant moved the deputy commissioner for a rehearing for reconsideration of his order of November 16, 1976, striking the testimony of her psychiatrist. The rehearing was denied by operation of Rule 500-4.24. The motion stood denied as of December 23, 1976. Rule 500-4.27 provides that "an appeal to the commissioner from a decision, order or ruling of a deputy commissioner . . . shall be commenced within twenty days . . . ." Since a rehearing of the order was requested, appeal should have been brought pursuant to Rule 500-4.25. Claimant's appeal filed January 17, 1977 was not timely filed and will not be considered.

Claimant also seeks a declaratory ruling under Rule 500-5.1 which states that "[a] petition for declaratory ruling may be filed with the industrial commissioner as to the applicability of any statutory provision, rule, or other written statement of law or policy, decision or order of the industrial commissioner. . . ." A declaratory ruling is not appropriate here as claimant is not asking for a ruling within the area defined by the statute. She asks instead for a decision based on the facts of this controversy.

The claimant also requests that standards be set for the admissibility of psychiatric testimony following guidelines set forth by the American and Iowa Psychiatric Associations. No "guidelines" were submitted with claimant's petition and therefore no specific action was requested. No proposed rule or amendment was set forth. It should be further noted that claimant's three barrelled attack under a document entitled merely "notice of appeal" is not considered appropriate or consistent with the provisions of the law to properly bring these three divergent matters to the attention of the commissioner.

As a caveat, it is the opinion of this agency that Dr. Berryhill should have complied with Deputy Commissioner Mueller's order to present his file regarding claimant.

Claimant revealed in an interrogatory filed March 24, 1976 that she had been seen by psychiatrist Dr. L. K. Berryhill. On June 28, 1976, Dr. Berryhill was deposed by claimant's attorney, Mr. Robert L. Ulstad, and defendants' attorney, Mrs. Claire F. Carlson. While under cross-examination by Mrs. Carlson, Dr. Berryhill refused to disclose the total contents of claimant's file which he had maintained. Claimant's motion for a protective order "delineating the matters that can be inquired into upon cross-examination and the extent of the production of the psychiatrist's file in order that the treatment of this patient by the psychiatrist not be interrupted or complicated thereby" was filed July 12, 1976. Deputy Commissioner Mueller responded nine days later by ordering the entire medical file submitted to him so that it might be reviewed and an order concerning the admisibility of its contents issued. On July 23, 1976, Dr. Berryhill was advised by Attorney Ulstad to copy his complete file and to submit it to the deputy commissioner. Dr. Berryhill's response was a letter of September 1, 1976 to Deputy Commissioner Mueller presenting his belief that his file contained much information that was relevant for the purpose of treating the claimant, but that was irrelevant for an industrial evaluation. When Mr. Ulstad again requested on October 4, 1976 that Dr. Berryhill submit his records, the doctor suggested that claimant be seen by an independent psychiatrist whose testimony might be used for litigation purposes. On October 22, 1976 defendants moved to strike Dr. Berryhill's deposition and this motion was sustained by the deputy commissioner on November 16, 1976.

Under Iowa Code, §85.27:

> Any employee, employer or insurance carrier making or defending a claim for benefits agrees to the release of all information to which they have access concerning the employee's physical or mental condition relative to the claim and further waives any privilege for the release of such information. Such information shall be made available to any party or their attorney upon request. 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. The information requested shall [nunc pro tunc order inserted "be submitted to the industrial commissioner who shall"] determine the relevance and materiality of the information to the claim and enter an order accordingly.

Claimant by bringing this action has waived the psychotherapist-patient privilege.

The supreme court of California sitting *en banc* in *In Re Lifschutz,* 2 Cal. 3d 415, 467 P.2d 557, 85 Cal. Rptr. 829 (1970), dealt with a psychiatrist's refusal to produce records or to answer questions in a suit for assault filed by a patient he had treated ten years prior to litigation. While the patient neither expressly waived nor claimed the psychotherapist-patient privilege, the superior court found that because the patient had put his emotional and mental condition in issue by instituting the suit the privilege did not apply and ordered the doctor to comply with the subpeona and to answer questions posed during the deposition.

The psychiatrist alleged the orders infringed his right to privacy and his right to practice a profession. He also attempted at several points to use the doctrine of *jus terti* and attacked the statute authorizing compulsion of his testimony on equal protection grounds asserting that a clergyman would not be required to reveal confidential communications. The California Supreme Court found no infringement of the physician's constitutional rights and no denial of equal protection.

The court acknowledged at footnote 4 p. 423, 561, 833, that although under some circumstances a doctor might be allowed to assert the rights of his patient when, as in *Griswold v. Connecticut,* 381 U.S. 479 (1965), the patient cannot easily or effectively do so himself, the patient in *Lifschutz* was "a party to the action, and had full opportunity to challenge the disclosures which [had] so far been sought but [had] declined to do so." Claimant here through her attorney repeatedly urged Dr. Berryhill to obey Deputy Commissioner Mueller's order. In *Romanowicz v. Romanowicz,* 213 Pa. Super. 382, 248 A.2d 238 (1968), a psychiatrist refused to appear in response to the patient's subpeona without a special order of the court. There, as here, the patient actively sought the introduction of the doctor's testimony. The superior court of Pennsylvania held at 385, 240 that "[a] patient, . . . always has the right to introduce her own physician's testimony, regardless of the reluctance of the physican himself." The court was careful to note that the physician-patient privilege is the patient's and not the physician's.

The *Lifschutz* court at 433, 569, 841, identified two grounds for the patient-litigant exception to the psychotherapist-patient privilege:

> First, the courts have noted that the patient, in raising the issue of a specific ailment or condition in litigation, in effect dispenses with the confidentiality of that ailment and may no longer justifiably seek protection from the humiliation of its exposure. Second, the exception represents a judgment that, in all fairness, a patient should not be permitted to establish a claim while simultaneously foreclosing inquiry into relevant matters.

At 431, 567, 839, the court pointed out that divulgence of "only those matters directly relevant to the nature of the specific 'emotional or mental' condition which the patient . . . voluntarily disclosed" would be required and that trial courts could "utilize the protective measures at their disposal to avoid unwarranted intrusions into the confidences of the relationship." Claimant here by asking for a protective order followed the procedure suggested by the California Supreme Court at 435, 572, 844, to limit the scope of the inquiry. Her rights are specifically protected under Iowa Code .85.27 which provides that "[t]he information requested shall be submitted to the industrial commissioner who shall determine the relevance and materiality of the information to the claim and enter an order accordingly."

Dr. Berryhill's revealing of claimant's records does not violate Section 9 of the American Medical Association's "Principles of Medical Ethics" which states: "A physician may not reveal the confidences entrusted to him in the course of medical attendance, or the deficiencies he may observe in the character of patients, *unless he is required to do so by law* or unless it becomes necessary in order to protect the welfare of the individual or of the community." (emphasis added) Dr. Berryhill was ordered by Deputy Commissioner Mueller to submit his file.

* * *

Signed and filed this 6 day of April, 1977.

ROBERT C. LANDESS
Industrial Commissioner

No appeal.

CHARLOTTE MARIE BARNES,

Claimant,

vs.

GLOBE UNION, INC.,

Employer,

and

EMPLOYERS INSURANCE OF WAUSAU,

Insurance Carrier,
Defendants.

Arbitration Decision

This is a proceeding in arbitration brought by Charlotte Marie Barnes, the claimant, against Globe Union, Inc., her employer, and Employers Insurance of Wausau, the insurance carrier, to recover benefits under the Iowa Workmen's Compensation Act by virtue of an alleged series of industrial injuries which have resulted in the claimant's inability to perform any acts of gainful employemnt since February 25, 1975.

* * *

The claimant, age 59, married, testified that she began her employment with the defendant-employer on July 7, 1958. She further testified that the years 1973 and 1974 she assisted in the assembly of push buttons used in the

appliance industry. Her duties required the installation of a pin a "fourth of an inch long" and a small spring which was then inserted into the push button itself. Within this time period of 1973-74 the assembly procedure was changed. The pins were no longer installed by a hand-held tweezer but rather with the use of an air hose.

The claimant further testified that she took a leave of absence beginning on February 25, 1975 due to her "nerves" and received non-occupational disability payments until May of 1975. Claimant now claims that the pressures for production and the change in procedure has created an inability on the part of the claimant to cope with her work situation.

Herein lies the issue, which is whether or not the claimant has established by a preponderance of the evidence that her current inability to perform acts of gainful employment is causally connected to her employment.

The claimant came under the care of Ashton McCrary, M.D., who sent the claimant ot the Mayo Clinic where she was seen by Norman P. Hanson, M.D., a consultant in the Adult Section of Psychiatry. The disability determination division of the Social Security Administration sent the claimant to Paul M. Kersten, M.D., a board-certified psychiatrist. The claimant became a patient of L. K. Berryhill, a psychiatrist in Fort Dodge, Iowa, on September 4, 1975.

This record contains medical reports filed by the defendants in answer to claimant's interrogatories consisting of Dr. McCrary's report of March 3, 1975; Dr. Black's report of March 27, 1975; and Dr. McCrary's reports of April 21 and June 3, 1975, as well as Dr. Kersten's report of June 19, 1975.

Although both Dr. Kersten and Dr. Hanson find that the claimant is suffering from some mental depression, neither of these expert witnesses connect the condition with the claimant's employment.

It is noteworthy to record at this junction in this decision that the entire evidence, both oral and written, given by Dr. L. B. Berryhill has not been considered by virtue of a ruling made on April 6, 1977 by the Iowa Industrial Commissioner wherein an order of November 16, 1976 so holding was affirmed. The doctor, during his evidentiary deposition, refused to make his file available to defendant's counsel. Notwithstanding the statutory protection contained in Section 85.27, Code of Iowa, the doctor has remained steadfast in his refusal to comply with an order to submit his file to the undersigned for appropriate rulings.

With respect to other medical evidence, the record shows that on May 20, 1976 claimant filed a "Submission under Section 500---4.17," and the defendants filed a resistance thereto on May 24, 1976. This matter requires a ruling.

The Commissioner's Rule 500---4.17 (85,86,17A) reads as follows:

> Doctor's and practitioner's reports-evidence. In any contested case commenced after July 1, 1975, a signed narrative report of a doctor and practitioner setting forth the history, diagnosis, findings and conclusions of the doctor and practitioner and which is relevant to the contested case shall be considered evidence on which a reasonable prudent person is accustomed to rely in the conduct of a serious affair. The industrial commissioner takes official notice that such narrative reports are used daily by the insurance industry, attorneys, doctors and practitioners and the industrial commissioner's office in decisionmaking concerning injuries under the jurisdiction of the industrial commissioner.
>
> Any party against whom the report may be used shall have the right, at the party's own expense, of cross-examination of the doctor or practitioner. The cross-examination shall be performed no later than thirty days after the hearing unless notice prior to the hearing of the intent to offer specifically identified reports into evidence shall be given the party against whom the report is to be used by the party wishing to place the report in evidence. In that event, cross-examination shall be had within thirty days of the receipt of the notice by the party wishing cross-examination.
>
> Nothing in this rule shall prevent direct testimony of the doctor or practitioner.

The hearing in this matter was held on April 2, 1976, and since the record contains no attempt on the part of the claimant to introduce the documents in question at the hearing, it is held that the attempted filing of May 20, 1977 is tardy and those matters not already in the record as evidentiary deposition exhibits are stricken from this record, specifically items 1, 3, 4, 5, 6, 9, 10, 11 and 12. Item 2, Dr. McCrary's report of November 28, 1975 is admitted as an answer to defendants' interrogatory. Item 7 is admitted as a Norman deposition exhibit. Item 8 is admitted as a Kersten deposition exhibit.

Likewise, the claimant's attempted submissions under Rule 500---4.17 on November 8, 1976 and July 19, 1977 are stricken as being untimely filed.

The claimant has the burden of proving by a preponderance of the evidence that the mental depression of February 25, 1975 is the cause of her disability on which she now bases her claim. *Lindahl v. L. O. Boggs,* 236 Iowa 296, 18 N.W.2d 607. *Bodish v. Fisher,* 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 question of causal connection is essentially within the domain of expert medical testimony. *Bradshaw v. Iowa Methodist Hospital,* 251 Iowa 375, 101 N.W.2d 167.

When one considers the evidence of Dr. Kersten and Dr. Hanson, it is clear that claimant did not carry the burden of proof to show any connection between the work environment and her condition. Thus the record lacks sufficient evidence to support an award in this case.

* * *

Signed and filed this 28 day of September, 1977.

HELMUT MUELLER
Deputy Industrial Commissioner

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

SEASONAL EMPLOYEE

DOUGLAS R. WOLFE,

Claimant

vs.

WEIGEL & STAPF CONSTRUCTION CO.,

Employer,

and

UNITED STATES FIDELITY & GUARANTY CO.,

Insurance Carrier,
Defendants.

Arbitration Decision

This is a proceeding in arbitration brought by Douglas R. Wolfe, the claimant, against Weigel & Stapf Construction Co., his employer, and United States Fidelity & Guaranty Co., the insurance carrier, to recover benefits made under the Iowa Workmen's Compensation Act by virtue of an industrial injury which occurred on June 21, 1976.

* * *

The agreed issue requiring determination is whether or not the claimant's employment comes within the terms of section 85.36(9), Code of Iowa, which reads in part as follows:

> 9. In occupations which are exclusively seasonal and therefore cannot be carried on throughout the year, the weekly earnings shall be taken to be one-fiftieth of the total earnings which the employee has earned from all occupations during the twelve calendar months immediately preceding the injury.

The Employer's First Report of Injury indicates that the claimant was gainfully employed fulltime for ten hours per day for a five-day week, or fifty hours.

The general rule set forth in section 85.36, Code of Iowa, is that the basis of compensation is the weekly earnings of the employee at the time of the injury. Weekly earnings are defined as the gross salary to which the employee would be 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 for which he was employed. See section 85.36, first unnumbered paragraph, Code of Iowa.

The first seven paragraphs of section 85.36, Code of Iowa, deal with determining the gross weekly wage when the pay periods are of certain intervals. It should be noted that pargaraph seven is the qualifying paragraph for the payment of irregular wages contemplated in paragraph six when a claimant has not worked 13 calendar weeks. Paragraph one applies to this case as wages were paid weekly.

Paragraph eight, nine and ten deal with exceptional circumstances. Paragraph eight deals with employees whose hourly earnings are unascertainable. Paragraph nine deals with occupations which are exclusively seasonal. Paragraph ten deals with employees who earn no wages or less than the usual weekly earnings of the regular full-time adult laborer in the line of industry in the locality.

Defendants urge that the exception concerning exclusively seasonal occupations applies in this case. The Employer's First Report of Injury shows that the employer operates a grain elevator construction enterprise. For purposes of this decision it may be assumed that such construction operations begin as early as possible in the spring, depending entirely on existing weather conditions. It may also be assumed that such construction terminates in the early winter, again dependent upon weather conditions, and that as such the employer's business is "seasonal." This does not mean, however, that claimant's employment was seasonal if it could be carried on at all times of the year. Section 85.36(9) has not as yet received the attention of the Iowa Supreme Court and this is therefore a case of first impression.

The statute refers to "occupations" which are exclusively seasonal. While *Webster's Seventh New Collegiate Dictionary* refers to "occupation" under the definition of "business," the definition includes "a commercial or industrial enterprise." That portion of *Webster's* definition of "business" dealing with enterprise and business is more applicable than the portion which refers to "occupation."

Webster's refers to "enterprise" as "a business organization." The connotation of the phrases used is not that of an individual avocation.

The term "occupation" is defined by *Webster's* as "an activity in which one engages; the principal business of one's life." The reference is to a singular activity of the employee as opposed to enterprise activity of the employer. The evidence which is relevant to this determination is the occupation of the employee.

The record stands without contradiction that the claimant's occupation was that of a laborer assisting in the pouring of a concrete structure, and it is taken as a matter of official notice that such occupations are carried on at all times of the year.

THEREFORE, it is found that it is the occupation of the employee that controls the application of section 85.36(9), supra, and not the business of the employer, and that section 85.36(9) does not apply in this case.

It is further found that the claimant was a full-time adult

laborer in Vinton, Iowa earning $3.50 per hour working 50 hours per week.

* * *

Signed and filed this 16th day of September, 1977.

HELMUT MUELLER
DEPUTY INDUSTRIAL COMMISSIONER

No Appeal.

SEASONAL EMPLOYEE

WILLIAM N. WHITE,

Claimant,

vs.

CITY OF FORT DODGE,

Employer,

and

IOWA NATIONAL MUTUAL INS. CO.,

Insurance Carrier,
Defendants.

Review-Reopening Decision

This is a proceeding in Review-Reopening brought by the claimant, William N. White, against the City of Fort Dodge, Iowa, his employer, and Iowa National Mutual Insurance Company, the insurance carrier, to recover benefits under the Iowa Workmen's Compensation Law by virtue of an industrial accident which occurred on October 3, 1974.

* * *

The record supports the following findings of fact, to wit:

Claimant, presently age 70, was employed by the City of Fort Dodge on October 3, 1974. He had been so employed since May 15, 1974 and worked in the Parks and Forestry Department. A fair reading of the evidence would indicate that this employment was to be temporary in nature.

The claimant, on October 3, 1974, was exchanging some play equipment at a park. As he was assisting in the moving of a new merry-go-round, the claimant was forced to walk backwards and fell in a hole and the merry-go-round came down on top of the claimant. The merry-go-round hit the claimant in the stomach and the claimant "jackknifed" causing him to fall backwards. The employer was given due notice of the injury. The claimant was hospitalized immediately.

He was hospitalized for approximately one week suffering from a compression fracture of the first lumbar vertebra. He was treated by Hoyt Allen, M.D.. He was also seen by Dr. Allen intermittently and was released to return to work by Dr. Allen on May 1, 1975.

The claimant contacted his supervisor at that time and was told that no position was available because of an appropriations cutback. The claimant has been unemployed since October, 1974, except for a period in early 1976 when he was employed by the Canteen Company. The claimant quit because of his condition.

The claimant has the burden of proving by a preponderance of the evidence that the injury of October 3, 1974, is the cause of his disability upon 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. 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 more than slightly aggravated, this resultant condition is considered a personal injury within the Iowa law. *Ziegler v. U.S. Gypsum Co.,* 252 Iowa 613, 106 N.W.2d 591. *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 her disability. *Yeager v. Firestone Tire & Rubber Co.,* 253 Iowa 369, 112 N.W. 299.

Based on the foregoing principles it is found that the claimant has sustained his burden of proof.

Although the claimant has stated that he was healthy prior to the accident which is the subject matter of this action, the record indicates that the claimant has had gout and arthritis. These conditions contributed to the granting of a total Social Security Disability Pension prior to the accident. Later, the claimant went on to the retirement phase of Social Security and worked only intermittently to keep his income below that level which would reduce the Social Security Benefits.

Robert A. Hayne, M.D., a neurosurgeon, states, in a letter dated December 7, 1976, that the claimant's physical impairment from the instant injury is 25% of the body as a whole. Dr. Allen's reports do not give us a degree of impairment. John R. Walker, M.D., an orthopedic surgeon, in a letter dated May 25, 1976, indicates that the claimant's "temporary partial disability" is about 50%. How this converts to permanent partial disability is unknown. Dr. Hayne's opinion will therefore be followed.

Since the injury here is to the body as a whole, the resultant injury must be evaluated industrially and not merely functionally. In determining industrial disability, consideration may be given to the injured employee's age, education, 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 660.

The claimant was 69 years of age at the time of the hearing. A reading of *Olson,* supra, indicates that consideration may be given to age in determining industrial disability. Claimant is at a point in his life when the normal benefits of retirement should be enjoyed. In short, the claimant's age is a serious factor in determining a finding that the claimant's industrial disability is 30%.

The next problem which must be addressed is the rate of compensation to which the claimant is entitled. The defendants contend that the proper rate of compensation

should be $18.00 based on the fact that the claimant is a seasonal employee within the meaning of §85.36(9), Code of Iowa, which states:

> 85.36 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:
>
> * * *
>
> 9. In occupations which are *exclusively* seasonal and therefore cannot be carried on throughout the year, the weekly earnings shall be taken to be one-fiftieth of the total earnings which the employee has earned from all occupations during the twelve calendar months immediately preceding the injury. (emphasis added)

The defendants' position is without merit since the occupation in which the claimant is engaged is not *exclusively* seasonal. The testimony of Arthur J. Davis indicates that the work done by the park department remains all year, although subject to variations. The occupation involved is engaged in activity, albeit varied, throughout the year. Therefore, it is found that the correct rate of compensation is $66.06. The estoppel issue raised by the claimant may have some merit, but the estoppel issue now is moot.

* * *

Signed and filed this 14th day of March, 1977.

JOSEPH M. BAUER
Deputy Industrial Commissioner

Appealed to Commissioner; Dismissed.

SECOND INJURY FUND

GEORGE F. ROBINSON,

Claimant,

vs.

SECOND INJURY FUND OF IOWA,

Defendant.

Second Injury Fund Decision

INTRODUCTION

This is a proceeding by George F. Robinson, claimant, for the recovery of benefits from the Second Injury Fund of Iowa.

* * *

ISSUE

The issue to be determined is the entitlement of claimant to benefits from the Second Injury Fund.

STATEMENT OF FACTS

In 1939, claimant injured his left eye as a result of a bow and arrow accident. He subsequently lost the sight in this eye in 1953.

On June 11, 1976, claimant sustained an injury to his right knee while working for the City of Blairstown, Iowa. As a result of the injury, claimant was paid workers' compensation for a 9% percent permanent partial disability to his right leg.

APPLICABLE LAW

Section 85.64, Code of Iowa, provides:

> If an employee who has previously lost, or lost the use of, one hand, one arm, one foot, one leg, or one eye, becomes permanently disabled by a compensable injury which has resulted in the loss of or loss of use of another such member or organ, the employer shall be liable only for the degree of disability which would have resulted from the latter injury if there had been no pre-existing disability. In addition to such compensation, and after the expiration of the full period provided by law for the payments thereof by the employer, the employee shall be paid out of the "Second Injury Fund" created by this division the remainder of such compensation as would be payable for the degree of permanent disability involved after first deducting from such remainder the compensable value of the previously lost member or organ . . .

The "permanent disability', mentioned in the above section refers to industrial disability. 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 the employee 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.

ANALYSIS

The combined disabilities of claimant qualify him for a determination of his industrial disability as provided in §85.64.

Claimant is 49 years old, married, and the father of three children. He received a G.E.D. while serving in the Air Force from 1945-48. Prior to working for the city of Blairstown as a water and street maintenance man, claimant worked as a farm laborer, a warehouse worker, and a truck driver. He also performed various duties associated with the trimming, topping, and removal of trees.

At the time of claimant's injury to his knee, he was earning $4.00 per hour. On August 26, 1976, claimant was "fired" from his employment with the city of Blairstown. He subsequently worked as a security guard for Kelley's Security at the rate of $2.40 per hour and as a warehouse worker for Valley Produce at the rate of $4.50 per hour. He voluntarily terminated his employment for Kelley's Security and was "fired" by Valley Produce. On the date of the hearing, claimant was working as a truck driver at the rate of $3.50 per hour.

Claimant was last examined by W. John Robb, M.D., an

orthopedic surgeon, on August 16, 1977. Dr. Robb's findings were:

> . . . he has an excellent range of motion without any swelling in the knee joint. Internal and external rotation are negative. There is no tenderness over the knee or patella. There is minor tenderness over the patellar tendon. Resistance to extension is excellent.
>
> . . . He has no swelling of the knee joint.
>
> . . . no evidence of instability of the ligaments. The knee joint shows a full range of motion, no instability, no tenderness of the medial or lateral meniscus.
>
> The disability that he describes would relate entirely to the patellar tendon which does not show any abnormality grossly.

Dr. Robb described claimant's disability as follows:

> . . . the 15% permanent partial impairment of function of the knee represents a 5% partial impairment of function of the lower extremity.

At the hearing claimant described his present problems as a result of the knee injury to be difficulties with kneeling, standing, heavy lifting and sleeping. He testified that he is unable to do farm or tree work.

Leonard A. Miller, a professor and coordinator of the rehabilitation counseling program at the University of Iowa, testified on behalf of claimant. The evaluation of claimant by Miller was comprised of three parts: (1) work accessability barriers; (2) work performance barriers; and (3) work reward barriers.

Miller estimated the ". . . disability impact of the latest disability (knee) to be in the 30-35% range." He based this estimate on the following conclusions:

> (1) Increased restrictions on work that could be performed being accessible to Mr. Robinson.
>
> (2) Increased restrictions on being able to perform semi-, (sic) unskilled jobs on the more strenuous, physical end of such jobs.
>
> (3) The increased probability that Mr. Robinson will be able to only locate employment and be able to perform jobs with wages about half, to two-thirds of his last known employment.

Applying the above evidence to the considerations outlined in *Olson* and *Barton,* claimant proved an industrial disability of 25%. The loss of sight in claimant's left eye plus the 5% disability to claimant's left leg did not appreciably alter claimant's earning capacity.

The evidence in this case reveals that after claimant injured his knee, he lost jobs with the city of Blairstown and Valley Produce for reasons not related to his knee injury or to the residuals of his knee and eye disabilities. These two jobs paid the same or more per hour than the job he held when he injured his knee. Additionally, the difference in hourly rate between the job claimant presently holds and the job he held at the time of the knee injury if $.50 per hour. This difference is a 12.5% reduction in his hourly rate.

The complaints of claimant about his knee at the hearing correlated poorly with the physical findings of Dr. Robb at the time of his examination on August 16, 1977. The only abnormality noted by Dr. Robb was minor tenderness over the patellar tendon. The poor correlation raised questions about the objectivity of claimant in describing his complaints at the hearing.

The estimate of disability by Miller was considered high because claimant's employment history since the knee injury was inconsistent with the conclusion that claimant ". . . will be able to only locate employment and be able to perform jobs with wages about half, to two thirds of his last known employment".

The 25% industrial disability award (125 weeks) must be reduced by deducting the compensable value of the previously lost members. The compensable value of the previously lost members are 125 weeks for the loss of the left eye and 18 weeks for the 9% disability to the right leg. After reducing the award (125 weeks minus 143 weeks), claimant is not entitled to any recovery from the Second Injury Fund.

* * *

Signed and filed this 19 day of January, 1978.

DENNIS L. HANSSEN
Deputy Industrial Commissioner

Appealed to Commissioner; Affirmed.
Appealed to District Court; Pending.

SECOND INJURY FUND

JIM D. ASAY,

Claimant,

vs.

INDUSTRIAL ENGINEERING EQUIPMENT COMPANY,

Employer,

and

TRAVELERS INSURANCE COMPANY,

Insurance Carrier,

and

SECOND INJURY FUND, STATE OF IOWA,

Defendants.

Decision on Appeal

This is a proceeding to review two separate review-reopening decision. The defendant employer, Industrial Engineering Equipment Company, and its insurance carrier, Travelers Insurance Company, seek review of a decision filed September 3, 1976 wherein claimant, Jim D. Asay, was awarded permanent partial disability for an injury to his right arm which he incurred on November 14, 1973.

The defendant employer, Industrial Engineering Equipment Company, its insurance carrier, Travelers Insurance Company, and Second Injury Fund seek review of a decision filed September 3, 1976 wherein claimant, Jim D. Asay, was awarded healing period benefits and additional permanent partial disability for an injury to his right arm to be paid by the defendant employer and benefits under Iowa Code §85.34(3) to be paid by the Second Injury Fund for an injury incurred on February 16, 1976. * * *

Forty-two year old claimant who has an eighth grade education is married and has one dependent child. At age five claimant contracted polio which resulted in severe damage to his left arm. He has worked in various areas of automotive mechanics. At the time claimant was discharged, he had been working for defendant employer about nine years as an air compressor mechanic whose duties consisted of overhauling and repairing compressors. This work was accomplished with the aid of torque wrenches calibrated up to 200 pounds. On November 14, 1973 claimant sustained a fracture to his right wrist necessitating surgery to remove bone fragments. Although claimant returned to work in April of 1974, he was unable to work a full forty hour week because of recurrent pain. On February 19, 1976 a wrench, which claimant was using to tighten a bolt while replacing a compressor, slipped, jamming claimant's right wrist against the machine resulting in an injury which the attending physician, Dennis L. Miller, M.D., described as "a contusion of the wrist superimposed on the preexisting post traumatic degenerative arthritis." Dr. Miller released Asay to return to light duty on March 1, 1976; but as no such work was available, claimant's employment was terminated as of March 8, 1976, and he has not been employed since that time.

A memorandum of agreement pertaining to the first injury was filed and approved November 29, 1973, providing for temporary disability at the rate of $91 per week. A corrected form 5 was filed August 2, 1977, showing payment of 17 4/7 weeks of healing period and 46 weeks of permanent partial disability based on 20% of the right arm. A memorandum of agreement pertaining to the second injury was filed March 3, 1976. A form 5 was filed August 2, 1977 showing payment of six days of temporary total disability as a result of the second injury.

Defendants' petition for review regarding claimant's first injury alleges the deputy commissioner failed to consider a medical report by Dr. Sprague and seeks review of the deputy commissioner's award of 50% functional impairment to the right arm. Defendant employer and insurance carrier's petition for review involving claimant's second injury again questions the deputy commissioner's failure to consider Dr. Sprague's mecial report and to consider a report by Carroll B. Larson, M.D. and asks review of the deputy's award of 65% functional impairment to the right arm which defendant alleges is unsupported by sufficient, competent evidence in the record. Defendant Second Injury Fund likewise asks a review of the deputy's findings and of the additional evidence presented.

A number of physicians have examined claimant at various times to evaluate his first or his second injury with Dr. Miller and F. Dale Wilson, M.D., examining the injured area following each incident. Dr. Miller's ratings appear low in comparison with those made by the other physicians, while Dr. Wilson's seems high. The deputy gave greater weight to Dr. Wilson's report because the doctor "described the tests given in great detail and is, therefore, the more persuasive." While the report is obviously more complete with regard to subjective observations made by the claimant himself, there is no basis for concluding Dr. Wilson's examination was more complete than Dr. Sprague's for the first injury or than Dr. Larson's for the second which this commissioner finds equally thorough. It should be noted, however, that the deputy commissioner did not have the benefit of the expanded report of Dr. Sprague which was submitted on appeal.

Dr. Miller, orthopedic surgeon, saw claimant shortly after his first injury. In a letter of February 19, 1975 to claimant's attorney, Dr. Miller assessed claimant's impairment at 5% of his right upper extremity. Dr. Miller also evaluated claimant on February 25, 1976 following his second injury. The doctor again estimated claimant's impairment after the second injury as 5% of the right upper extremity. These assessments were based on loss of motion only.

Section 17A.14 states in part:

> *Rules of evidence -- official notice.* In contested cases:
>
> 5. The agency's experience, technical competence, and specialized knowledge may be utilized in the evaluation of the evidence.

The reports of the various doctors concerning findings of range of motion do not apprise this commissioner of the amount of motion which the claimant has lost but only that which remains. Although range of motion of individuals is not uniform, average ranges of motion have been established by competent studies. One such study was conducted by the American Medical Association Committee on Rating of Mental and Physical Impairment. The results of this study are contained in the publication, *Guides to Evaluation of Permanent Impairment* (1971). It is well known that these AMA *Guides* have been used to evaluate loss of motion in workers' compensation matters. Although not in effect at the time of this hearing, the industrial commissioner has adopted a rule (500-2.4) which will become effective September 28, 1977 recognizing the AMA *Guides* as a guide for evaluating permanent partial disabilities of scheduled members.

Although the AMA *Guides* are not a part of the record in this proceeding, they often have been referenced in the administration of workers' compensation claims and are helpful in the evaluation of evidence.

According to the AMA *Guides*, the average range of dorsipalmar flexion, which is the up and down movement of the wrist, is 130 degrees. The average range of radial-ulnar deviation, which is the side to side motion of the wrist, is 50 degrees. The average range of rotation (supination and pronation of the forearm or rotating the forearm from the elbow) is 160°.

A table is a useful means of comparing the evaluations.

November 14, 1973 Injury

	AMA Guides	Dr. Wilson	Dr. Sprague	
Dorsal extension	60°	68°	40°	
Palmar-flexion	70°	70°	40°	
Total	130°	138°	80°	
Radial-deviation	20°	20°	30°	(probably
Ulnar-deviation	30°	42°	15°	reversed)
Total	50°	62°	45°	
Rotation	160°	180°	–	
Total right arm		50%	20%	

Other medical findings by Dr. Wilson related to this first injury included a decreased grip strength and continual pain. Dr. Sprague also noted "mildly decreased grasp with gradual but continuing decrease in the grasp strength with continued exercise." Dr. Sprague's x-ray examination showed chronic changes of the wrist joint.

February 16, 1976 Injury

	AMA Guides	Dr. Wilson	Dr. Larson
Dorsal extension	60°	42°	40°
Palmer-flexion	70°	26°	40°
Total	130°	68°	80°
Radial-deviation	20°	25°	20°
Ulnar-deviation	30°	12°	30°
Total	50°	37°	50°
Rotation	160°	160°	–
Total right arm		65%	20%

Additional findings by Dr. Wilson related to this second injury consisted of a decrease in grip strength and an exacerbation of osteoarthritis. Although the variance in Dr. Wilson's disability ratings may be explained because they consider factors other than the mobility, it is difficult to ascertain why his assessments of mobility show such a great divergence from those of Dr. Sprague and Dr. Larson.

The record indicates claimant sustained a permanent partial disability of the right upper extremity as a result of the first injury. However, aggravation caused by the second injury resulted in a temporary disability only.

The State of Iowa through the Second Injury Fund is, of course, implicated in this action because the claimant had 100 percent disability of the left arm which predated the industrial injury of November 14, 1973. Iowa Code §85.64 reads:

> Limitation of benefits. If an employee who has previously lost, or lost the use of, one hand, one arm, one foot, one leg, or one eye, becomes permanently disabled by a compensable injury which has resulted in the loss of or loss of use of another such member or organ, the employer shall be liable only for the degree of disability which would have resulted from the latter injury if there had been no pre-existing disability. In addition to such compensation, and after the expiration of the full period provided by law for the payments thereof by the employer, the employee shall be paid out of the "Second Injury Fund" created by this division the remainder of such compensation as would be payable for the degree of permanent disability involved after first deducting from such remainder the compensable value of the previously lost member or organ.
>
> Any benefits received by any such employee, or to which he may be entitled, by reason of such increased disability from any state or federal fund or agency, to which said employee has not directly contributed, shall be regarded as a credit to any award made against said second injury fund as aforesaid.

The Iowa position on total disability was presented in *Diederich v. Tri-City Railway Co.*, 219 Iowa 587, 594, 258, N.W. 899, 902 (1935) in which the court said that "disability may be only a twenty-five or thirty per cent disability compared with the one hundred per cent perfect man, but, from the standpoint of his ability to go back to work to earn a living for himself and his family, his disability is a total disability. . . ." This position was reiterated in *Dailey v. Pooley Lumber Co.*, 233 Iowa 758, 764-65, 10 N.W.2d 569, 573 (1943) wherein (although recognizing that injury to a scheduled member is arbitrarily compensable according to the schedule) total disability was described as:

> an inability of the individual, . . . to earn - not a mere inability of a certain member to function. It may arise solely from some injury to or loss of a scheduled member; or it may result from some injury of wider extent.
>
> . . . . Permanent total disability . . . . may be caused by some scheduled injury, even though no other part of the body except the scheduled member be affected. This may happen because of lack of training, age, or other condition peculiar to the individual.

Professor Arthur Larson in 2 Larson, *Workmen's Compensation Law,* §58.51 at 10-107 (1976) states total disability "is not to be interpreted literally as utter and abject helplessness. Evidence that claimant has been able to earn occasional wages or perform certain kinds of gainful work does not necessarily rule out a finding of total disability nor require that it be reduced to partial." *Larson* further suggests the modern rule may be summarized as follows: "An employee who is so injured that he can perform no services other than those which are so limited in quality, dependability, or quantity that a reasonably stable market for them does not exist, may well be classified as totally disabled."

The record presented in this case leads this commissioner to conclude that claimant was 100 percent permanently totally disabled as a result of his first injury in spite of the fact that he was able to do some work as shown by his own testimony.

> I was released, returned to work for light work at that time. Then they just kept getting me into the heavier stuff all the time; and outside of about two weeks because the wrist would always swell up and get sore; and I would have to give it a rest again and start over.

Obviously, the services which claimant was able to provide were limited in quantity and dependability rendering his

ability to earn a living such that he could be classified as totally disabled. This finding of 100 percent permanent total disability following the first injury is additionally supported by a comparison of the functional disability ratings of Drs. Sprague and Larson. Dr. Larson found the same percentage of functional disability after the second injury which Dr. Sprague found after the first. The degree of motion for dorsal extension and palmar flexion remained unchanged. Dr. Larson found a greater degree of motion from side to side than Dr. Sprague recorded subsequent to the initial injury.

Prior to a change in statute, payments for permanent total disability were limited to a maximum of five hundred weeks. The current law provides for lifetime benefits. Under the former law when the Second Injury Fund was involved, calculations were made by deducting the compensable value of the previously lost member or organ from the five hundred weeks allowed for a permanent total disability. Payments would then commence immediately and be paid for the remainder of the weeks allowed. Applying current law leads to an anomalous result. Compensable value and rate of compensation are different as permanent partial disability and permanent total disability are not now compensated at the same rate as they were prior to the change in the statute. Because permanent total disability benefits are payable for life, there is no way to give credit for the compensable value of the previously lost member without deducting its compensable value from the beginning of the period in which Second Injury Fund payments are to be made. Furthermore, the statute suggests that the value of the previously lost member be "first" deducted. Applying this to the instant case results in a suspension of benefits during the period which the Second Injury Fund is entitled to credit as a result of the total prior loss of the left upper extremity. Although this result is contrary to the intent of compensating an injured worker during his period of incapacity from earning, it is necessitated by a failure to alter the Second Injury Fund provisions at the time a change was made in permanent total disability benefits.

The Second Injury Fund is entitled to credit for the "compensable value" of the previously lost member. Under the workers' compensation scheme, the "compensable value" is determined by multiplying the allowable number of weeks times the applicable rate of weekly benefits. The period of suspension would, therefore, be less than two hundred thirty weeks because the rate for permanent partial disability ($84) is less than the rate for permanent total disability ($91). The compensable value of the previously lost member is a total of $19,320 (230 x $84). This results in a suspension of benefits for 212.3 weeks ($19,320 ÷ $91).

* * *

THEREFORE, it is ordered that defendant employer and insurance carrier pay healing period at the rate of ninety-one dollars ($91) per week for a period of twenty-one and three-sevenths (21 3/7) weeks. Commencing with April 14, 1974 defendant employer and insurance carrier are to pay the claimant forty-six (46) weeks of permanent partial disability at eighty-four dollars ($84) per week. Credit is to be given for amounts previously paid.

Commencing March 2, 1975 the Second Injury Fund is entitled to two hundred twelve and two-sevenths (212 2/7) weeks as credit for the value of the previously lost member.

It is further ordered that defendant State of Iowa on behalf of the Second Injury Fund pay claimant ninety-one dollars ($91) per week beginning March 27, 1979.

* * *

Signed and filed this 28 day of September, 1977.

ROBERT C. LANDESS
Industrial Commissioner

Appealed to District Court; Pending.

SECOND INJURY FUND

WILLIAM P. McKELVEY,

Claimant,

vs.

DUBUQUE PACKING COMPANY,

Employer,
Self-Insured,

and

SECOND INJURY FUND,

Defendants.

Review-Reopening Decision

This is a proceeding in Review-Reopening brought by the claimant, William P. McKelvey, against his self-insured employer, Dubuque Packing Company, and the Second Injury Fund for the recovery of benefits for injuries sustained by him on February 24, 1975.

* * *

The issue left to be determined is the extent of compensable disability due Claimant under the provisions of the Second Injury Compensation Act.

In addition to the disability to Claimant's right leg [20% permanent partial], Claimant sustained an 8% permanent partial disability to his left leg in 1973 as a result of a non-industrial accident.

Under the Second Injury Compensation Act the combined disabilities of Claimant qualify him for an industrial disability determination. 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.

Claimant is 26 years old, married, and the father of two children. Since graduating from high school in 1970, Claimant has worked for Iowa Beef Processors, United Packing Company, and Defendant Employer. His work for these employers primarily involved physical labor requiring no specialized training.

William M. Krigsten, M.D., an orthopedic surgeon,

estimated Claimant's physical impairment to his body as a whole to be 15% as a result of the knee injuries. Dr. Krigsten recommended to Claimant that he seek training from vocational rehabilitation in a job which does not require a great deal of climbing, walking, and standing.

Earl D. Pratt of Pratt-Younglove Employment Service and Deborah Ann Hansen of Rehabilitation, Education, and Services Branch of the Department of Public Instruction, also recommended vocational rehabilitation for Claimant. The testimony and conduct of Claimant since the injury of February 24, 1975 demonstrated a lack of motivation for vocational rehabilitation.

Applying the evidence offered in this case in respect to Claimant's industrial disability to the considerations outlined in *Olson,* supra, Claimant proved an industrial disability of 20%. The functional disability noted by Dr. Krigsten limits Claimant's ability to engage in employment for which he is fitted. The lack of motivation demonstrated by Claimant in pursuing vocational rehabilitation was considered by the undersigned to be a decreasing factor in determining his industrial disability.

The 20% industrial disability award must be reduced by deducting the compensable value of the previously lost members i.e. 20% of 500 weeks less 20% of 200 weeks and 8% of 200 weeks. The net award after the reduction is 44 weeks of compensation at the rate of $89.00 per week.

* * *

Signed and filed this 29th day of December, 1976.

DENNIS L. HANSSEN
Deputy Industrial Commissioner

No Appeal.

SECOND INJURY FUND

DALE B. ANDERSON,

Claimant,

vs.

VILAS FEED MILL,

Employer,

and

EMPLOYERS MUTUAL CASUALTY CO.,

Insurance Carrier,

and

SECOND INJURY FUND
STATE OF IOWA,

Defendants.

Review of Order

This is a proceeding brought by the claimant, Dale B. Anderson, for review of an order denying the relief sought against the Second Injury Fund. Vilas Feed Mill, employer, Employers Mutual Casualty Company, insurance carrier, and the Second Injury Fund State of Iowa were joined as co-defendants.

The order was entered on March 2, 1976 upon the motion for adjudication of point of law filed on behalf of the Second Injury Fund by the Iowa Attorney General's office. The order of the deputy industrial commissioner held that the claimant had no claim against the Second Injury Fund. A petition for review of the order and request that the hearing be delayed until the record was made in the review-reopening hearing was filed March 9, 1976 by Claimant. On March 12, 1976 a resistance was filed on behalf of the Second Injury Fund by the Iowa Attorney General's office. Also on March 12, 1976 a motion to stay the review-reopening proceedings was filed on behalf of the Second Injury Fund by the Iowa Attorney General's office and approved by the industrial commissioner "without the intent of giving judicial credence to the allegations of the motion."

A notice was filed March 17, 1976 by Claimant indicating that he would introduce his testimony and the testimony of Dr. Thomas Summers on the question of his injuries and disability at the review hearing. The review hearing was conducted on March 25, 1976 in the Office of the Industrial Commissioner, Des Moines, Iowa, with all parties in attendance. The industrial commissioner ruled that the claimant could not introduce additional evidence at the review hearing, as the hearing was a review of the pretrial determination of legal issues and not for the resolution of factual issues.

* * *

The file in the Office of the Industrial Commissioner reflects that the claimant has been paid by the defendant employer for this injury an amount based upon 73% loss of the arm.

The facts, as provided in the pleadings, are that Claimant suffered a non-compensable injury to his cervical spine in 1962, a non-compensable injury to his right hand in 1963, a compensable injury to his lumbar spine in 1972 and a compensable injury to his right arm in 1973.

Claimant, in his brief and argument, relies upon two broad principles: 1) that the Iowa Workmen's Compensation Act must be broadly construed in favor of injured workers and 2) that workmen's compensation statutes of various states differ widely; therefore, resort to court decisions interpreting other state statutes can only be authority of extremely limited value. The claimant contends that he satisfied the requirements of §85.64, Code of Iowa 1973, by suffering loss or loss of use to his right hand in 1963 and ten years later in 1973, suffering a compensable injury resulting in loss or loss of use to his right arm. It is also contended the cervical spine injury of 1962 and the lumbar spine injury of 1972 must be considered as well as the injuries to the hand and arm. It is Claimant's position that the statutory listing in §85.64, Code of Iowa, of bodily parts (i.e., one hand, one arm) requires an interpretation that each is " . . . another such member" for purposes of rights under the Second Injury Fund. Claimant further contends that §85.64, Code of Iowa, does not require the two injuries (an injury to a hand and an arm) involve different upper extremities. On behalf of the Second Injury Fund, the State of Iowa contends the supreme court of

Iowa has established general guidelines of statutory construction and the proper application of these would preclude any recovery against the Second Injury Fund.

Section 85.64, Code of Iowa, provides:

> Limitation of benefits. If an employee who has previously lost, or lost the use of, one hand, one arm, one foot, one leg, or one eye, becomes permanently disabled by a compensable injury which has resulted in the loss of or loss of use of another such member or organ, the employer shall be liable only for the degree of disability which would have resulted from the latter injury if there has been no pre-existing disability. In addition to such compensation, and after the expiration of the full period provided by law for the payments thereof by the employer, the employee shall be paid out of the "Second Injury Fund" created by this division the remainder of such compensation as would be payable for the degree of permanent disability involved after first deducting from such remainder the compensable value of the previously lost member or organ.

So far as this tribunal is able to determine, §85.64, Code of Iowa, has been subjected to supreme court of Iowa scrutiny only in the case of *Irish v. McCreary Saw Mill,* 175 N.W.2d 364 (1970), involving injuries sustained to a left arm and right hand. Familiar rules of statutory construction are applicable in the absence of precedents.

The goal in statutory interpretation is to ascertain legislative intent in order, if possible, to give it effect. *Steinbeck v. Iowa District Court in and for Linn County,* 224 N.W.2d 469 (1974). In searching for legislative intent, the objects sought to be accomplished as well as the language used must be considered to place a reasonable construction on the statute which will best effect its purpose. *State v. Prybil,* 211 N.W.2d 308 (Iowa 1973).

Words are to be given their ordinary meaning unless defined differently by the legislative body or possessed of a particular and appropriate meaning of law. *State ex rel. State Highway Commission vs. City of Davenport,* 219 N.W.2d 503 (1974). In determining the meaning of a word in a statute, the statute should be considered as a whole. *State ex rel. Fenton v. Downing,* 261 Iowa 965, 155 N.W.2d 517 (1968). A court may not, under the guise of construction, extend, enlarge or otherwise change the terms of the statute. *City of Cedar Rapids v. Moses,* 223 N.W.2d 263 (Iowa 1974).

In the matter sub judice the Iowa legislature has clearly provided that to qualify for Second Injury Fund benefits, an employee must have previously lost, or lost the use of one hand, one arm, one foot, one leg, or one eye. The employee must then later be permanently disabled by a compensable injury, resulting in the loss of or loss of use of *another such member or organ.*

A literal reading of §85.64, Code of Iowa, supports Claimant's contention that the "entry requirements" to Second Injury Fund benefits are satisfied by alleging the loss or loss of use of the right hand and right arm. However, the statute as a whole must be considered when determining the meaning of a particular word. *State ex rel. Fenton v. Downing,* supra. All provisions of the act of which a statute is a part and other pertinent statutues must also be considered in construing a statute. *Consolidated Freightways Corp. of Delaware v. Nicholas,* 258 Iowa 115, 137 N.W.2d 900 (1965).

The word "another", an adjective, is defined as "different or distinct from the one considered". *Webster's Seventh New Collegiate Dictionary.* The commonly understood meaning of the term "member" as it applies to the animal body, generally means a part or organ, especially a limb or other separate part. *Black's Law Dictionary.* The claimant contends the cervical spine injury of 1962 and the lumbar spine injury of 1972 must also be considered as qualifying the claimant to benefits from the Second Injury Fund. The commonly understood meaning of "another member" does not include an injury to a portion of the trunk. This contention is clearly against the manifest intent of the Iowa legislature to restrict these funds to obvious impairments such as loss of members or eyes.

It is recognized that this leaves out of account a large range of preexisting impairments which give rise to the impediment of hiring the handicapped but until the legislature amends §85.64, Code, the explicit language precludes the liability of the Second Injury Fund on the basis of a cervical or lumbar spine injury.

Although commonly understood meanings of the specific words of a statute are helpful, more persuasive is analysis of the total provisions of Chapter 85.

The Iowa Workmen's Compensation Act has consistently been interpreted to mean weekly compensation is payable for the loss of a scheduled member in a single injury only to the extent of functional impairment. In such a case loss incurred to a scheduled member, no factors of industrial disability are considered. *Barton v. Nevada Poultry Co.,* 253 Iowa 285, 110 N.W.2d 660 (1961). The deputy industrial commissioner carefully set out the numerical "values" for the loss of the component parts of an appendage concluding that nowhere within the Iowa Workmen's Compensation Law is it provided that an employee recover in two injuries to the same scheduled member, more than in a single injury to that scheduled member by having an entitlement to a rating based upon industrial disability. The deputy industrial commissioner also examined §85.34(2)(s), Code of Iowa, which allows the consideration of industrial disability upon the loss of separate and opposite organs by a single accident, finding it to be an apparent foundation for entitlement to benefits based upon the body as a whole from the Second Injury Fund. The deputy industrial commissioner concluded further that as a practical matter the Second Injury Fund in this case has no exposure, since once deduction is made for "the value of the previously lost member or organ" and once the employer pays the value of the second injury, all compensation due is paid as the permanent disability is a scheduled permanent partial disability. These conclusions are adopted as reasonable and logical within the provisions of the Iowa Workmen's Compensation Law.

It should be noted that the loss of an arm also includes the loss of a hand. In such a case there is not allowed an independent recovery for the loss of the hand (175 weeks) plus the loss of the arm (230 weeks) or a total of 405

weeks. The total recovery is based upon the loss to an arm (230 weeks). To allow recovery for the loss of two "members" when a hand and later the arm on the same side are lost is illogical and inequitable.

Signed and filed this 30th day of July, 1976.

ROBERT C. LANDESS
Industrial Commissioner

Appealed to District Court, Affirmed.
Appealed to Supreme Court, Affirmed.

SERVICE – METHOD

CHARLES C. BARKER,

Claimant,

vs.

DARLING AND COMPANY,

Employer,

and

FIRE & MARINE INSURANCE CO.,

Insurance Carrier,
Defendants.

Ruling

NOW on this 17th day of April, 1978 the matter of defendants' motion to dismiss comes on for determination.

A proposed review-reopening decision was filed in this matter on March 7, 1978. A petition for review was filed by claimant pursuant to 86.14 [sic] on March 29, 1978. On that same date, defendants filed a motion to dismiss the petition for review.

Initially it should be noted that defendants' motion to dismiss states:

> That Rule 500-4.27 (86,17A) of the Iowa Rules of Administrative Procedure pertaining to the Industrial Commissioner provides that a notice of appeal must be filed with the Industrial Commissioner within ten days of the filing of the decision, order, or ruling appealed from.

This is not the time frame set out in Rule 500-4.27 which reads:

> Except as provided in 4.2, 4.25 and 4.26, an appeal to the commissioner from a decision, order or ruling of a deputy commissioner in all other contested case proceedings where the proceeding was commenced after July 1, 1975, shall be commenced within twenty days of the filing of the decision, order or ruling by filing a notice of appeal with the industrial commissioner. The notice shall be served on the opposing parties as provided in 4.13. An appeal under this section shall be heard in Polk county or in any location designated by the industrial commissioner.

Rule 500-4.13 provides:

> Method of service. Except as provided in 4.6 and 4.7, service of all documents and papers to be served according to 4.12 and 4.18 or otherwise upon a party represented by an attorney shall be made upon the attorney unless service upon the party is ordered by the industrial commissioner. Service upon the attorney or party shall be made by delivery of a copy to or mailing a copy to the last known address of the attorney or party, or if no address is known, by filing it with the industrial commissioner's office. Delivery of a copy within this rule means: Handing it to the attorney or party; leaving it at the office of the attorney or party's office or with the person in charge of the office; or if there is no one in charge of the office, leaving it in a conspicuous place in the office; or if the office is closed or the person to be served has no office, leaving it at the person's dwelling house, or usual place of abode with some person of suitable age and discretion who is residing at the dwelling or abode. Service by mail under this rule is complete upon mailing. No documents or papers referred to in this rule shall be served by the industrial commissioner.

Claimant's petition, according to the certificate of service, was mailed on March 27, 1978. Under the rule 500-4.13 service by mail is complete upon mailing, meaning claimant's petition for appeal was timely filed.

THEREFORE, defendants' motion to dismiss is hereby overruled.

Signed and filed this 17th day of April, 1978.

ROBERT C. LANDESS
Industrial Commissioner

No Appeal.

STATUTE OF LIMITATIONS

SUMMARY JUDGMENT

OSCAR GADDY,

Claimant,

vs.

IOWA BEER AND LIQUOR
CONTROL COMMISSION,

Employer,

and

STATE OF IOWA,

Insurance Carrier,
Defendants.

Order

NOW on this 27th day of June, 1978, the matter of claimant's motion for summary judgment and defendants' resistance to this motion comes on for determination.

A review of the file indicates a review-reopening decision was filed July 25, 1977 wherein claimant was denied further relief. On August 19, 1977, claimant's notice of appeal was filed. Claimant subsequently filed a motion for summary judgment on June 2, 1978 followed by defendants' resistance to this motion filed June 13, 1978. Claimant's contention is that the defendants violated his constitutional rights by terminating his workers' compensation benefits by failing to comply with the procedure set out in *Auxier v. Woodward State Hospital,* filed May 17, 1978.

Under Iowa Rule of Civil Procedure 237(c), a motion for summary judgment is to be granted, if upon reviewing the entire record, it is shown that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. The burden is on the movant to show the absence of any issue of fact and the court must view the circumstances of the case in the light most favorable to the party opposing the motion. *Sand Seed Service, Inc. v. Poeckes,* 249 N.W.2d 663 (Iowa 1977).

The rule is intended to provide for the prompt disposition of cases in which no genuine issue of fact exists and to avoid the time and expense of a trial. *Daboll v. Hoden,* 222 N.W.2d 727 (Iowa 1974).

On reviewing the record, it is noted that a hearing was held in this matter on October 26, 1976. It is hereby determined that issues of material fact exist following the deputy industrial commissioner's proposed decision which will be considered on appeal. Even if *Auxier v. Woodward State Hospital,* filed May 17, 1978, is applicable to this case, it does not justify a motion for summary judgment at this stage of the proceedings.

THEREFORE, claimant's motion for summary judgment is hereby denied.

Signed and filed this 27th day of June, 1978.

ROBERT C. LANDESS
Industrial Commissioner

Appealed to District Court; Pending.

TEMPORARY TOTAL DISABILITY

LUIS BARRERA,

Claimant,

vs.

HEINZ, USA,

Employer,

and

LIBERTY MUTUAL,

Insurance Carrier,
Defendants.

Arbitration Decision

This is a proceeding in arbitration brought by the claimant, Luis Barrera, against his employer, Heinz, USA, and Liberty Mutual, the insurance carrier, to recover benefits under the Iowa Workers' Compensation Act by virtue of an alleged industrial injury which occurred on March 3, 1977.

* * *

Claimant had been employed by defendant-employer approximately two months prior to March 3, 1977. The claimant testified that on that date, while on the employer's premises, he slipped and fell, apparently because of a substance on the floor. He could not get up by himself and was assisted to the locker room. He returned to work on March 4, 1977, and did light work, experiencing some pain in his left knee. He was laid off the following week and returned to work on March 14, 1977, doing heavy work. On March 15, 1977, he reported his injury to the nurse, who sent the claimant to William Catalona, M.D. Claimant was first seen by Dr. Catalona on March 17, 1977. Dr. Catalona wrote a report on March 18, 1977 which indicates that the condition in the left knee was due to injury or sickness arising out of the claimant's employment. At that time Dr. Catalona estimated that the claimant would be off until May 16, 1977. An arthrogram on March 17, 1977 showed a complete rupture of both the medial and lateral menisci of the left knee. Although surgery was discussed, Dr. Catalona suggested that surgery be delayed until such time it would become an absolute necessity.

The claimant is a 25-year-old Chicano male who has a very slight knowledge of English, and communication problems are evidenced throughout the file. The claimant saw Dr. Catalona again on March 24, 1977 and April 7, 1977, and the condition at those times remained relatively unchanged. The claimant noted swelling in his left knee and on April 14, 1977 Dr. Catalona recommended surgery. One of the many communication gaps occurred at this time. Dr. Catalona scheduled surgery for April 15, 1977 and noted at that time that the claimant's condition was worsening. The communication gap developed over the projected recovery time for the suggested surgery. Dr. Catalona's interpretation of the conversation indicates that he advised the claimant that the normal recovery time from the suggested surgery was 8 to 10 weeks. At this time the claimant apparently misunderstood Dr. Catalona's statement and was under the impression that the physician was dealing in absolutes rather than in projections. The claimant at this point decided that he did not want surgery and doubted that Dr. Catalona could predict this period of recuperation with such certainty. At this point, Dr. Catalona and the claimant reached an impasse and apparently never saw each other again.

The claimant contacted a social service worker by the name of Maria Martinez in Iowa City, and an appointment was made for the claimant to report to the University Hospitals in Iowa City, apparently with the blessings of Dr. Catalona, under the primary care of Richard A. Brand, M.D., an orthopedic surgeon. On May 3, 1977 Dr. Brand noted that the claimant had no definite effusion of the left knee. His impression was that a twisting injury to the left

knee had occurred and that the claimant had a left lateral meniscus tear. He recommended an arthroscopy with examination of both medial and lateral compartments of the knee. The claimant was apparently informed of risks of infection, blood clots and swelling of the knee as well as persistent pain, and the possibility of anesthetic complications. Surgery was scheduled for June 1, 1977, but again surgery was delayed because the claimant felt that the exercises would improve his condition and felt that the explained complications were absolutes rather than possibilities.

The claimant was again seen by Dr. Brand on August 23, 1977, and surgery was scheduled for September 1, 1977. Claimant had a lateral meniscectomy on September 1, 1977 and leg lifts have been prescribed to rehabilitate his knee. The claimant is using an elastic stocking, crutches and a knee-immobilizer. Dr. Brand was of the opinion that the claimant had not been doing the straight leg exercises, and again he told claimant that it was absolutely imperative that he do the leg lifts in order to build the muscle back and that he would have to live with the pain in order to build his muscles back up. Dr. Brand noted the communication gap aforementioned and seemed to indicate that the claimant did not want to understand the instructions. Dr. Brand was to see the claimant again in three weeks.

The issues for determination in this matter are whether the claimant sustained an injury arising out of and in the course of his employment and whether the claimant is entitled to temporary total compensation from the date of the injury.

To be compensable, an employee's injury must occur in the course of and also arise out of his employment. The burden rests upon the claimant to establish these factors by a preponderance of the evidence, *Musselman v. Central Telephone Co.,* 261 Iowa 352, 154 N.W. 128. *Almquist v. Shenandoah Nurseries,* 218 Iowa 724, 254 N.W. 35.

The claimant has the burden of proving by a preponderance of the evidence that the injury of March 3, 1977 is the cause of the disability upon which he 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. 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 Co.,* 191 N.W.2d 667 (Iowa 1971).

In *Becker v. D & E Distributing Co.,* 247 N.W.2d 727, 730 (1976), it was said that " 'probability' may be inferred by combining an expert's 'possibility' testimony that the described condition of which complaint is made did not exist before the occurrence of those facts alleged to be the cause thereof."

Based on the foregoing principles, it is found that the claimant has established his claim by the requisite preponderance of the evidence. Dr. Catalona's initial reports indicated the injury was related to work, and his testimony at page 15 indicates at least a possibility of causal connection. This possibility, coupled with the lay testimony offered at the hearing, is sufficient to establish the claim by a preponderance of the evidence.

The problem which must be addressed at this point is what benefits the claimant is entitled to. There is no indication of any permanency at this time. This, at least, entitles the claimant to temporary total disability compensation benefits pursuant to §85.33, Code of Iowa. If permanency is found at a later date, payments pursuant to §85.33 will be credited against healing period compensation.

The claimant last worked on March 15, 1977 and has not worked since. It is well established in the record that this period of disability could have been shortened significantly if the difficulties in communication which are readily apparent in the record, had not been present. However, the employer takes the claimant subject to these deficiencies, particularly in lack of ability to communicate in the English language. Perhaps if the surgery had occurred earlier, this case would not be before this tribunal or many of the matters heretofore discussed would not be issues. It is apparent that the claimant is entitled to benefits under §85.33 for the period of disability.

* * *

The next item which will be discussed is the medical management of this particular case. It is the communication gap, which is apparent in the file and is mentioned above, which causes this deputy industrial commissioner to recommend to the defendants that they provide the services of a licensed physical therapist in the claimant's home area to help the claimant exercise in accordance with the direction of Dr. Brand, who operated on the claimant herein. Such treatments should take place at a fairly frequent basis and, if implemented, perhaps in a very short period of time the claimant will either reach maximum medical recuperation or return to work, which is the ultimate goal of the Workers' Compensation Act.

* * *

Signed and filed this 26th day of October, 1977.

JOSEPH M. BAUER
Deputy Industrial Commissioner

No appeal.

TESTIMONY – CREDIBILITY

MICHAEL G. METZ,

Claimant,

vs.

DON PETERSON,

Employer,

and

WESTERN CASUALTY AND SURETY COMPANY,

Insurance Carrier,
Defendants.

Appeal Decision

This is a proceeding brought by Don Peterson, defendant employer, and Western Casualty and Surety Company, his insurance carrier, appealing an arbitration decision entered on August 11, 1977, wherein Michael G. Metz, claimant, was awarded medical benefits and temporary disability compensation.

* * *

The issue presented is whether or not claimant's health impairment arose out of and in the course of his employment on July 23, 1975.

On May 28, 1975, claimant entered the employment of defendant as a painter in his brush and spray painting business. Claimant's duties consisted of scraping, brushing and spraying paint and involved some ladder work, as well as lifting of five gallon paint buckets from a car trunk or trailer, carrying the paint to the sprayer, and pouring it in. Sometimes the two men worked in conjunction to lift the paint. On other occasions they worked independently.

Claimant alleged an injury on July 23, 1975, while he and his employer were painting a barn -- a job requiring much scraping and ladder work. Claimant testified that after lunch-time he observed a rapid deterioration in his condition and that his "back muscles were getting just extremely tense and tight and felt very constricted and sore, and [his] left hip and leg [were] extremely sore, much sorer than [they] had ever been before when [he] had some trouble in the same leg . . . ." The claimant did not suffer any particular incident, accident or occurrence on July 23, 1975. At the end of the afternoon, he mentioned to his employer his hip and leg had been troubling him. Nevertheless, he worked the following day and continued working until September 8, 1975.

Defendant employer who said that he and claimant went to a relative's home to dig potatoes after work on July 23, testified that he did not see the claimant injured on that date. He stated that he was not told of a work-related injury on that day or on any subsequent day until claimant called him after he had back surgery and asked him the procedure for filing an insurance claim. However, he was aware, because of claimant's "distinct limp" and "noticeable expressions of pain," that claimant was experiencing physical problems. This awareness prompted defendant employer to ask whether or not claimant had been hurt at work and claimant responded that "he didn't think so." He also said that claimant had discussed with him the possibility of going to a chiropractor.

Claimant's medical history presented in this case dates back to a car accident in November of 1973. At that time he saw Floyd Jones, M.D. with compliants of low backache. The doctor, who prescribed no treatment, diagnosed a second degree muscle spasm to scoliosis.

In June or July of 1974, claimant testified to suffering a pulled hamstring. Claimant was referred to a physical therapist, Joel A. Larmore, who on July 2, 1974, listed claimant's complaints as low back and left leg pain. The therapist noted "some restriction in the sacroiliac area" with a moderate amount of tightness noted in the left low back region" with acute tenderness "over the left sacroiliac area as well as the left sciatic notch."

Between the pulled hamstring in 1974 and July, 1975, claimant stated that he had pain in his leg and hip which appeared, for instance, after hard running and by extension in the tailbone area.

Claimant testified it was pain of the same sort that was bothering him in 1975 saying:

> I think myself certainly I concluded that it probably was the same problem . . . . Because it was -- It hurt in the same place . . . . [I]t was similar in that it was in the same region, and again it felt like it was deep inside the muscle; however, it was much, more severe in 1975 after July 23rd, '75. It is difficult to say if it is the same type of pain, you know. It was so much more intense.

On September 12, 1975, claimant entered the hospital and listed the company writing his private insurance policy as the applicable insurance carrier. This policy from Time Insurance Company dated July 21, 1974, contained a special exclusion rider which excluded from coverage "any injury to or disorder of the lumbar sacro-iliac region of the insured, Michael G." Time informed the hospital that the claimant's expenses would not be covered. At that point claimant notified defendant employer who in turn contacted his workers' compensation insurance carrier. It should be noted that this is the first occasion on which the record indicates the claimant made any claim of work injury. When the workers' compensation insurance carrier took the claimant's statement, the claimant related no prior back problems, and affirmatively stated that he had none.

A myelogram showed a herniated ruptured disc between L5 and S1 on the left side. Surgery to remove the disc was performed on September 16, 1975. Stating that a herniated disc is not a birth defect, Dr. Rassekh, who performed the surgery, said that a:

> . . . herniated disc can be caused by trauma, even minor or major, and usually is related to deterioration of the disc and the displacement of the nucleus part of the disc sideway and at the time minor trauma such as cough or sneeze or just bending forward can produce the final rupturing of the disc.

Such a ruptured disc would produce leg pain. The doctor asserted that while heavy lifting might contribute to the degeneration of a disc and aggravate a preexisting condition, he could not "say that because he lifted something that he had a ruptured disc, but maybe on repeated lifting basis, that aggrevated [sic] some normal process which had been there and aggrevating [sic] facts or heavy lifting."

During direct examination the doctor testified concerning the history which he took from the claimant when the claimant entered the hospital for surgery. Doctor Rassekh related this history:

> . . . [H]e has had off and on back pain for the last year and six weeks prior to his admission of September while he was camping, he started having an insidious onset of pain in the left gluteal region and buttocks down to the leg and has been getting worse over the next six weeks, with numbness of the left foot. That is what he reported to me.

The same history is found in the hospital records. On

cross-examination, Dr. Rassekh said that the claimant had not told him of any work accident or injury, and also had not told him of the automobile accident in 1973, or of leg pain prior to 1975. This awareness prompted the doctor to testify:

> I believe, as I mentioned before, the disc degeneration does not occur after an isolated incident or isolated episode of lifting. It is a process which takes time and with repeated trauma. I believe he did have degeneration of the disc at that level prior, if the last accident occurred on July of '75, that he did have pain before, that did indicate that he had degenerated disc, deterioration prior to this date, when he did seek medical attention for his back pain and leg pain in 1974.

The claimant must prove by a preponderance of the evidence that the disability on which he bases his claim was one arising out of and in the course of his employment. *Lindahl v. L. O. Boggs,* 236 Iowa 296, 18 N.W.2d 607 (1945). A possibility is insufficient; a probability is necessary. *Anderson v. Oscar Mayer & Co.,* 217 N.W.2d 531 (Iowa 1974). Establishing a causal connection is within the domain of expert testimony. *Bradshaw v. Iowa Methodist Hospital,* 251 Iowa 375, 101 N.W.2d 167 (1960). Claimant need not prove that an employment injury be the sole proximate cause of his disability, but only that it is directly traceable to an employment incident or activity. *Langford v. Kellar Excavating & Grading, Inc.,* 191 N.W.2d 667 (Iowa 1971). Personal injury has been defined by the Iowa Supreme Court to be *any* impairment to the employee's health which results from the employment. *Almquist v. Shenandoah Nurseries,* 218 Iowa 724, 254 N.W. 35 (1934). An employer hires an employee subject to any active or dormant health impairments existing prior to employment. *Ziegler v. U.S. Gypsum Co.,* 252 Iowa 613, 106 N.W.2d 167 (1961). While claimant is not entitled to compensation for the results of a preexisting injury or disease, the claimant is entitled to compensation to the extent of the injury if the preexisting injury or disease is aggravated, accelerated, worsened or "lighted up". *Yeager v. Firestone Tire & Rubber Company,* 253 Iowa 369, 112 N.W.2d 299 (1961).

This record is fraught with inconsistencies in claimant's testimony which are inadequately explained. The claimant's back problems dated from 1973, although in his statement to the insurance carrier he denied such prior problems. The prior back condition does not appear to be of the kind that would have slipped claimant's mind, especially when it is noted that claimant's statement was taken by the defendant insurance carrier not long after his health and accident insurance carrier had denied his claim on the basis of the exclusion for back problems. Also, in claimant's application for his health and accident insurance policy, he did not list any back difficulties although they existed at the time of the application. The claimant told Dr. Rassekh that he had hurt his back while camping and did not tell him of any work injury. He also told his employer that he might have hurt his back while backpacking, and that he did not think he had hurt his back at work.

In his deposition, the claimant states that he did not hurt his back while camping and explained how he thought Dr. Rassekh might have misinterpreted the history. However, there is no basis for concluding that claimant's testimony in his deposition is correct and that testimony relating to his earlier statements is incorrect. It was not until after claimant had learned that his health and accident insurance carrier had rejected coverage that he first alleged a work injury. It cannot be said that more probably than not claimant suffered an injury arising out of and in the course of his employment rather than at some other time and place.

Expert medical testimony relating to causation is couched in vague generalities. Medical testimony does not establish that more probably than not the claimant's health impairment was causally related to a work injury. Taking the evidence in the light most favorable to the claimant, at best it can be said only that if a work injury did occur, the claimant's back condition *may* have been causally related to such an injury.

WHEREFORE, the arbitration decision entered on August 11, 1977, is hereby reversed. It is found and held as a finding of fact that claimant has failed to establish by a preponderance of the evidence that the disability on which he bases his claim arose out of and in the course of his employment.

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

Costs of the proceedings are taxed to defendants.

Signed and filed this 31 day of January, 1978.

ROBERT C. LANDESS
Industrial Commissioner

Appealed to District Court; Pending.

EVIDENCE – HEARINGS
TESTIMONY – CREDIBILITY

JAMES GARWOOD,

Claimant,

vs.

CONSTRUCTION PRODUCTS INC. a/k/a
ECONOMY FORMS CORP.,

Employer,

and

HOME INDEMNITY COMPANY,

Insurance Carrier,
Defendants.

Arbitration Decision

This is a proceeding in arbitration brought by the claimant, James Garwood, against his employer, Construction Products, Inc., and its insurance carrier, Home Indemnity Company, to recover benefits under the Iowa Workmen's Compensation Law, on account of an injury allegedly sustained on February 19, 1976.

* * *

The issue to be determined in this matter is whether or not the claimant sustained an injury arising out of and in the course of his employment when an altercation occurred between the claimant and his supervisor, a Mr. Todd. A second issue is whether or not the alleged injury brought about any compensable disability and medical expenses.

There seems no essential dispute about some factors surrounding the incident. Claimant was either going or coming from the bathroom at the time of the incident. A resolution of this fact is irrelevant. He was stopped by the foreman, Mr. Todd. Some dispute exists as to the conversation which occurred at this time. A resolution of this dispute is irrelevant as no dispute exists that the conversation was about claimant's return to his work station. Some dispute existed as to whether or not claimant was swung around forecefully by his right arm as he attempted to walk away from the foreman, or whether or not he was merely grabbed on the right sleeve of a jacket, not resulting in any turn. Claimant testified the grabbing was forceful. The foreman testified that claimant's sleeve was grabbed with his fingers. Claimant then, according to the foreman, slipped away, brushed his sleeve off and returned to his station. An impartial witness was unable to give great assistance as to the general circumstances surrounding the incident. The witness did, however, testify that claimant appeared to be grabbed on the shoulder, and then pivoted around. He did not testify that the turning was forceful. Claimant may or may not have pivoted voluntarily. It is accordingly found that no forceful incident, such as to be significant in bringing about an injury, occurred at the time of the incident. Claimant's testimony in this aspect, as in others, is disregarded for reasons which will be explained later.

At first impression during direct testimony, claimant seemed credible enough. As his testimony and the hearing progressed, the observations of this deputy commissioner changed and disbelief became the dominant impression. Claimant's demeanor during his own testimony and during that of other witnesses, especially the direct testimony of Todd, was extremely important to the decision of this deputy commissioner. During the direct testimony of Todd, claimant appeared to gleefully make notes of what he wished his counsel to ask. Claimant's answers to questions quite frequently were made in uncertain terms, leaving the impression that perhaps a more complete answer could be given to any question asked. Many answers seemed to be given in a manner intended to be consistent with other answers but not necessarily consistent with the truth. Significant also in determining the credibility of the claimant were some of his closing remarks at the hearing as to his being an easygoing individual. This seemed to be said almost facetiously and contradicted other evidence as to claimant's personality. Although quantity of witnesses is hardly a method of determining credibility, the different incidents described by the different defendants' witnesses, as to their own experiences with claimant, indicate claimant was a somewhat an explosive individual prone to reacting to circumstances beyond his control with temper and threats. Much of claimant's conduct toward his foreman, Todd, subsequent to the instant injury, indicated a certain "vengeance" on the part of the claimant toward the employer and Todd. It is this motive of vengeance which this deputy commissioner finds is the real reason for seeking benefits for the incident of February 19, 1976.

It should be noted that although some unpleasant words had been exchanged between the claimant and the foreman prior to February, 1976, the incident on February 19 (or February 23, 1976) was in fact part of the employment environment of the claimant. Claimant's aggressiveness in the matter did not appear until later. The origin of the conflict between Mr. Todd and the claimant stemmed from their association at work. Accordingly it is found that an incident arising out of and in the course of the employment did in fact occur on or about February 19, 1976. The date of injury, in fact, is found to be February 23, 1976 consistent with the defendants' evidence.

Although an incident recognizable as arising out of and in the course of claimant's employment under the Iowa Workers' Compensation Law is found to have occurred, claimant's credibility and motives combined with other evidence lead this deputy commissioner to find that no benefits are due claimant as a result of this incident. Claimant saw the company physician a few days following the alleged incident. At that time a complaint of an arm injury was made as a result of the described incident. Claimant's other testimony indicated that in the hours and days following the altercation he had gone as far as to call the county attorney to ask about filing charges against the foreman, Todd. His testimony and demeanor indicated he harbored a great deal of hostility at this time. Claimant has sustained an admitted prior injury some weeks before the instant injury in the area of the arm and right shoulder. That injury was not compensable under the compensation act. Although claimant testified this injury had healed, the credibility factor and motives already noted, leads this deputy commissioner to find that claimant used the prior injury as the basis for stating to Dr. Valin, a few days after the instant injury, that the arm complaints then suffered were related to the altercation of February 23, 1976. The next visit the claimant made to a physician concerning any alleged result of the altercation was in the latter part of 1976. At no time was any complaint of back pain noted by a physician or otherwise until late in 1976. It is only claimant's testimony and statements at subsequent times that tell us he sustained any back pain at the time of the injury. A back injury, or any other injury, is inconsistent with the other testimony surrounding the severity of the incident. Any opinions of Dr. Misol, or of Dr. Merrill are based upon the assumptions that claimant did in fact sustain a significant episode which would affect his back on February 23, 1976. With the finding that no such significant effect on the back occurred at the time of the incident, any opinion as to causal relationship is of no value. Accordingly no disability is found to have resulted from the instant injury which is compensable under the Iowa Workmen's Compensation Law.

It should be noted that in evaluating the claimant's propensity for the behavior described by the defense witnesses the report of Raymond Moore, Ph.D. in psychology, was considered very significant. The report indicates a

potential for responses consistent with the acts testified to by the defense witnesses in that claimant has difficulty in viewing alternative solutions to problems and has difficulty coping. His testimony to idealize himself, as noted in the report, and to deny negative facts about himself, would be consistent with claimant's not admitting to the many acts to which defendants' witnesses testified.

It should be noted that some testimony was given concerning an incident at work in the latter part of 1976. It was after this point of time when claimant's back difficulties, minimum as they may be, appeared. The history given appears to focus on this time as the source of any back injury. With the finding that there was no compensable disability or medical expense as a result of the altercation with the foreman, Todd, perhaps the medical reality of claimant's true injury should be reevaluated. Nothing in this decision should be construed as a finding that claimant may not have in fact a legitimate claim for something occurring at a later point of time. Perhaps the claimant's motive for vengeance has clouded his judgement as to when the real injury occurred.

* * *

Signed and filed this 21 day of April, 1978.

ALAN R. GARDNER
Deputy Industrial Commissioner

No appeal.

TESTIMONY – EXPERT

HERMAN WERINGA,

Claimant,

vs.

WAYNE FEED SUPPLY COMPANY,

Employer,

and

TRAVELERS INSURANCE COMPANY,

Insurance Carrier,
Defendants.

Arbitration Decision

This is a proceeding in arbitration brought by the claimant, Herman Weringa, against his employer, Wayne Feed Supply Company, and its insurance carrier, Travelers Insurance Company, to recover benefits on account of an injury allegedly sustained under the Iowa Workmen's Compensation Law on October 20, 1975.

* * *

The issue to be determined in this matter is whether or not the claimant sustained compensable disability and medical expense as a result of an injury allegedly arising out of and in the course of claimant's employment on October 20, 1975. Examination of the evidence indicates the alleged injury bringing about claimed disability is an exposure to grain dust and chemicals over a period of years. That claimant has a serious pulmonary problem which is severely if not totally disabling is uncontradicted by the evidence. The cause of the disability is the primary dispute.

Testifying on claimant's behalf was Dr. John Anderson, M.D., an internist limiting his practice to cardiovascular disease and respiratory disease. Dr. Anderson's testimony as to a causal relationship between claimant's exposure to dust and resultant problems is not as clear as might be hoped. Dr. Anderson uses phrases such as "within a reasonable medical certainity" the work "could have been a factor" in the development of claimant's problems. Dr. Anderson indicates quite frequently that he does not know the statistical probability as to a causal relationship between exposure to dust and problems such as suffered by claimant. Dr. Anderson feels no one can tell which is the greater factor, smoking or dust exposure. It should be noted that claimant was a heavy smoker. The mechanism of how the dust brings about problems such as suffered by claimant is "difficult to understand."

The language used by Dr. Anderson leads this deputy commissioner to conclude that the doctor feels the exact cause of claimant's problems is indeterminable. At best, claimant's work environment "could" be a factor. Such uncertainty does not indicate sufficient probability to establish the work environment as a causative factor in the development of the condition suffered by claimant.

Dr. Anderson does, on one occasion on page 14 of the transcript of his testimony, indicate that "very likely" the exposure "could" aggravate claimant's condition. Dr. Anderson's further language on the same page indicates sufficiently that an aggravation exists. Dr. Anderson's testimony thus establishes a prima facie case of aggravation of a preexisting condition. Whether or not this aggravation was temporary with no contribution to the underlying development, as indicated by Dr. Paul From, M.D., is not clear and is subject to the finding in the preceding paragraph.

A determination of Dr. Anderson's exact meaning is not necessary. Even assuming Dr. Anderson's testimony as establishing a prima facie case of disability as a result of the aggravation, this deputy commissioner views Dr. Paul From's testimony as grossly overbalancing Dr. Anderson's testimony. Dr. From is an internist with a great deal of expertise in the cardiopulmonary area. Dr. From gives an excellent explanation of lung function, and how the "filtering" system of the upper respiratory system would prevent dust exposure such as sustained by claimant from causing problems such as suffered by claimant. The best illustration of Dr. From's opinion is found on page 30, lines 15 - 23 of his testimony.

> Well, since I think it was basically caused by tobacco smoke I think it would have progressed this far. I think that maybe he would have enjoyed himself more times during the years if he hadn't been subjected to dust, but I think he would still be where he is at today even if he hadn't worked in that elevator, from a medical standpoint, you know, because I look at the word "aggravation" differently than you do.

In other testimony, Dr. From negates causative factors

such as exposure to nitrogen from fermentation in grain elevators, noxious elements of dust or chemicals, and any spores or fungi. These other factors are negated as no evidence indicates their existence.

Accordingly no causal relationship between claimant's work environment and claimant's current problems is found. No temporary aggravation such as described by Dr. From is established as disabling so as to allow any temporary or healing period disability.

* * *

Signed and filed this 27 day of July, 1977.

ALAN R. GARDNER
Deputy Industrial Commissioner

No appeal.

TESTIMONY – EXPERT

ORVILLE G. WRIGHT,

Claimant,

vs.

WALTER KIDDE CO. (LeFebure),

Employer,

and

THE TRAVELERS INSURANCE CO.,

Insurance Carrier,
Defendants.

Decision on Appeal

This is a proceeding brought by Walter Kidde Company, defendant employer, and The Travelers Insurance Company, its insurance carrier, pursuant to Rule 500-4.25(2), for appeal from a review-reopening decision wherein Orville G. Wright, claimant, was found to have sustained an injury arising out of and in the course of his employment with defendant employer on April 16, 1973 and resulting in permanent total disability. * * * The only issue on appeal is the extent of claimant's disability.

* * *

William R. Basler, M.D., testified to having examined and treated claimant a number of times for various ailments between June 10, 1966 and August 12, 1968. On some of those occasions, claimant had complained of back pain. One such occasion was on September 6, 1967 and of that complaint, Dr. Basler testified as follows:

> This was, again, while he was working for the railroad, I think. He picked up a hundred-pound bag of sodium nitrate at ten A.M., Beverly, Iowa, complained of pain in the low thoracic spine area bilaterally. Examination at that time revealed anterior flexion to 40 degrees, no other limitations of motion, mild spasm of the musculature adjacent to T-12. X ray was done on 9/8/67 of the thoracic spine which showed slight scoliosis of the upper thoracic region, convexly to the right. There was no evidence of fracture.

Dr. Basler testified that in his opinion the scoliosis and convexity found in that examination was not a permanent condition. In an examination for a different ailment on October 30, 1967 claimant was found to have some pain and swelling in the right low back and buttocks for which Dr. Basler recommended the use of a lumbosacral garment. A follow-up examination was made on November 2, 1967 and Dr. Basler found, "[H]e was much improved. His back was moving well; there was no limitation of movement." Claimant consulted Dr. Basler for various ailments several times during 1968, including visits for a shoulder ailment on August 5, 6, 7 and 8. Dr. Basler testified:

> A. Yes. Then, I have a notation made on 8/5/68 that he had – now has low back pain. The last visit was 8/12/68. His back was okay with the exception of minimal tenderness in the low back. That's the last.
>
> Q. Did you ever have any contact with Orville Wright after 8/12/68, Doctor?
>
> A. I don't believe so.

It was also Dr. Basler's testimony that any disability that claimant had as of August 12, 1968 was of a temporary nature and that at that time there was no evidence of any disk involvement in claimant's ailments.

David C. Naden, M.D., is an orthopedic surgeon who has seen claimant many times since May 10, 1973 when he examined claimant in the emergency room at Saint Luke's Hospital in Cedar Rapids admitted him to the hospital with a diagnosis of acute low back strain. Claimant was hospitalized for two weeks and made some improvement but shortly after he was dismissed from the hospital his condition deteriorated and surgery was performed on July 13, 1973. The surgery included a partial laminectomy and removal of a degenerative disk from the L4-5 disk space. Claimant was discharged from the hospital on July 21, 1973.

In his examination of claimant, Dr. Naden noted a discrepancy of approximately three-fourths of an inch in the length of claimant's legs, the right leg shorter than the left, causing a pelvic obliquity or pelvic tilt. In Dr. Naden's opinion, "there is a good relationship" between the discrepancy and claimant's condition. Dr. Naden went on to say, "I think it's as much a cause as any other problem he has come in contact with."

Additionally, Dr. Naden testified:

> . . . another interesting thing is that all of the time that I have known him, which has been three years, this fellow's examination has never really changed any. What I mean by that is he had had some evidence of some muscle spasm and he moved like somebody that is muscle-bound. He's very muscular, very strong, and he just -- he's kind of stiff, and it never changed in three years.

Dr. Naden admitted to having given a series of releases for claimant to return to work and statements for insurance purposes that were somewhat in conflict. On September 27, 1973 Dr. Naden issued a work release indicating that claimant could return to work on October 8, 1973 but was

to be permanently restricted to a limit of 25 pounds in lifting. On October 18, 1973 Dr. Naden issued another release allowing claimant to return to work on October 22, 1973 with no restrictions. Dr. Naden admitted having issued an "attending physician's statement" for health insurance purposes in which he restricted claimant to lifting 5 to 10 pounds. Another statement over Dr. Naden's signature, dated September 18, 1974 indicated that "stooping, bending or lifting such as with painting will cause excessive strain on (claimant's) back . . ." Dr. Naden also admitted having given attending physician's statements in November, 1974 and March, 1975 that suggested claimant has a need for vocational rehabilitation for purposes of job replacement. Dr. Naden stated, "It is my opinion that Orville Wright had a twenty-five (25) per cent loss of physical function and physical impairment due to a chronic lumbosacral strain."

John R. Walker, M.D., is an orthopedic surgeon who examined claimant on October 8, 1975. Dr. Walker testified at length concerning the nature of his examination and his findings. In his examination, Dr. Walker also noted a discrepancy in the length of claimant's legs of some three-fourths of an inch, but he did not concur in Dr. Naden's opinion regarding the effect of the discrepancy. He testified as follows:

> Q. What significance do you attribute to that leg variance with regard to this man?
>
> A. Not very much really. We find a half an inch – three-eights to a half an inch constantly. I don't think it has anything to do with his back pain and problem. I might add a quarter of an inch heel raise to balance him out a little bit but you – I don't think he -- it has anything to do with the particular back problem.
>
> Q. Is it a factor in his pain?
>
> A. No, I don't think so. If it is, theoretically, all you have to do is put a heel raise on and he would be well and go back to work, but I don't think it's a factor. I'm sure if you put a heel raise on, it would make little or any difference, although I'm not saying you shouldn't put a heel raise on him.

As to the extent of claimant's disability, Dr. Walker testified:

> Well, I indicated disability here, some figures I -- that I put down. He is badly disabled now. I think if he goes on this way he should be considered about seventy-five per cent disabled in the body as a whole. With the spinal fusion I would hope to reduce it to thirty per cent of the body as a whole, but there is no promise that you can do that. Employability -- functionally is one thing. Industrially, is another ball game all together and I won't go into that. I don't think it's within my jurisdiction.

Dr. Walker later indicated that employability had played some part in his estimate of claimant's disability.

Owen Julius is a rehabilitation counselor with some seven years' experience who worked with claimant after he was referred to Mr. Julius for rehabilitation services by the Iowa Department of Public Instruction. At Julius' instruction, a program for claimant was initiated at the Kirkwood Skill Center in Cedar Rapids but the program was ended after a few weeks.

> Q. And do you know the reason that this was stopped?
>
> A. Well, it was stopped because we just weren't able to make any substantial progress, and Orville's pain in his back was to the point where it just wasn't feasible to go on. It didn't seem like there was any competitive labor he was going to be able to do.
>
> Q. What do you mean it wasn't feasible to go on?
>
> A. Well, there wasn't going to be any progress. Nothing was going to develop as far as competitive employment.
>
> A. Did you try specific occupations to fit Mr. Wright into?
>
> A. Well, what we did is we had him go through some basic academic testing and some vocational assessments, and then we had a – at that time they had a transitional workshop, where they had people do a task, such as some minor woodworking, sanding, and collating, and things of this nature, and he just wasn't able to go at a competitive level.

Julius also testified as follows:

> A. Right now, if I were asked to recommend Mr. Wright for a competitive job, I wouldn't do it. It just wouldn't be there.
>
> Q. There isn't any job or occupation that you believe at this time Mr. Wright could go into?
>
> A. Well, when you say there isn't any job, you can search the world over and maybe find a one perfect job, but within reason, going out into Iowa State Employment Service and securing a job off the job bank, I just don't believe you could find one right now.

When the injury suffered is a general body injury, as in the case sub judice, the claimant's disability is evaluated from an industrial and not an exclusively functional standpoint. *Martin v. Skelly Oil Company,* 252 Iowa 128, 106 N.W.2d 95 (1960). 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. *Olson 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. *Barton v. Nevada Poultry Co.,* 253 Iowa 285, 110 N.W.2d 660 (1961).

As was noted in the opinion of the deputy industrial commissioner, claimant is thirty-three years old, married and has an eleventh grade education. He has had prior job experience as a busboy, a laborer for the Chicago-Northwestern Railroad Company and a janitor for Weyerhauser Company. After the injury of April 16, 1973, claimant twice returned to work for defendant employer and on each attempt, he was forced to quit work due to his back.

The only real dispute as to claimant's disability comes down to the variance between Dr. Naden's assessment of 25% and Dr. Walker's assessment of 75% functional disability. In regard to the medical testimony in a workers'

compensation case, 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).

Dr. Naden had examined claimant many times prior to making his estimate of 25% disability. Yet his testimony reveals that at the time the assessment was made, Dr. Naden had obtained no definitive history of claimant's prior back problems. Later in response to a question outlining claimant's prior back problems, Dr. Naden apportioned his assessment of the disability as follows: of the 25%, 10% allocable to the surgery performed on claimant, 7 1/2% to prior back problems and 7 1/2% to chronic mid-back strain at T-12. Dr. Basler had testified that the prior back problems of claimant were temporary in nature.

Dr. Naden also testified that in the three years he had been treating claimant, his condition had not changed. Yet Dr. Naden admitted having given a number of statements concerning claimant's limitations varying from a limitation on lifting 5 to 10 pounds to a statement releasing claimant to work with no restrictions whatever.

Dr. Walker examined claimant on only one occasion in anticipation of giving testimony in this case. Dr. Walker had the benefit of a comparatively complete and accurate history of claimant's back problems. His examination was thorough and the physical findings were not in conflict with either Dr. Basler's findings or Dr. Naden's findings. The only apparent discrepancy in Dr. Walker's testimony as compared with the testimony of Dr. Naden was in Dr. Walker's assessment of claimant's disability. Dr. Walker evaluated claimant at 75% functional disability. It must also be noted that Dr. Walker indicated a possibility that this figure could be reduced to a 30% level of functional disability through surgery.

The testimony of Dr. Basler was concerning back problems prior to the incident in question. He indicated that claimant's problems were temporary in nature. This testimony is accepted concerning claimant's prior condition.

Dr. Naden rated claimant's functional impairment at 25%. A substantial amount of claimant's disability appears to be based upon pain. This does not appear to be considered in the evaluation of Dr. Naden.

Dr. Walker rated claimant's functional impairment at 75%. Part of his evaluation admittedly included claimant's employability. This is outside of the scope of an expert medical opinion.

While neither the opinion of Dr. Naden nor Dr. Walker are accepted or rejected totally, each established permanent impairment which is causally related to the incident in question. Dr. Naden's opinion is considered to be low based upon his vacillation on weight restrictions and lack of consideration of pain. Dr. Walker's opinion is considered high in light of his consideration of employability. Claimant's functional impairment is felt to be somewhere between the estimates of Drs. Naden and Walker.

Assessing an exact amount of functional impairment is not necessary, however, as it is only one of the elements to be considered in determining industrial disability. Claimant's age is such that he could normally be expected to be in the labor market for a considerable length of time. His education is limited to eleventh grade in special education. His qualifications appear to be limited to fields of physical endeavor. He had demonstrated since the injury to be incapable of carrying on gainful employment.

This case appears to be one in which the services of a comprehensive rehabilitation center similar to the Industrial Injury Clinic, Theda Clark Memorial Hospital, Neenah, Wisconsin could be helpful. It is difficult to believe that this claimant should remain permanently, totally industrially disabled for the remainder of his life. Defendants are encouraged to tender and claimant is encouraged to accept services similar to those available at the Industrial Injury Clinic.

* * *

THEREFORE, defendants are ordered to pay claimant five hundred (500) weeks of permanent total disability at the rate of sixty-three dollars ($63) per week. Defendants are further ordered to offer claimant the services of a comprehensive rehabilitation center similar to the Industrial Injury Clinic, Theda Clark Memorial Hospital, Neenah, Wisconsin, such offer to be extended for a period of one hundred twenty (120) days from the date of this decision. If claimant wishes to avail himself of such services, he is to convey his acceptance of the offer to defendants in writing prior to the expiration of the one hundred twenty (120) day period.

* * *

Signed and filed this 7 day of April, 1977.

ROBERT C. LANDESS
Industrial Commissioner

No appeal.

TESTIMONY – EXPERT

T. HOWARD KIRCHNER,

Claimant,

vs.

SHELLER GLOBE CORPORATION,
KEOKUK DIVISION,

Employer,
Self-Insured,
Defendant.

Review Decision

This is a proceeding brought by the defendant, Sheller-Globe Corporation, a self-insured employer, against claimant, T. Howard Kirchner, for review pursuant to the provisions of §86.24 of the Iowa Workers' Compensation Act of an arbitration decision wherein Claimant was found to have sustained a back injury arising out of and in the course of his employment on September 26, 1973, resulting in permanent partial disability of 60% to his body as a whole.

* * *

T. Howard Kirchner, claimant, was at the time of the arbitration proceeding fifty-seven years old and married. He

has an eighth grade education. Claimant's testimony revealed that his previous work history included jobs requiring manual labor. Claimant was employed by Keokuk Steel Casting from 1941 until 1964 and by Wilson Implement, Thomas Truck Line and the Missouri Highway Commission for short periods of time. He was also self-employed as a service station operator for ten months.

Defendant employer, Sheller Globe Corporation, hired Claimant on September 30, 1968, as a packer of crash pads. In December of 1968, Claimant was moved to the production line for crash pads and later was transferred to the boiler room to scoop coal for one and one-half months. After leaving the boiler room, Claimant was a general laborer for Defendant until May of 1971 when he was transferred to the ECC Department. Claimant worked in the ECC Department until September 26, 1973, earning $3.40 per hour while working normally forty hours per week.

On September 26, 1973, Claimant was working the second shift, 3:30 p.m. until 12:00 midnight, at Defendant's plant. Approximately 6:00 p.m. Claimant was bending over to pick up six-foot pieces of weather stripping from the floor to load on a cart, when according to his testimony at the arbitration hearing, "... I had the awfullest pain in my back. I couldn't hardly move." After reporting the incident to his foreman, Claimant was directed to the First Aid Department. Claimant received no treatment from the First Aid Department but was given permission to go home.

The following day Claimant was examined by John Beckert, D.O., who had treated Claimant with adjustments on two or three prior occasions. On October 4, 1973, Michael DeSchmidt, labor relations supervisor for Defendant, requested that Claimant see T. Lopez, M.D., for an examination. Dr. Lopez referred Claimant to Felix M. Martin, M.D., a neurosurgeon.

Claimant was examined by Dr. Martin on October 17, 1973. The examination conducted by Dr. Martin involved three phases: a) an interview, b) the physical examination of the patient, and c) ancillary studies for completion of the evaluation of the patient. Dr. Martin noted in Claimant's medical history a prior six-month period of soreness in the lower back and that on September 26, 1973, the pain increased so much that Claimant was unable to return to work the next day. The x-rays, according to Dr. Martin, disclosed, "... some axial abnormalities of the spine, as well as narrowing of the intervertebral disc spaces." Later in his testimony, Dr. Martin stated, "He showed multiple degernative disc disease." A myelogram was performed, which revealed that one of the discs was more prominent than the others, protruding into the spinal canal.

It was the opinion of Dr. Martin, as a result of his examination and the study of x-rays, Claimant's back condition was a "... chronic-like affair over an acute one, due to the multiple disc involvement." Questioned as to whether or not Claimant's back condition preexisted the date of the alleged injury, Dr. Martin replied, "Probably so. Within limits." On cross-examination, Dr. Martin testified:

> Q. If he had this degenerated disc disease, as you refer to it, prior to September 26th, 1973, and he's engaged in work where he stoops and lifts from 30 to 50 pounds, that would aggravate the condition, would it not?
>
> A. Yes, sir – it may.
>
> Q. When you are lifting am I correct that it creates quite a pressure on the discs in the lower part of the back?
>
> A. That is correct.
>
> Q. And stooping and lifting could cause a disc to bulge; is that not true?
>
> A. That's correct.
>
> Q. If his back condition generally preceded that date, would you agree that the work that he was doing that day, which consisted of stooping and lifting 30 to 50 pounds, could, or probably did, highlight or aggravate his condition?
>
> A. It would be possible.
>
> Q. Would you say that it is also probable?
>
> A. It is very probable – yes – I would agree on that point.

Subsequently, Claimant returned to Dr. Lopez, who prescribed no further treatment.

James A. Gwaltney, Jr., M.D., an orthopedic surgeon, examined Claimant on October 31, 1974, and noted in the history taken that Claimant indicated having been injured September 26, 1973, while working for Sheller Globe and that the previous week before the injury Claimant had noticed some back pain whenever he bent over at home. Dr. Gwaltney observed a set of Claimant's x-rays taken prior to his evaluation and found:

> The patient exhibits on x-ray of lumbo-sacral spine a rather severe degenerative disc disease, from the 3rd disc – 3rd lumbar disc – which is between the 3rd and 4th lumbar vertebrae – all the way to the sacrum. That includes the 4th and 5th discs; and what it appears to me is that patient has a rather marked degree of spinal stenosis.

Dr. Gwaltney observed that Claimant had first degree spondylolisthesis of the 5th lumbar vertebra and estimated a 7-millimeter forward shift of the 5th lumbar vertebra on the sacrum. On myelogram, Dr. Gwaltney observed a bulging disc at L3-L4 on the right. When questioned as to whether it is possible to tell from the x-rays whether these problems were of relatively recent origin or were they preexisting the date of injury, Dr. Gwaltney expressed the opinion that everything preexisted the date of injury except the bulging disc at L3-L4. Dr. Gwaltney further indicated that the L3-L4 disc rupture probably occurred while Claimant was working at Defendant's plant on September 26, 1973.

[Lay testimony was offered that Claimant had no prior back problems.)

* * *

After the April 11, 1975, filing by the deputy industrial commissioner of the arbitration decision, Claimant was examined on August 28, 1975, by Donald W. Blair, M.D., and Robert Hayne, M.D. Dr. Blair, an orthopedic surgeon, with the benefit of prior x-rays upon which Drs. Martin and Gwaltney based their testimony, made the following tentative diagnosis as to Claimant's condition:

As you mentioned my opinion is not based on all of the information which will be available. At this time I do not find evidence of a herniated disk from a clinical standpoint. His primary findings are of a chronic and recurring strain through the lumbosacral region of his back, and also x-rays which were taken at Methodist Hospital in Des MOines do show narrowing of the lumbosacral disk space. In view of this I feel we could also be dealing with a degenerative disk at the lumbosacral level.

Dr. Hayne, a neurosurgeon, also testifying on behalf of the Defendant, stated in his deposition on pages 10 and 11:

> Q. From your examination of the x-rays, do you have an opinion as to whether or not the appearance of the spine shown there would be consistent with a man of that age who had participated in labor over his working lifetime?
>
> A. Yes, I think that the findings on x-rays would be compatible with that.
>
> Q. Was there anything on the x-rays that would specifically indicate a single incident of trauma or injury?
>
> A. I don't feel one could state that there was any specific effect from a given injury from the x-rays of the lumbosacral spine of Mr. Kirchner. It appeared more the after effects perhaps of repeated strains on the back.
>
> Q. Doctor, specifically would that apply to this episode that he described September 27, 1973 at work, having pain while stooping and lifting?
>
> A. Yes. I don't think that there would be any definite relationship between the x-rays and the lumbosacral spine and this that you described.

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 trauma 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 condition 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 workers' 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).

The case sub judice consists of conflicting medical testimony. Absolute certainty as to the cause of 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 v. Quealy,* supra.

Statements of at least four doctors were introduced into evidence in an attempt to prove or disprove that Claimant's back condition was causally connected to his work at Defendant's plant. Two doctors were orthopedic surgeons and two were neurosurgeons. All four personally examined and evaluated Claimant's condition: Dr. Martin examined Claimant on October 17, 1973, Dr. Gwaltney examined Claimant on October 31, 1974 and Drs. Blair and Hayne conducted separate examinations on August 28, 1975.

In regard to medical testimony, the commissioner is required to state the reasons on which testimony is accepted or rejected. *Sondag v. Ferris Hardward,* 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.

Neither Dr. Blair or Dr. Hayne in their respective depositions say an injury did not occur. On cross-examination, Dr. Blair made the following observation:

> Q. He described to you, I believe, his work, stooping and lifting up from 30 to 65 pounds, is that correct?
>
> A. Yes.
>
> Q. Would that tend to aggravate a condition such as you find in him?
>
> A. Yes.

In light of Dr. Hayne's previous testimony, notice should be also taken of the following statement made on redirect examination:

> Q. Doctor, would these also make him more susceptible to degeneration unrelated to any specific trauma, just through wear and tear?
>
> A. It could conceivably do that, but I think that the affects of the traumatic incident which you described would be over and above those that would be brought about from the effects of the ordinary stress and strain of his work.

Consequently, considering all medical testimony and giving weight to that of Drs. Martin and Gwaltney and the testimony of witnesses Hinze and Hall, 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.,* 238 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 future inability because of his injury to earn a living. *Olson 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. *Barton v. Nevada Poultry Co.,* 253 Iowa 285, 110 N.W.2d 660 (1961).

Claimant has only an eighth grade education. Claimant's previous work experience consists primarily of jobs requiring manual labor.

Doctors Martin and Gwaltney testified as to Claimant's functional impairment. Dr. Martin rated it at 25% and Dr. Gwaltney rated it at 50%. The testimony of all the doctors indicates that Claimant is restricted to sedentary activities, such as clerical work.

Claimant's reluctance to attempt to locate employment, as reflected in the review proceeding does not weigh favorably. Claimant's age, qualifications, experience and inability to carry on the type of employment in which he has been engaged are negative factors bearing upon Claimant's earning capacity. Therefore, the deputy industrial commissioner's award of 60% appears appropriate.

It should be noted that Drs. Blair and Hayne both recommend "symptomatic" treatment. This treatment requires that Claimant make an attempt to work to determine his tolerance and then to stay within that range of work. Although Claimant at the review proceeding testified as to pain on each activity attempted, Claimant shows a marked reluctance to engage in endeavors on an extended basis and his statement, "...no need of going" in response to a question whether he had contacted the employment service is not convincing of total industrial disability.

[Healing period benefits were also allowed.]

* * *

Signed and filed this 2nd day of July, 1976.

ROBERT C. LANDESS
Industrial Commissioner

Appealed to District Court; Affirmed and Remanded for Further Findings.

TESTIMONY – LAY

CHARLES EDWARD TIGHE, II,

Claimant,

vs.

MORTON BUILDING,
and
HIGHLANDER INN AND SUPPER CLUB,

Employers,
and

BITUMINOUS CASUALTY COMPANY,
and
FIREMAN'S FUND AMERICAN INSURANCE COMPANIES,

Insurance Carriers,
Defendants.

Decision on Appeal

This is a proceeding brought by Charles Edward Tighe, II, claimant, against Morton Building, defendant employer, and Bituminous Casualty Company, its insurance carrier, pursuant to Rule 500-4.26 of the Industrial Commissioner's Rules and §86.24, Code of Iowa, for appeal of an arbitration decision wherein the deputy industrial commissioner found that claimant failed to sustain his burden of proof by a preponderance of the evidence that an injury on March 14, 1974 arose out of and in the course of his employment.

The original proceeding initially also claimed benefits from Highlander Inn and Supper Club, employer, and its insurance carrier, Fireman's Fund Insurance Companies, for an alleged injury on January 20, 1975. This matter was settled prior to the arbitration hearing and the claim against them was dismissed.

* * *

The case on appeal presents two issues: First, claimant's contention that the record supports a finding that an injury resulting in disability arose out of and in the course of his employment with defendant employer; Second, an issue relating to the interpretation and application of Rules 500-4.17 and 4.18. We shall begin with the record as to claimant's injury.

Claimant testified that he graduated from Chariton High School in 1971, where he had participated in both track and football. Following a summer during which he was employed by the Iowa State Highway Commission, claimant entered Graceland College in the fall of 1971 where, along with his academic pursuits, he continued his participation in football and track. He transferred to the State University of Iowa in Iowa City for the next academic year, but claimant chose not to return to school in the fall of 1973. In the spring of 1974, claimant was hired by defendant employer as a laborer on a crew erecting pole barns. On March 14, 1974, claimant was working for defendant employer near Milo, Iowa when his foot slipped as he and another employee were lifting a pole and claimant felt "something happen" in his back. He felt no pain and made no mention of the incident, continuing with his work. The next day, claimant felt some stiffness and pain in his back, which he mentioned to someone on the job, but he finished his day's work. The pain increased as claimant continued his work until, on March 20, he asked for and received permission to leave work and seek medical attention.

That same day, March 20, 1974 claimant was examined by Joseph H. Sage, D. O., who sent him to Lucas County Memorial Hospital for x-ray examination. A few days later, claimant was examined by R. W. Gustafson, D.O., who shared office space with Dr. Sage. After approximately five

days of convalescence, claimant returned to work and continued with his regular work until the middle of April, 1974 when he resigned and moved to Iowa City in anticipation of the start of summer school at the University. Near the end of July, 1974 claimant accepted part-time employment at Perkins Cake and Steak in Iowa City where his duties included helping to unload a truck once a week, occasionally lifting 100-pound bags of flour, in addition to his work as a cook. He continued his work throughout the fall term of 1974 while he was a student at the University of Iowa, until he quit his job sometime late in December. When claimant returned to his parent's home in Chariton for the Christmas holidays, he arranged an appointment with Michael Bonfiglio, M.D., an orthopedic surgeon at the University of Iowa Hospital. Sometime between January 12 and January 20, 1975 claimant began work at the Highlander Inn and Supper Club in Iowa City where he worked as a breakfast cook and aide for banquet preparations. He would cook breakfast at the Highlander, working until 2:00 p.m. when he would go home, and returning at 5:00 p.m. to work until 11:00 p.m. or midnight. He was also enrolled at the University of Iowa for the spring term.

Not long after his employment at the Highlander began, claimant's back started to suffer increasing amounts of pain. His appointment with Dr. Bonfiglio was on February 11, 1975 and, after examination, claimant was fitted with a lumbosacral corset which he was to wear during working hours. Claimant was instructed on isometric exercise, started on theraputic doses of Bufferin and advised to restrict his work activities. He returned to his usual tasks, but attempted to avoid any heavy lifting. On March 25, 1975 claimant was admitted to the University of Iowa Hospital for diagnostic tests and bedrest and was discharged on April 10, 1975. For a period of three weeks after discharge from the hospital, claimant did not return to work. He made a short-lived attempt to resume his employment around the first of May, but this effort ended on May 11. Claimant continued to see Dr. Bonfiglio throughout the spring and summer of 1975 while he attended school and was hospitalized from August 5, 1975 to August 12, 1975 for diagnostic purposes and bedrest. He returned to his parents' home in Chariton for a brief time, leaving in September, 1975 for Oklahoma to attend school. Claimant's medical record shows reexamination by Dr. Bonfiglio immediately prior to claimant's departure for Oklahoma and again in December, 1975.

Kathryn Tighe, claimant's mother, testified that she knew of no injury to claimant prior to March 14, 1974 other than a cut on his chin received playing football in high school. Before March 14, claimant had been living at his parents' home and on that day he returned home from work complaining of an injury. After March 14, 1974 and before he left for Iowa City in April of that year, claimant was observed by Mrs. Tighe to be guarded in movements, proceeding cautiously when going up stairs or sitting. Mrs. Tighe observed claimant frequently on football weekends in Iowa City during the fall of 1974 and noticed in October of that year that he moved with difficulty and that his gait had changed. Mrs. Tighe testified that she knew of no injury to claimant between March 14, 1974 and January, 1975 when he began work at the Highlander. She saw claimant in Iowa City only two or three times after his hospitalization in March, but again observed that his gait was off and his movements were guarded. In August, 1975 she observed that his movements seemed to be improved though his gait had not returned to "normal".

Charles E. Tighe, claimant's father, testified that he knew of no serious injuries to claimant nor of any back problems of claimant prior to March 14, 1974. To Mr. Tighe's knowledge, claimant had no physical limitations as to outdoor work before March 14, 1974. After that date and before claimant returned to Iowa City in April, Mr. Tighe observed that claimant was having difficulty getting around and was guarded in his movements. From the date of the incident in March until claimant started to work at the Highlander, claimant's strength, stamina and endurance were greatly decreased.

Under the Workmen's Compensation Laws of Iowa, a claimant has the burden of proving by a preponderance of the evidence that his injury arose out of and in the course of his employment. *Musselman v. Central Telephone Co.,* 261 Iowa 352, 154 N.W.2d 128 (1967). *Lindahl v. L. O. Boggs,* 236 Iowa 296, 18 N.W.2d 607 (1947). "Out of" and "In the course of" employment are two separate requirements. The first requires a showing of causal relationship between the employment and the injury while the second has reference to the time, place and circumstances of the accident and both must be proved by the claimant by a preponderance of the evidence in order to sustain an award. *Buehner v. Hauptly,* 161 N.W.2d 170 (Iowa 1968). Whether the injury "arose out of" the employment, that is, whether the injury had a direct causal connection with the employment or arose independently of the employment is essentially within the domain of expert testimony. *Musselman v. Central Telephone Co.,* supra. *Bradshaw v. Iowa Methodist Hospital,* 251 Iowa 375, 101 N.W.2d 167 (1960). The opinion of an expert witness need not be couched in definite, positive or unequivocal language. *Dickinson v. Mailliard,* 175 N.W.2d 588, 593 (Iowa 1970). An expert may testify to the possibility of a causal connection, but the possibility, standing alone, is not sufficient -- a probability is necessary to generate a question of fact or to sustain an award. *Burt v. John Deere Waterloo Tractor Works,* 247 Iowa 691, 73 N.W.2d 732 (1956). However, expert medical evidence must be considered with all other evidence introduced bearing on the causal connection. *Burt v. John Deere Waterloo Tractor Works,* supra.

Recently, the Iowa supreme court, in *Becker v. D. & E. Distributing Company,* 247 N.W.2d 727 (Iowa 1976) spelled out the Iowa law on this problem with great clarity. Briefly summarized, the court indicated that an expert witness may testify to the possibility, the probability or the actuality of the causal connection between claimant's employment and his injury. If the testimony shows a probability or actuality of causal connection, this will suffice to raise the question of fact of connection for the trier of fact and, if accepted, will support an award. If the testimony shows a possibility of causal connection, it must be buttressed with other evidence such as lay testimony as to observations of objective symptoms before and after the incident claimed to have resulted in injury. In the case sub judice, claimant has produced the testimony of his parents

as to their observations of his objective symptoms before and after the incident on March 14, 1974. Claimant has not produced expert testimony of even a possibility of causal connection between his employment with defendant employer and his injury. A complete and thorough review of the record, including clinical notes of medical examinations of claimant reveals no indication by an expert of a possibility, probability or actuality of the requisite causal connection. Dr. Bonfiglio's letter of January 2, 1976 to claimant's attorney states that only Drs. Sage and Gustafson can give a specific statement as to whether a proximately related cause of his patient's condition within reasonable medical certainity was the injury described as occurring on March 14, 1974. No evidence was presented from either Dr. Sage or Dr. Gustafson or even Dr. Bonfiglio or any of his associates as to any causal connection between claimant's condition and his injury of March 14, 1974. Without any expert testimony as to causal connection, this element is left wholly to surmise or conjecture, which is insufficient to discharge claimant's burden to establish by a preponderance of the evidence a right to compensation. *Slack v. C. L. Percival Co.,* 198 Iowa 54, 199 N.W. 323 (1924). Compensation cannot be awarded upon a state of facts which is equally as consistent with no right to compensation as it is with such right. *Flint v. City of Eldon,* 191 Iowa 845, 850, 183 N.W. 344 (1921).

The second issue in this appeal relates to an interpretation of the industrial commissioner's rules, specifically Rules 500-4.17 and 4.18. On December 22, 1975 claimant's attorney wrote Dr. Bonfiglio, briefly outlining some of the factual developments of this claim and asking questions of Dr. Bonfiglio relating to causation of claimant's injuries, periods of convalescence and degree of any permanent partial disability claimant may have suffered. The letter concluded by requesting a copy of a medical report of a follow-up examination of claimant by Dr. Bonfiglio and indicating that Dr. Bonfiglio's reply would be in lieu of deposition. The doctor's reply was a letter, dated January 2, 1976 in which the response to the questions were set out in separate paragraphs numbered to correspond with the questions asked and worded in such manner as to render the reply incomprehensible without knowing the questions in the attorney's letter. A copy of the clinical notes from the two most recent examinations of the claimant was attached and made a part of the letter by Dr. Bonfiglio. No copy of this correspondence was furnished defendant employer, either voluntarily or upon demand at the arbitration hearing. Defendant was able to obtain copies from Dr. Bonfiglio's office and submitted a request for attorney's fees and expenses incurred in obtaining the report, which request was denied by the deputy industrial commissioner in his arbitration decision.

Rule 4.17 indicates the nature and form of doctor's reports contemplated by the Rules of the Industrial Commissioner. Hypertechnical forms and requirements are not necessary. Rule 4.18 says that "Each party to a contested case shall serve *all* reports of a doctor or practitioner relevant to the contested case proceeding in the possession of the party upon each opposing party . . ." (emphasis added). The rule further provides that, "Any party failing to comply with this provision shall be subject to (Rule) 4.36." That the letters in question are of the form and nature contemplated by these rules is clear. Claimant resists their production, however, on the claim that they are privileged as the work product of his attorney.

Federal Rules decisions have focused on the privilege of attorney's work product, discussing "privilege" as that term is used in the law of evidence. *U.S. v. Reynolds,* 345 U.S. 1, 73 S.Ct. 528 (1952). Recognizing that Workmen's Compensation is a creature of state, not federal law, and cognizant of the differences between state and federal standards, we may, nevertheless, utilize the decisions of the federal courts for assistance in examining the nature of the privilege extended to the work product of an attorney. The privilege is extended to the thoughts, analysis and interpretations of facts and events, of the attorney in his preparation for trial. The written statement of a witness, whether prepared by him and later delivered to the attorney, or drafted by the attorney and adopted by the witness, is not properly considered the work product of an attorney. This is because the statement is the recordation of the thoughts, impressions and interpretations of the witness himself, not those of the attorney. Counsel's recordation of an oral statement of a witness, on the other hand, would normally be considered "work product" because it includes the attorney's analysis and impression of what the witness has told him. *Hickman v. Taylor,* 329 U.S. 495, 67 S.Ct. 385 (1946). *Scourtes v. Fred W. Albrecht Grocery Co.,* 15 F.R.D. 55 (N.D. Ohio 1953). Here we have a letter of Dr. Bonfiglio, clearly not within the "work product" privilege, the notes of Dr. Bonfiglio, not within the privilege, and the letter of counsel to Dr. Bonfiglio, arguably within the privilege. The federal courts have held that the work product of a party's attorney is not sacrosanct and it is discoverable in some circumstances. *Walsh v. Reynolds Metals Co.,* 15 F.R.D. 376 (D.C. New Jersey 1954). "In furtherance of complete justice, unless clearly indicated, privileges defeating legitimate objects of discovery should not be extended." *Nola Electric v. Reilly,* 11 F.R.D. 103 (S.D.N.Y. 1950). This is because "mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation." *Hickman v. Taylor,* supra.

Workmen's Compensation is, of course, a creation of state law. "The fundamental reason for the enactment of this legislation is to avoid litigation, lessen the expense incident thereto, minimize appeals, and afford an efficient and speedy tribunal to determine and award compensation under the terms of this act." *Flint v. Eldon,* supra. We should be most reluctant to extend privileges that may operate to defeat the intention of the legislature. Pursuant to §86.18, Code of Iowa, the supreme court of Iowa has held, "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 is best suited to develop the truth and thus to protect the substantial rights of the parties." *Renner v. Model Laundry, Cleaning and Dyeing Company,* 191 Iowa 1288 (1921). The claim of privilege of work product cannot be extended to the two letters between claimant's attorney and Dr. Bonfiglio so as to prevent the operation of Rules 4.17 and 4.18 and preclude the production of valid, relevant information.

* * *

Signed and filed this 3 day of February, 1977.

ROBERT C. LANDESS
Industrial Commissioner

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

TESTIMONY – LAY

EHTEL M. RAMOS,

Claimant,

vs.

REACO, INC.,

Employer,

and

ATLANTIC MUTUAL INS. CO.,

Insurance Carrier,
Defendants.

Decision on Appeal

This is a proceeding brought by Ethel M. Ramos, claimant, pursuant to Rule 500-4.25(2), Iowa Administrative Code, for appeal of a rehearing decision of a review-reopening proceeding wherein claimant was awarded additional temporary total disability benefits from her employer, Reaco, Inc., and its insurance carrier, Atlantic Mutual Insurance Company, for a period "from April 28, 1975 through May of 1975" for an injury received arising out of and in the course of her employment on February 20, 1975.

* * *

The deputy in the original review-reopening proceeding found causal connection between the original injury and the urinary tract problems. In the original award, temporary total disability benefits were awarded for a period up to April 21, 1975, the time when claimant first returned to work on a limited basis. Temporary total disability benefits and medical expenses through this period had been paid by defendants. Further award of hospital and medical benefits was made on an 80% basis of expenses incurred while the claimant was hospitalized in Iowa Lutheran Hospital from April 28, 1975 through May 20, 1975 and for medical care rendered by D. J. Tesdall, M.D. from April 22, 1975 through July 28, 1975. In addition, the medical bills of J. L. Fatland, M.D. and Des Moines Anesthesiologists, P.C. were allowed in full for surgical procedures which were performed on May 5, 1975 while claimant was in Iowa Lutheran Hospital. After the rehearing, the deputy extended the temporary total disability to cover the period of subsequent hospitalization.

The deputy was not persuaded that the disability of the claimant subsequent to the hospitalization up until August 4, 1975 when claimant again returned to work was related to the urinary problems or any other problem related to the initial injury.

Medical evidence appearing to be favorable to the claimant's position is contained in the report of Dr. Tesdall dated July 23, 1976 in which he states, "I reviewed Mrs. Ramos' medical record from May 20th through August 4, 1975. She was seen in the office several times during that period and was still having symptoms from her urinary problems. I would not have released her to return to work during that interval of time." As noted by the deputy, it is not indicated that the reason for not releasing the claimant to return to work was necessarily connected with her urinary symptoms or for other problems for which Dr. Tesdall was treating claimant.

The discharge diagnosis of claimant from Iowa Lutheran Hospital was:

1. Stress incontinence
2. Cystocele
3. Reactive depression
4. Chronic gastritis
5. Staphyloccal bronchitis
6. Elevated IGA
7. Hyperuricemia

In the pertinent findings of the discharge summary from Iowa Lutheran Hospital and prepared by Dr. Tesdall is found the following dissertation:

> Hospital course: the patient was admitted complaining of both urge and stress incontinence. She also was depressed having both initial and terminal sleep disturbance. She had previously had an injury, a fall at work, causing her to have supposedly fractured lumbar vertebraes for which she was treated at Iowa Methodist Hospital. During her hospitalization she had difficulty in emptying her bladder and apparently something popped causing her to lose control of her urine. Dr. Mintzer saw the patient and felt that she did have cystocele and that repair may need to be done, however, he felt that two months should elapse with treatment of Kegel exercises prior to consideration of surgery. He said he would talk to Dr. Krantz in Kansas City who had done the last procedure if it seemed that surgery would be necessary. Dr. Fatland saw the patient, Had a cystoscopy. Postoperatively she was placed on antibiotics. She was found to have a staph coagulase positive which was treated with Keflex. Patient complained of epigastric distress despite treatment with Gelusil, Gaviscon and Vistaril. Etrafon and Elavi were added for the depression. Her bladder control did improve postoperatively with the urgency and urge incontinence lessening. She did have some vaginal burning which was relieved by Premarin cream. Finally, because of the persistence of epigastric burning and distress, Dr. Prusak saw her and did do a gastoscopy which revealed chronic gastritis. The patient was sleeping better at the time of the discharge. However she was still having some epigastric distress.

Although on appeal to the commissioner the entire matter is subject to review, the claimant had indicated she wishes the issue limited to temporary disability between May 20, 1975 and August 4, 1975. Defendants in their

brief on appeal contend that the claimant has not carried the burden of proof necessary to show entitlement to any compensation in excess of that already awarded her. Defendants have apparently conceded that the temporary disability awarded by the deputy in the review-reopening and rehearing proceedings were proper.

While the record is clear that claimant was having symptoms from urinary tract problems, it is equally clear that she was suffering from other problems as well. The lay testimony of the claimant without expert testimony as to the causal relationship between claimant's "symptoms" and her "disability" is not sufficient. Dr. Tesdall's statement in claimant's rehearing exhibit 1 only states that she continued to have "symptoms" from her urinary problems. Although he indicates he would not have released her to return to work, he does not indicate what was the disabling condition. The discharge summary including the majority of the drugs recommended would tend to indicate that other nonrelated items were contributing greatly to claimant's disability, claimant's self-serving statements to the contrary notwithstanding.

* * *

It is found that the claimant has failed to establish by a preponderance of the evidence that she had compensable disability in excess of that which has previously been awarded.

* * *

Signed and filed this 23 day of June, 1977.

ROBERT C. LANDESS
Industrial Commissioner

No appeal.

TRANSCRIPTS Page

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VOCATIONAL REHABILITATION

STEPHEN J. WAGNER,

Claimant,

vs.

FINLEY HOSPITAL,

Employer,

and

INSURANCE COMPANY OF NORTH AMERICA,

Insurance Carrier,
Defendants.

Decision on Appeal

This is a proceeding brought by defendant employer, Finley Hospital, and its insurance carrier, Insurance Company of North America, pursuant to Iowa Code §86.24 and Rule 500-4.27 appealing a proposed ruling on application for rehabilitation benefits wherein claimant, Stephen J. Wagner, was awarded benefits under Iowa Code §85.70.

* * *

On December 6, 1976, eighteen-year-old claimant, who was a parttime groundskeeper for defendant and a student at Loras College, suffered an injury arising out of and in the course of his employment when his right hand became entangled in a snowblower. A discharge summary by Gerald Meester, M.D. reveals the nature of claimant's injuries thusly:

> several open fracture dislocations were noted. . . . The distal end of the long finger distal to the midportion of the second phalanx was unviable and was amputated primarily. The ring finger was left intact although there were multiple fractures including severe destruction of the PIP and DIP joints noted.

Claimant was fortunate to have been referred by Dr. Muster to Douglas Crosby, chief physical therapist at Finley Hospital, who first saw claimant on December 24, 1976. Crosby stated that his role was to promote "cleansing and debridement of the soft tissue injuries to the hand and to increase active, functional range of motion in the fingers and to reduce the effects of the soft tissue injury."

Following his surgery claimant described the condition of his hand as follows:

> The only finger that worked correctly was my index finger. My middle finger and ring finger did not work at the finger joints. They did not bend, and my little finger bent to some degree of which physical therapy helped me get it to an almost normal state.

Claimant claimed continuing sensitivity in his hand and fingers to temperature, pressure and vibration.

Claimant contacted vocational rehabilitation early in 1977. His counselor was Linda Sanford who testified in this matter stating that claimant could work prior to any training he received. She said a determination was made as to the type of occupation claimant was going into and the training that was needed. Some tuition funds were provided to claimant by her department.

On May 2, 1977, claimant returned to his work at Finley Hospital; however, he testified to some difficulty in performing his work. On June 3, 1977, claimant left the employ of defendant giving as his reason "another job offer for the summer." That job was at a boys' camp. In October of 1977 claimant enrolled in a six month welding course. Regarding his enrollment he said:

> I had had a small amount of experience in high school. I like it. I thought I could make a living at it. I talked to different people, welders, my parents and Mrs. Sanford and asked if my injury would harm my welding and they said I could overcome most of whatever that is, but I took welding primarily because I was interested and I thought I could do it.

He chose this course over on-the-job training at John Deere saying:

> I found out that I could most likely get a job at John Deere in a welding field. They would send me to school for a couple of weeks and teach me how to do their welding job and put me on the job, but that way, I only knew that one job and I didn't want that, so I wanted to go to school myself and learn all aspects of welding so I could go down and know

every job that they would give me.

Right-handed claimant stated he was able to use his right hand for welding.

Also testifying in this matter were Finley's director of personnel, Richard W. Geisler, and maintenance supervisor, William K. McCoy. Geisler's job is to recruit, interview, and channel applicants to the right department. In an attempt to improve his recruiting procedures, he also interviewed employees who were leaving their jobs. He said that claimant returned at the same rate of pay to the same position with the same duties as he left when he was injured. McCoy, who acknowledged that claimant had complained to him about his injured hand, expressed the opinion that claimant was doing a satisfactory job as groundskeeper.

At issue in the case sub judice is the interpretation of Iowa Code §85.70. The relevant part of that section reads:

> An employee who has sustained an injury resulting in permanent partial or permanent total disability for which compensation is payable under this chapter, 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 twenty-dollar weekly payment from the employer in addition to any other benefit payments, during each full week in which he is actively participating in a vocational rehabilitation program recognized by the state board for vocational education.

Nothing in the statute indicates the type of employment to which claimant is to return other than that the employment be gainful.

It is to be noted at the outset that the mere fact that a claimant is able to seek training does not mean that such person is ready to return to gainful employment and is therefore precluded from receiving benefits under the statute. Here, however, based on the facts of this case, it is found that claimant could return to gainful employment as evidenced by his returning to precisely the same job he left at the time of his injury and by his leaving that job to take another position. Claimant's desire to return to work and his ambition in seeking to better himself are indeed commendable. The statute, however, does not contemplate that an injury in and of itself will be an event which will require an employer to partially contribute to the employee's attempts to better his employment position.

WHEREFORE, it is found:

That claimant has not substantiated by a preponderance of the evidence his claim for vocation benefits.

* * *

Signed and filed this 27 day of March, 1978.

ROBERT C. LANDESS
Industrial Commissioner

Appealed to District Court; Pending.

VOCATIONAL REHABILITATION

BETTY Y. SCHMIDTHUBER,

Claimant,

vs.

WALKER MFG. CO./DELUXE PRODUCTS, INC.,

Employer,
Self-Insured,
Defendant.

Review — Reopening Decision

This is a proceeding in Review-Reopening brought by the claimant, Betty Y. Schmidthuber, against Deluxe Products, Inc., a division of Walker Manufacturing Company, her employer and authorized self-insurer, to recover additional benefits under the Iowa Workmen's Compensation Act by reason of an industrial injury which occurred on October 12, 1972.

* * *

The claimant was injured on October 12, 1972. At the time of the accident she was moving a roll of paper which weighed from 50 to 70 pounds. The paper dropped onto her leg. She reported the incident to her employer and continued to work for the remainder of the day, a Friday. The slight pain and discomfort increased to a degree that on the following Monday the claimant was directed to a Dr. Haughland by her employer. The pain was over the left anterior aspect of her thigh. After a couple of weeks she was seen by R. E. McCoy, M.D. The treatments continued for some time until the claimant was hospitalized in March, 1973. On March 28, 1973, exploratory surgery was performed by Dr. McCoy. The myelogram taken on the claimant indicated a bulging disk at L4-5 or the L5-S1 level. The surgery revealed no abnormality.

In May of 1973 the claimant returned to work as a security guard. She continued to work for about six months and was seen by Dr. McCoy on November 1, 1973, at which time she reported that she was continuing to have pain in her left hip. Dr. McCoy's physical examination revealed that there was "no physical problem which might have a surgical solution." (Dr. McCoy's report dated June 25, 1975, Defendant's Exhibit #1) Dr. McCoy then referred the claimant to the Mayo Clinic, there to see Allan J. D. Dale, M.D.

In a report dated December 13, 1973, Dr. Dale referred the claimant on for further consultation.

The claimant was then referred by Dr. Haugland to Luke Chang, M.D., for acupuncture treatments. She was apparently also consulting a chiropractor at this time. The claimant also has seen a Dr. Hoover, but no report is in evidence revealing his findings. R. D. Brainard, D.O., referred the claimant to Dr. Hoover.

Dr. Chang reports that the claimant received eleven acupuncture treatments.

Robert A. Hayne, M.D., reports that he examined the claimant on April 5, 1976. He felt that the claimant sustained a bruise over the left anterior aspect of the left thigh. He states that there will be no improvement. He

estimates the claimant's disability as 9% of the body as a whole.

The claimant is now gainfully employed, owning her own beauty salon. She commenced this activity after having attended Capri College of Cosmotology from April 1, 1975, until March 11, 1976. After she entered school, she submitted a Form 20, Application for Additional Benefits for Rehabilitation Services, which was sent into a Mr. McQueen, an adjuster for defendant employer. The form was apparently never transmitted to the Industrial Commissioner as the file does not reveal the submission of a Form 20.

The claimant's duties at the present time include managing a beauty salon, although her husband assists in the routine heavy duties which arise.

* * *

Claimant, age 48, has worked for a significant period of her life. Her duties have included those of an assemblyline worker, seamstress, a long distance telephone operator, waitress, and short order cook. She worked in every department of the defendant employer's plant. This employment covered a period of ten years. Her entire work life has been devoted to employment activities of a laboring nature, involving some amount of physical exertion. The claimant is now involved in an occupation which requires somewhat less in the way of this exertion. The success of the claimant in rehabilitation has lessened her industrial disability. The claimant's industrial disability is therefore fixed at 15%.

* * *

[Healing period benefits were also awarded.]

The last problem to be addressed in this decision is that of rehabilitation benefits. Section 85.70, Code of Iowa, unchanged since the date of the accident, states:

> 85.70 Additional payment for attendance. An employee who has sustained an injury resulting in permanent partial or permanent total disability, for which compensation is payable under this chapter, 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 twenty-dollar weekly payment from the employer in addition to any other benefit payments, during each full week in which he 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. An appeal of the decision of the industrial commissioner may be taken to the district court as prescribed in section 86.26. 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.

It is implicit that vocational rehabilitation of injured employees is a commendable goal. The purpose of this section is to again make an injured employee a productive member of society. Vocational rehabilitation is not a "stepchild" or a worthless appendage to the Workmen's Compensation Law. It is to be recognized as a part of the entire scheme of workmen's compensation. Indeed, the success of the claimant's experience with this program has lessened the award of permanent partial disability, thus giving the employer a benefit.

In this case, the claimant made the proper prayer for rehabilitation. The evidence shows and supports the finding of fact that the claimant submitted forms for rehabilitation to the employer, but these were never received by the Industrial Commissioner. The claimant's application for vocational rehabilitation benefits is now timely and should be allowed. Since the training program exceeded the statutory allowance, the maximum allowable benefit will be allowed, i.e., payment for 26 weeks at $20.00 per week. The defendant cannot now receive the benefit of decreased permanent partial disability compensation while refusing to pay benefits for the cause of that decreased industrial disability.

* * *

Signed and filed this 29 day of October, 1976.

JOSEPH M. BAUER
Deputy Industrial Commissioner

No appeal.

WILLFUL INJURY

ADMINISTRATIVE PROCEDURE ACT

Blumer, Norlan, v. Metz Baking Co., and Liberty Mutual Insurance Co. 12-13-76
In ruling on claimant's resistance to defendants' appeal to the industrial commissioner, held that when action commenced prior to July 1, 1975 and arbitration decision appeal filed after July 1, 1975, was a "proceeding in process" to which the IAPA was not applicable. [District Court dismissed]

AGGRAVATION

Moore, Paul Edward, v. One Trip Plumbing & Heating Co., Inc., and Home Insurance Co. 6-22-78
On appeal of a proposed decision in arbitration, deputy's decision adopted as the final decision of the agency, noting that where claimant's industrial disability was the result of the aggravation of a preexisting condition, the percentage of disability is determined from claimant's incapacity that has resulted from such aggravation.

CAUSATION

Dovell, Robert L., v. Iowa Roofing Co., and Bituminous Casualty Corp. 7-22-76
On appeal of a proposed decision in arbitration, held that claimant's and doctor's testimony supported the finding that a compensable back injury had occurred but also indicated no permanent disability.

DEFAULT

Powell, Lerenzle V., v. International Harvester Co. (self-insured) 8-12-76
In review of ruling sustaining claimant's motion for default for failure of defendants to file appearance within 30 days of the filing of the original notice, held that such was proper. The district court affirmed the default determination and remanded the matter for a hearing to give the employer an opportunity to offer evidence to mitigate damages.

EVIDENCE – ADDITIONAL EVIDENCE SUBMITTED ON APPEAL

Temple, Melvin, v. Vermeer Manufacturing Co., and Liberty Mutual Insurance Co. 6-30-78
On appeal of a proposed decision in arbitration, additional evidence offered on appeal not considered in that no good reasons were presented why such evidence could not have been presented at the original hearing. [Appealed to district court; pending.]

INDEPENDENT CONTRACTOR

Cadman, Ronald, v. Craig Tvedte d/b/a Tweeter's Lounge, and Western Casualty & Surety Co. 4-19-77
On appeal of proposed decision in arbitration, held that claimant was an independent contractor and not an employee of the defendant and was thus denied benefits. [District Court reversed; Court of Appeals reversed and remanded to District Court.]

INDUSTRIAL DISABILITY

Ippert, Sharon K., v. Lehigh Leopold Furniture Co., and American Mutual Liability Ins. Co. 7-29-76
On appeal of a proposed decision in arbitration, held that claimant had sustained an industrial disability of 10% to the body as a whole based upon medical evidence and the factors considered in determining industrial disability.

Kendall, Beryl, v. Cy's Crosstown Moving & Storage, and Allied Mutual Insurance Co. and North American Van Lines and Employers Insurance of Wausau 7-26-76
On appeal of a proposed decision in arbitration, held that claimant had sustained an industrial disability of 5% to the body as a whole due to back injury. [District Court remanded; settled.]

Quijano, Charles R., v. John Burriola (insurance carrier unknown) 12-23-77
On appeal of a proposed decision in arbitration, held that claimant had sustained an industrial disability of 25% to the body as a whole as the result of multiple injuries sustained in a fall.

Redig, Joseph M., v. Winnebago Industries, Inc., and Great American Insurance Co., ... 3-3-78
On appeal of a proposed decision in review-reopening, held that claimant had sustained an industrial disability of 35% to the body as a whole based upon a functional impairment of 15% and the other factors of age, education, qualifications, experience and inability to engage in employment for which he is suited.

JUDICIAL REVIEW

Christy, Donna E., v. Virginia Gay Hospital and Argonaut Insurance Co., ... 11-18-76
In ruling on defendants' motion to dismiss the appeal to the industrial commissioner and claimant's

resistance thereto, held that claimant's application for rehearing was not timely filed under Rule 500-4.24, and that since this was a "proceeding in process" before July 1, 1975, claimant's subsequent appeal would have been to the district court under §86.34.

LIMITATIONS – APPEAL FROM DECISION OF DEPUTY

Curry, Emma JoAnn, v. Wally Ray, and United States Fidelity & Guaranty 11-19-76
In response to claimant's notice of appeal and defendants' resistance thereto, held that amended decision of the deputy commissioner did not renew the period for filing a petition for review under §86.24, Code of Iowa.

MEDICAL SERVICES – EMPLOYER'S DUTY TO PROVIDE

Wright, Mary V. Golden Age Manor, Inc., and United States Fire Insurance Co. 12-23-77
On appeal of a decision rendered on remand, held that claimant sustained a period of temporary total disability and defendants were to provide further reasonable and necessary medical care for claimant.

SECOND INJURY FUND

Anderson, Dale B., v. Vilas Feed Mill, and Employers Mutual Casualty Co., and Second Injury Fund, State of Iowa 7-30-76
On review of an order which held that the claimant had no claim against the Second Injury Fund, held that §85.64, when speaking of "another member," does not include an injury to a portion of the trunk of the body and also does not apply to two injuries to the same scheduled member. [District Court affirmed; Supreme Court affirmed]

SUBSEQUENT STIPULATION BY PARTIES

Oyen, Eldon A., v. John Deere Dubuque Works of Deere & Co. (self-insured) 2-25-77
On appeal of a proposed decision in arbitration, award allowed by the deputy commissioner was modified based upon a subsequent stipulation of the parties.

TEMPORARY TOTAL DISABILITY

Schroeder, Thomas J., v. Sande Construction & Supply Co. and Western Casualty & Surety Co. 1-4-78
On review of a remand decision, held that claimant had sustained a compensable back injury allowing payment of temporary total disability benefits and medical expenses, but no permanency was found to exist.

TESTIMONY – EXPERT

Bolender, Dennis R., v. U.S. Gypsum Co., and American Motorists Insurance Co., and Electrical Materials Co. and, Dodson Insurance Group 7-28-76
On appeal of a proposed decision in arbitration, greater weight was given to testimony of physician who treated claimant on the date of the alleged injury and subsequently thereafter than the doctor who examined claimant solely for the purpose of being a witness and who also failed to testify as to the presence or absence of a causal connection.

Miller, Marshall D., v. Iowa State Penitentiary, and State of Iowa 3-10-78
On appeal of a proposed decision in review-reopening, held that claimant had sustained a 3% permanent partial disability of the left arm based upon doctor's statement relative to the AMA Guide.

Swigert, Albert L., v. Dewey Ford, Inc., and Liberty Mutual Insurance Co. 6-29-78
On appeal of a proposed decision in review-reopening, it was noted that when considering medical evidence, the thoroughness of each examination and the doctor's access to information concerning the claimant's medical history are factors to be noted in giving weight to their testimony.

On appeal of the following proposed decisions, held that the proposed decision by the deputy is adopted as the final decision of the agency.

Meyer, Floyd D., v. Wilson and Co., Inc. (self-insured) 5-23-77

Willingham, Thomas Lazell, v. Red Jacket Mfg. Co., and The Travelers Insurance Co. 6-17-77

Smith, Geraldine, v. R. L. Polk & Co., and Michigan Mutual Insurance Group 6-17-77

Delanoit, Clarence, v. Land-O-Lakes, and The Travelers Insurance Co. 8- 2-77
[District Court affirmed; appealed to Supreme Court]

Heck, Earl, v. Geo. A. Hormel Co., and Liberty Mutual 6-23-78
[Appealed to District Court; pending]

Rounds, Herschel E., v. Glen Beck; William Beck; Glen Beck and William Beck, Partners; Glen Beck and William Beck, Joint Venture 6-29-78

RESULTS ON CASES APPEALED DURING THE LAST BIENNIUM

Amadeo v. Artistic Bldg. Maintenance and Aetna Casualty & Surety Co. Appealed to District Court; affirmed.

Barnett v. Community School District and Iowa National Mutual Insurance Co. Remanded from District Court; settled.

Bryson v. Montgomery Ward and Co. Appealed to District Court; settled.

Connet v. Farmers Mutual Cooperative Creamery Ass'n and Iowa National Mutual Insurance Co. Appealed to District Court; dismissed.

Courtney v. Dale's Towing Service and IMT Insurance Co. Appealed to District Court; dismissed and settled.

Francis v. Chamberlain Mfg. Co. and Bronson, Dennehy-Ulseth, Inc. Appealed to District Court; dismissed.

Fredericksen v. Northwest Iowa Masonry, Inc., and Hawkeye-Security Insurance Co. Appealed to District Court; affirmed. Appealed to Court of Appeals; affirmed.

Halstead v. Johnson's Texaco and Travelers Insurance Cos. Appealed to District Court; affirmed. Appealed to Supreme Court; affirmed.

McDaniel v. Armstrong Rubber Mfg. Co. and American Mutual Liability Insurance Co. Appealed to District Court; dismissed.

Sondag v. Ferris Hardware and Grain Dealers Mutual Insurance Co. Appealed to District Court; affirmed. Appealed to Supreme Court; dismissed.

Wieser v. United States Gypsum Co. and American Motorists Co. Appealed to District Court; affirmed.

Witt v. Henke Mfg. Corp. and Bituminous Casualty Co. Appealed to District Court; dismissed.