State of Iowa

1980

ROBERT D. RAY

Governor

THIRTY-FOURTH BIENNIAL REPORT OF THE

Industrial Commissioner

For the Period Ending June 30, 1980
and
REPORT ON DECISIONS
ON SELECTED CASES

ROBERT C. LANDESS
Industrial Commissioner

Published by
STATE OF IOWA
Des Moines

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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-fourth Biennial Report of the Iowa Industrial Commissioner covering the period from July 1, 1978 through June 30, 1980 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

CONTENTS

AGENCY PERSONNEL

Robert C. Landess	Industrial Commissioner
Carl J. Haaland	Assistant Industrial Commissioner
Joseph M. Bauer	Deputy Industrial Commissioner
Judith Ann Higgs	Deputy Industrial Commissioner
Lee M. Jackwig	Deputy Industrial Commissioner
E. J. Kelly	Deputy Industrial Commissioner
David E. Linqusit	Deputy Industrial Commissioner
Barry Moranville	Deputy Industrial Commissioner
Helmut Mueller	Deputy Industrial Commissioner
Mary M. Weibel	Legal Analyst
Marianne E. Gilliam	Claim Analyst
Laura M. Heemstra	Claim Analyst
Carrie Thomas	Claim Analyst
Wendy Wilson	Claim Analyst
Leonard C. Ewald	Employment Restoration Counselor
Ruth McLaughlin	Office Manager
Carol F. Fowler	Law Clerk
Albert A. Ringgenberg	Law Clerk
Wayne J. Hauber	Statistical Research Analyst
Sharon Downen	Secretary to the Commissioner
Janet Griffin	Chief Docket Clerk
Mae Barker	Docket Clerk
Kathy Kellar	Docket Clerk
	Docket Clerk
Linda Bouley	Receptionist/Secretary
Sarah Swagler	Receptionist/Secretary
Judy Hubbard	Judicial Secretary
Rose Ricke	Judicial Secretary
Jackie Walden	Judicial Secretary
Sandra Butterfield	Chief Compliance Clerk
Mary Jane Barber	Compliance Clerk
Carol Genochio	Compliance Clerk
Alexine Gunn	Compliance Clerk
Karen Leonhardt	Compliance Clerk
Donna Gordon	Secretary/Records Clerk
	Secretary/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, 85B, 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.

IOWA INDUSTRIAL COMMISSIONER
MISSION STATEMENT

I. To administer, inform, regulate and enforce the workers' compensation and occupational disease laws by:

   A. Informing the public of the provisions of the workers' compensation law by:

      1. Preparing and distributing literature concerning the workers' compensation law, rates, judicial decisions and statistics.

      2. Responding to written and oral inquiries regarding the law.

      3. Conducting conferences and training sessions.

   B. To promulgate and enforce all rules pertaining to the workers' compensation and occupational disease laws by:

      1. Providing the appropriate forms for use in matters under the jurisdiction of the Industrial Commissioner.

      2. Establishing the appropriate forms for use in matters under the jurisdiction of the Industrial Commissioner.

      2. Establishing and monitoring files arising from claims of work related injuries and illness.

      3. Informing parties to a claim regarding their rights and responsibilities.

   C. To determine by adjudicative means the rights and liabilities of parties in a disputed claim by:

      1. Conducting hearings and rendering decisions in contested cases.

      2. Approving settlements in accordance with the statutes.

      3. Conducting appeals within the agency.

GOALS-IOWA INDUSTRIAL COMMISSIONER

1. Develop and implement a scheduling program which allows for speedy resolution of issues while protecting the rights of litigants.
2. Revise the current index system to a computerized index for litigated cases.
3. Reduce the time between the filing of a contested case and filing of the final decision.
4. Train supervisory personnel through management training programs.
5. Establish training programs for all new staff members.
6. Reclassify job series within the agency to more adequately reflect the needs of the agency and to provide career opportunities for state employees.
7. Employ qualified people for all positions while meeting EEO/AA standards and requirements.
8. Continue review of organizational structure to determine where benefits may be derived from functional organization.

9. Courteous and effective communication by all employees with the public.
10. Create a public information system utilizing the media and information ciculars and bulletins.
11. Evaluate agency operation through program and modified base budgeting concepts.
12. Conduct periodic reviews and appropriate updates of word processing to insure conformity in procedures and increased utilization.
13. Prepare and distribute BAIS Reports.
14. Develop, produce and analyze production performance information for all key result areas.
15. Improve the development of statistical information and data processing to assist management in decision making, provide quick access to claimant information and provide a means for monitoring files.
16. Monitor claims to assure compliance with the law.
17. Conduct and take part in conferences and training sessions in relation to workers' compensation.
18. Develop procedures for computerized docket control.
19. Provide vocational rehabilitation counselling and referral services.
20. Generate interest and enthusiasm among employers and insurance carriers to establish vocational rehabilitation programs and facilities.
21. Develop a program to administer and control self-insureds.
22. Coordinate physical and vocational rehabilitation activities for injured workers.
23. Develop recommended amendments to the workers' compensation law.

COMPLIANCE ADMINISTRATION

A first report of injury is to be filed with the industrial commissioner in all cases where an employee alleges an injury or occupational disease which results in more than three days lost time or a permanent disability.

First reports of injury filed indicate reported claims are increasing.

First Reports Filed

1977/78	1978/79	1979/80
28,480	31,688	36,834

This does not necessarily indicate that the number of injuries has increased but rather greater awareness of the obligation to report injuries.

STATISTICAL DATA

INJURY REPORTS FOR BIENNIAL PERIOD

July 1, 1978 to June 30, 1979:

First Reports: 31,688
Number of Fatalities: 159
Lost No Time: 2,310
Denied: 877
Final Reports: 25,968

July 1, 1979 to June 30, 1980

First Reports: 36,834
Number of Fatalities: 158
Lost No Time: 8,165
Denied: 1,669
Final Reports: 30,625

SUMMARY OF NON-CONTESTED CASES

DURING BIENNIUM

	77/78	78/79	79/80
FIRST REPORTS	28,480	31,688	36,834
NUMBER OF FATALITIES	164	159	158
LOST NO TIME	2,157	2,310	8,165
DENIED	504	877	1,669
FINAL REPORTS	23,453	25,968	30,625

PERCENT CHANGE

	Comparison Of		
	78/79 to 77/78	79/80 to 78/79	79/80 to 77/78
FIRST REPORTS	11%	16%	29%
NUMBER OF FATALITIES	(–) 3%	(–) 1%	(–) 4%
LOST NO TIME	7%	253%	279%
DENIED	74%	90%	231%
FINAL REPORTS	11%	18%	31%

DATA PROCESSING

An automated records management system has been designed and installed for the Industrial Commissioner and the Bureau of Labor. This system provides the basis for automation of a variety of functions within the Commissioner's office. In addition, it provides the capability of integrating information collected by the Bureau of Labor with claim information collected by the Iowa Industrial Commissioner.

Computer hardware was available in June 1979 and the decision was made to enter all open claims. This required some overtime hours from the staff and it was necessary to hire some temporary clerical staff. On September 4, 1979, a follow up program was initiated for all new claims and in March 1980, the follow up program was established for all claims.

For compliance administration, the first report of injury is forwarded by the employer to the Industrial Commissioner. The compliance staff records the available information into the computer and forwards the first report to the Bureau of Labor. Based on the data from the first report, the Industrial Commissioner prints a Claim Activity Report (Form 2) and forwards an information letter to the injured employee. The computer is programmed to follow up every thirty (30) days or in thirty days from the last activity. This Claim Activity Report provides the insurance carrier with a "proof copy" of what is on file and with a form to make the required filing(s). In addition, the computer calculates the rate based on wage information from the first report. Following receipt of the first Claim Activity Report, the insurance carrier determines if the case is compensable, if they want to continue to investigate, if it is not compensable or if there was insufficient time loss. The insurance carrier records the appropriate information on the Claim Activity Report and returns it to the Industrial Commissioner. After it is received, the compliance staff records the new information and determines if there are any changes to the information that was previously recorded. Thirty days after this information is recorded, a second Claim Activity Report will be forwarded to the insurance carrier. If the claim has progressed to the point where a final report can be made, the form can be completed and returned.

If payments will continue for a period of time, the insurance carrier may provide a date that payments are estimated to be completed. This expected date will stop the thirty day follow up process until that expected date. In the event that required data is missing, or the claim is out-of-compliance, the report process will continue to generate every thirty days. If the required data is not available within ninety (90) days, the computer prepares a letter for the claim analysts. This letter is used as a reminder to the claim analyst that a file deserves special attention. One of the claim analysts will then contact the insurer to determine if there is a problem and how the claim can be brought into compliance with the law to avoid litigation.

Starting in mid 1980, the Industrial Commissioner provided print outs of all open claims to the insurers. The purpose of this was to exchange information and determine how the paper flow process could be improved. Response from the insurers was very positive and we have been able to update all of the records. The agency has also provided training on the new forms and how the computerized system works.

The contested case files are also recorded on the computer. This system provides the agency a means for docket control.

Based upon available data from the different claims, it is planned to develop statistical programs. Statistical programs are needed for: compliance performance, case management, cost analysis, injury analysis, and administrative management. A

number of data processing objectives have been established for the next biennuim. Successful accomplishment of these objectives will significantly enhance the current system.

ARBITRATIONS

JULY 1, 1978 to JUNE 30, 1979

	431	
Cases carried over from previous year	431	
Arbitrations filed	579	
Arbitrations dismissed		95
Arbitration decisions		111
Arbitrations settled		245
Arbitrations carried over to July 1, 1979		555
	1,010	1,010

JULY 1, 1979 to JUNE 30, 1980

Cases carried over from previous year	555	
Arbitrations filed	621	
Arbitrations dismissed		88
Arbitration decisions		165
Arbitrations settled		326
Arbitrations carried over to July 1, 1980		597
	1,176	1,176

REOPENINGS

July 1, 1978 to June 30, 1979

Cases carried over from previous year	308	
Reopenings Filed	558	
Reopenings Dismissed		82
Reopening Decisions		145
Reopenings Settled		229
Reopenings carried over to July 1, 1979		410
	866	866

July 1, 1979 to June 30, 1980

Cases carried over from previous year	410	
Reopenings Filed	638	
Reopenings Dismissed		79
Reopening Decisions		197
Reopenings Settled		308
Reopenings carried over to July 1, 1980		464
	1,048	1,048

ANALYSIS OF CONTESTED CASE FILING

DURING BIENNIUM

Year Ending Year Ending	Arb	RR	Other	Appeals
June 30, 1978	539	460	102	128
June 30, 1979	579	558	71	122
June 30, 1980	621	638	79	190
Increase 1978-79	40	98	(–) 31	(–) 6
Increase 1979-80	42	80	8	68
Increase 1978-80	82	178	(–) 23	62
% Increase 1978-79	7%	21%	(–) 30%	(–) 5%
% Increase 1979-80	7%	14%	13%	56%
% Increase 1978-80	15%	39%	(–) 23%	48%

ALL LITIGATED FILES
(Does not include Appeals)

July 1, 1978 to June 30, 1979

Cases carried over from previous year	824	
Petitions Filed	1,208	
Dismissed		202
Decisions		275
Settled		534
Files carried over to July 1, 1979		1,021
	2,023	2,032

July 1, 1979 to June 30, 1980

Cases carried over from previous year	1,021	
Petitions filed	1,338	
Dismissed		186
Decisions		388
Settled		658
Files carried over to July 1, 1980		1,127
	2,359	2,359

APPEALED DURING BIENNIUM

	1978-79		1979-80	
Cases carried over from Previous Year	66		47	
Appeals Filed	122		190	
Appeals Dismissed		11		14
Appeal Decisions		117		114
Appeals Settled		13		13
Appeals Carried Over		47		96
	188	188	237	237
Judicial Reviews to District Court		67		46
Judicial Reviews to Supreme Court		15		12

SUMMARY OF CONTESTED CASES DURING BIENNIUM

	77/78	78/79	79/80
Petitions Filed	1,101	1,208	1,338
Files Closed	872	1,011	1,232
Files Appealed to Commissioner	128	122	190
Judicial Review to District Court	52	67	46
Judicial Review to Supreme Court	13	15	12

PERCENT CHANGE

	Comparison of 78/79 to 77/78	Comparison of 79/80 to 78/79	Comparison of 79/80 to 77/78
Petitions Filed	10%	11%	22%
Files Closed	16%	22%	41%
Files Appealed	(–) 5%	56%	48%
Judicial Review to District Court	29%	(–) 31%	(–) 12%
Judicial Review to Supreme Court	15%	(–) 20%	(–) 8%

CASE LOAD PER DEPUTY

	Petitions Filed	Files/Deputy	No. of Deputies
June 30, 1978	1,101	206	4
June 30, 1979	1,208	302	4
June 30, 1980	1,338	243	5.5

SUMMARY OF RECEIPTS AND DISBURSEMENTS

July 1, 1978 to June 30, 1979

	Appropriation and/or Receipts	Disbursements	Balance June 30, 1979
SALARIES, GENERAL OFFICE AND MAINTENANCE -- Sch. 1	$690,594.30	$657,629.15	$32,965.15
PEACE OFFICERS -- Sch. 2	6,195.84	6,195.84	
	$696,790.14	$663,824.99	$32,965.15

SECOND INJURY

	Appropriation and/or Receipts	Disbursements	Balance June 30, 1979
Balance July 1, 1978	$12,110.46		
Interest on Investments	3,720.08		
Death Assessments	79,800.00		
Paid to Claimants		$13,327.27	$82,303.27
Balance Carried Forward			

Schedule 1

Salaries, General Office and Maintenance

	Appropriation and/or Receipts	Disbursements	Balance June 30, 1979
Appropriation	$688,200.00		
Receipts	2,033.40		
Refunds	130.91		
Warrants cancelled	229.99		
Salaries		$389,554.03	
Social Security (State Share)		21,547.43	
Retirement (State Share)		18,379.93	
Health Insurance (State Share)		11,906.16	
Life Insurance (State Share)		1,771.00	
Disability Insurance (State Share)		2,280.33	
Travel		14,719.86	
General Office Expense		31,683.18	
Printing		15,019.15	
Telephone		10,530.07	
Data Processing		74,743.75	
Building Rent and Utilities		20,969.23	
Hearing Expense		34.56	
Equipment		44,490.47	
Balance Reverted to General Revenue			$32,965.15
	$690,594.30	$657,629.15	$32,965.15

Schedule 2

Claims for Peace Officers Under Section 85.62

Claims	$6,195.84

SUMMARY OF RECEIPTS AND DISBURSEMENTS

July 1, 1979 to June 30, 1980

	Appropriation and/or Receipts	Disbursements	Balance June 30, 1980
SALARIES, GENERAL OFFICE AND MAINTENANCE -- Sch. 1	$868,846.82	$839,628.36	$29,218.46
PEACE OFFICERS -- Sch. 2	4,867.49	4,867.49	
	$873,714.31	$844,495.85	$29,218.46

SECOND INJURY FUND

	Appropriation and/or Receipts	Disbursements	Balance June 30, 1980
Balance July 1, 1979	$82,303.27		
Interest on Investments	9,956.69		
Death Assessments	26,100.00		
Paid to Claimants		$61,272.85	
Balance Carried Forward			$57,087.11

Schedule 1

Salaries, General Office and Maintenance

	Appropriation and/or Receipts	Disbursements	Balance June 30, 1980
Appropriation	$837,945.00		
Receipts	30,505.41		
Refunds	396.41		
Salaries		$499,668.01	
Social Security (State Share)		29,895.83	
Retirement (State Share)		26,557.56	
Health Insurance (State Share)		16,653.71	
Life Insurance (State Share)		2,062.50	
Disability Insurance (State Share)		3,097.87	
Travel		10,215.56	
General Office Expense		35,124.10	
Printing		21,113.57	
Telephone		15,106.23	
Data Processing		86,307.08	
Building Rent and Utilities		72,869.50	
Hearing Expense		13.03	
Equipment		20,943.81	
Balance Reverted to General Revenue			$29,218.46
	$868,846.82	$839,628.36	$29,218.46

Schedule 2

Claims for Peach Officers Under Section 85.62

Claims	$4,867.49

JOHN ADAMS,

Claimant,

vs.

CARNATION COMPANY,

Employer,

and

CONTINENTAL NATIONAL GROUP,

Insurance Carrier,
Defendants.

Order

NOW on this 12th day of February 1979 the matter of claimant's appeal comes on for determination.

On October 31, 1978 the deputy industrial commissioner filed a review-reopening decision in this matter. In that decision, defendants' motion for summary judgment was sustained and claimant's petition was dismissed in that it had not been filed within three years of the last day on which compensation was paid to claimant and was barred under the provisions of §86.34, Code of Iowa (1963).

Claimant's notice of appeal was filed November 21, 1978. On November 22, 1978 claimant was notified to file the transcript of the hearing within thirty days of the filing of the appeal. An order filed by this commissioner on December 29, 1978 noted that no transcript nor request for extension of time had been filed by claimant. In that order, claimant was notified that if the transcript was not filed by January 5, 1978 [sic] claimant's appeal would be dismissed.

Claimant's motion for continuance was filed January 5, 1979 requesting an extension of time in which to file the transcript to January 25, 1979. The continuance was approved on January 5, 1979.

At this time no transcript has been filed nor further communication been received from claimant.

THEREFORE, it is ordered that claimant's appeal be and is hereby dismissed.

Signed and filed this 12th day of February 1979.

ROBERT C. LANDESS
Industrial Commissioner

No Appeal

ROBERT G. ADAMS,

Claimant,

vs.

HAPPEL & SONS, INC.,

Employer,

and

FEDERATED INSURANCE,

Insurance Carrier,
Defendants.

Review - Reopening Decision

This is the second proceeding in review-reopening brought by Robert G. Adams, the claimant, against Happell & Sons, Inc., his employer, and Federated Insurance, the insurance carrier, to recover additional benefits under the Iowa Workmen's Compensation Act by virtue of an industrial injury which occurred on November 8, 1975.

* * *

The issue requiring determination is the nature and extent of the claimant's disability, if any, chargeable to the defendants as a result of the industrial injury under consideration.

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

Claimant, who injured his spine while attempting to lift a three hundred fifty (350) pound flywheel, presently age 30, single, has not performed acts of gainful employment since the initial hearing of December 1, 1976. Defendants ceased payments to the claimant on June 30, 1976.

The claimant has the burden of proving by a preponderance of the evidence that the injury of November 8, 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 medical evidence produced by the defendant from the claimant's attending physician, W. John Robb, M.D., appears in this record in the form of two evidentiary depositions taken January 13, 1977 and September 12, 1978. Dr. Robb found that the claimant had a congenital abnormality at L4-L5 lumbar and that this defect was aggravated by the industrial injury under consideration, requiring a course of traction and conservative management. Dr. Robb also prescribed a brace, but the claimant's condition failed to improve due to "muscular strain and not to the defect present". (January 13, 1977 Depo. p 20, l. 4). Dr. Robb recommended an exercise program together with swimming. This attempt to improve the claimant's general muscle tone failed due to the pain such required movement produced. Thereupon Dr. Robb recommended to the claimant that he cease some of the exercise program. (September 13, 1978, Depo. p. 10, l. 13).

Dr. Robb saw the claimant on May 30, 1978 and noted no change in his objective findings. In summary, Dr. Robb recommends surgical intervention at L-4, L-5 consisting of a bony fusion so as to stabilize the spondylolisthesis and thereby reduce the symptoms. (Depo. p. 15, l. 12). (Depo. p. 21, l. 16).

The claimant refuses the defendant's offer of surgery. The issue thus presented by this refusal is a narrow one, to

wit: Is a refusal on the part of this claimant to submit to further diagnostic procedures and curative treatment so unreasonable as to cause him to forfeit the right to any compensation for the period of such refusal? Larson, in his treatise Workmen's Compensation Law, vol. (§13.22 (1978 ed.) at 3-398) discusses reasonableness thusly saying, it "resolves itself into a weighing of the probability of the treatment's successfully reducing the disability by a significant amount, against the risk of the treatment to the claimant." The issue was presented to the Iowa Supreme Court in the case of *Stufflebean v. City of Fort Dodge,* 233 Iowa 438, 9 N.W.2d 281 (1943). In that case the Supreme Court affirmed the Industrial Commissioner's finding that claimant's refusal to submit to surgery was not so unreasonable as to forfeit his right to compensation. It was also determined that if claimant failed to submit within a reasonable time, defendant would not be required to provide treatment.

The medical evidence and testimony clearly indicate that the claimant's condition is very unstable. The medical evidence further indicates that surgery could reduce this claimant's permanent partial disability and that the surgery as contemplated by Dr. Robb is successful in 60-65% of the cases, with 30% representing a status quo and 10% "going downhill". (Depo. p. 22, l. 5). The myleogram graphic procedure would assist Dr. Robb in determining whether or not the claimant has a disc involved with the resultant nerve root involvement. (Depo. p. 29, l. 5). Neither Dr. Robb nor Dr. Donald D. Castle, the examining neurologist, shed much light on the fighting issue presented in this matter, to wit: Their opinion as to the extent of the claimant's functional impairment after successful surgery.

We at this point confirm the claimant's right to refuse an offer of medical care. The claimant's refusal, which is held to be reasonable, however, does present a troublesome problem to this department. The offer of care by defendants meets the statutory obligation under Iowa Code, §85.27. Claimant's subsequent refusal creates an undue burden upon the defendants since it frustrates the employer's duty to provide reasonable medical services and hospital care to employees as required of him by §85.27.

It should be noted that §85.27 does not contain language which restricts the length of time that such medical care must be provided by the defendants. It follows then, that when the employer's attempt to improve the claimant's physical condition is being thwarted by claimant's refusal, the employer finds himself in a position of being asked to maintain this offer of care open for as long as the claimant chooses to remain steadfast in his refusal of care. This does not appear to be an evenhanded approach to a resolution of this problem. With the claimant's rejection of this offer, the defendants' obligation to provide hospital and medical care appears to have been discharged.

The award made in this matter reflects this deputy's best judgment as to the extent of the claimant's disability chargeable to this employer, and is not a reduction of the claimant's entitlement of industrial disability. See Larson, *supra.*

While a claimant is not entitled to compensation for the results of a preexisting injury or disease, the mere existence at the time of a subsequent injury is not a defense. If the claimant had a preexisting condition or disability that is aggravated, accelerated, worsened or "lighted up" so it results in a disability found to exist, he is entitled to compensation to the extent of the injury. *Yeager v. Firestone Tire & Rubber Company*, 253 Iowa 369, 112 N.W.2d 299. *Nicks v. Davenport Produce Co.*, 254 Iowa 130, 115 N.W.2d 812.

Based upon personal observation of the claimant, the undersigned agrees with Dr. Robb in his assessment of the claimant's veracity, in that the claimant's complaints of pain are valid and believable.

In light of the foregoing principles, it is concluded that the claimant's disability is caused by the aggravation to the preexisting congenital abnormality which occurred in November 8, 1975.

Functional disability is an element to be considered in determining industrial disability which is the reduction of earning capacity, but consideration must also be given to the injured employee's age, education, qualifications, experience and inability to engage in employment for which he is fitted. *Olson v. Goodyear Service Stores,* 255 Iowa 1112, 125 N.W.2d 251 (1963); *Barton v. Nevada Poultry,* 253 Iowa 285, 110 N.W.2d 660 (1961).

In view of the above rule of law, it is concluded that this 30-year-old male, who does not have a high school education, whose work experience is limited to hard labor and whose physical disability limits him to light or sedentary work, has sustained an industrial disability of 25%.

The claimant's healing period is found to have ended on June 10, 1977, being the day that Dr. Robb suspended the exercise program previously prescribed. (Depo. p. 8, l. 12).

* * *

Signed and filed this 16th day of February, 1979

HELMUT MUELLER
Deputy Industrial Commissioner

No Appeal

ELLIS BEN ADAMSON,

Claimant,

vs.

CROSSROADS FORD, INC.,

Employer,

and

LIBERTY MUTUAL INSURANCE,

Insurance Carrier,
Defendants.

Appeal Decision

Claimant appeals a review-reopening decision filed Octo-

ber 12, 1978 wherein he was denied compensation benefits but was awarded medical and mileage expenses.

* * *

On October 15, 1973 claimant injured his back while working for defendant employer. The workers' compensation carrier, Liberty Mutual, paid claimant $91 per week for the injury. In addition, claimant received $9 per week from Bankers Life for a disability plan qualified under section 85.38, Code 1973. When Dr. Walker released claimant to return to work on February 16, 1974, defendants terminated claimant's workers' compensation. The date of last payment of compensation was February 21, 1974.

Due to a problem with bleeding ulcers, which were not work related, claimant did not return to work on February 16, 1974. He did return to work on June 1, 1974. Between the date of last payment of workers' compensation until June 1, 1974, claimant received one check per week in the amount of $100 from Bankers Life under the disability plan.

After returning to work in June, 1974, claimant continued to work for defendant employer until September 22, 1975. On September 22, 1975 claimant experienced further problems with his back when he attempted to clean debris from a drainage trench surrounding the garage at his home. His wife reported the injury to the employer and informed the employer that the injury occurred at home. Claimant received $100 per week for 26 weeks after this injury. Claimant testified that at the time he received these checks Bankers Life was paying them, and that he knew Bankers Life was providing disability insurance and not workers' compensation. (Transcript, page 68) Due to his condition, claimant has not returned to any gainful employment since the September 22, 1975 incident.

On reviewing the record, it is found that the deputy found correctly that the September, 1975 back problems were proximately caused by the injury on October 15, 1973, entitling claimant to benefits provided in section 85.27, Code 1973. (See also section 86.34, Code 1973 as amended by 65 GA, Ch 144 28.) DeShaw v. Energy Mfg. Co., 192 N.W.2d 777 (Iowa 1972); Langford v. Kellar Excavating, 191 N.W.2d 667 (Iowa 1971)

The claimant last received disability plan benefits from the defendant in March, 1976. The petition for review-reopening was filed by the claimant on March 22, 1977. Under section 86.34, Code 1973 as amended, a review-reopening must be brought within three years from the date claimant last received compensation. The petition for review-reopening was filed over three years since claimant last received workers' compensation on February 21, 1974 but less than three years from the last date claimant received disability benefits from Bankers Life.

The issue on appeal is whether payment under a disability plan qualified under Iowa Code, section 85.38, can be construed as payment of compensation under Iowa Code section 86.13, and if so, whether defendants' failure to file a memorandum of agreement within thirty days after payment of weekly compensation began tolled the statute of limitations under section 86.34, Code 1973, as amended.

The issues in this case are similar to the issues in Carr v. John Deere Waterloo Tractor Works (Decision of Iowa Industrial Commissioner filed September 27, 1978) and Makedonski v. The Rath Packing Company (Decision of Iowa Industrial Commissioner filed May 18, 1979). In those cases it was found that there must be evidence that either the employer intended payments to be on account of workers' compensation liability, or that the employee believed them to be so intended for a payment to be construed as a payment of compensation under Iowa Code section 86.13. It was also found that the Iowa Workers' Compensation Act does not contemplate the filing of a memorandum of agreement in the event an employee is paid for reasons other than a workers' compensation liability. Here, the record reveals that the employer never intended the disability plan benefits paid during the bleeding ulcers episode after the first injury, nor the benefits paid after the second injury to be on account of workers' compensation liability. See also H. Raymond Smith v. Walnut Grove Products, et al, 32nd Biennial Report of the Industrial Commissioner, p. 70; and Charles W. Howard v. John Deere Waterloo Tractor Works, 33rd Biennial Report of the Industrial Commissioner, p. 170.

When claimant injured his back in 1973, the employer paid workers' compensation benefits plus disability plan benefits. The compensation benefits ceased when defendants received the report from John R. Walker, M.D., releasing the claimant to return to work. When claimant injured his back in September, 1975, the employer paid disability plan benefits in light of the phone call from claimant's wife informing the employer that claimant had injured his back at home. Thus, it is clear that the employer did not intend for the disability plan benefits to be on account of workers' compensation liability, because of the belief that claimant's problems were due to nonwork related incidents.

The claimant testified in the original proceeding that he knew he was receiving disability plan benefits rather than workers' compensation benefits after the 1975 incident. He further testified that he was aware that a workers' compensation claim had to be reopened within three years of the last payment of compensation. Claimant argues, however, that he believed he received two checks per week after the 1973 incident until he returned to work in June, 1974, which included the workers' compensation benefits as well as the disability plan benefits. Based on claimant's testimony that he knew Liberty Mutual provided workers' compensation benefits, that Bankers Life provided disability plan benefits, that he received the benefits in two separate checks, and that he read and signed the checks himself indicates that claimant knew or should have known when the workers' compensation benefits ceased.

Since the defendants did not intend the disability plan benefits to be on account of workers' compensation liability, and the claimant did not believe the benefits were so intended, the defendants' disability plan cannot be construed as a payment of compensation under the Iowa Code section 86.13. The statute of limitation under Iowa Code section 86.34 was not tolled by defendants' failure to file a memorandum of agreement because claimant was paid for reasons other than workers' compensation liability

under Iowa Code 86.13.

Claimant further argues that the doctrine of equitable estoppel prevents the running of the statute of limitations in Code section 86.34. 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 defendants falsely represented or concealed a material fact. The facts here presented do not show that defendants did either. Claimant was aware of the three-year statute of limitations. He knew the difference between workers' compensation and disability plan benefits, and knew when he received each of these. There was no false representation or concealment of a material fact on the part of the defendants. Since a failure to prove one required element prevents claimant from asserting defendants are 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.

* * *

Signed and filed this 31st day of October, 1979.

ROBERT C. LANDESS
Industrial Commissioner

Appeal to District Court 11/1/79.

NORMA ALI,

Claimant,

vs.

MASSEY-FERGUSON,

Employer,

and

SENTRY INSURANCE COMPANY,

Insurance Carrier,
Defendants.

Ruling

This matter again comes before the undersigned deputy industrial commissioner for determination of claimant's post-hearing Motion to Reopen Record to Amend Petition to Conform to the Proof filed on March 7, 1980. Defendants' Resistance to Motion to Reopen Record was filed on the same date March 7, 1980 and by additional motions filed on August 10, 1980.

Said Motion concerns the right of the claimant to amend her pleadings to conform to the evidence presented at the hearings, after conclusion of the case but before final disposition and entry of decision.

Claimant contends, based upon Rule 88, Iowa Rules of Civil Procedure, leave to amend should be liberally interpreted and "freely given when justice so requires." An amendment should not be allowed when it substantially changes the issues. In citing case precedent, *Beneficial Finance Company of Black Hawk County v. Reed,* 212 N.W.2d 454 (1973) and *Ackerman v. Lauver,* 242 N.W.2d 342 (1976), claimant argues there is sufficient authority showing that Rule 88, Iowa Rules of Civil Procedure, has always received liberal interpretation and amendments are the rule and denial the exception. Additionally, amendments to conform to the proof may be allowed anytime before the case is finally decided.

Defendants, conversely argue that to permit claimant to amend to conform to proof at this point in the proceeding, after final briefs were submitted and after conclusion of the evidence, would be untimely and create a hardship on the defendants.

Furthermore, defendants contend that to allow such amendment would substantially change the claim (or issues) so as to assert a new cause of action or injury not contemplated by the defense.

For authority defendants cite *Storm v. City of Council Bluffs,* 189 N.W.2d 522 (Iowa 1971) and *Roby v. John Deere Waterloo Tractor Works,* 31st Biennial Report of the Commissioner at page 95, and *Carter v. Maytag Co. and Travelers Insurance Company,* 32nd Biennial Report of the Commissioner at page 216. See also the dissent in *DeShaw v. Energy Mfg. Co.,* 192 N.W.2d 777 (1971).

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, supra,* 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. In the absence of a specific rule of the Industrial Commissioner concerning amendments the Iowa Rules of Civil Procedure apply. See Section 17A.22, Code of Iowa (Iowa Administrative Code) and Iowa Industrial Commissioner's Rule 500-4.35.

Rule 88, Iowa Rules of Civil Procedures, is relevant to this case. Rule 88 states:

> Amendments. 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 in 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. Leave to amend, including leave to amend to conform to the proof, shall be freely given when justice so requires.

Clearly, a denial of an amendment to conform to proof is common only when it substantially changes the issues of the case. When considering this case it is found the contemplated amendment by claimant does not change the issues. Specifically, one of the issues was extent of disability arising from claimant's injury in February and March 1977. The fact that claimant alleges a separate injury of February 24, 1977 and a separate injury for March 21, 1977 does not change the liability issue where only slightly over a month is involved between the episodes. The short lapse of time between injuries is not found to be significant or material to the overall claim of disability. Additionally, defendants have admitted for an injury date of March 3, 1977 creating a dispute between the parties as to the applicable injury. The injury and disability claimed from both injuries are to the low back. Indeed, the employer has confused the issues by admitting a date not claimed by the claimant. Nevertheless, claimant asserts, and her new evidence shows, both injuries contributed to her present low back disability and arose out of and in the course of the same employment. **Smith v. Village Enterprises, Inc.,** 208 N.W.2d 35 (Iowa (1973) and *Galbraith v. George,* 217 N.W.2d 598 (Iowa 1974).

The cases of *Roby, supra,* and *Carter, supra* are distinguishable in that they referred to prior Industrial Commissioner's Rule on amendments. Additionally, Rule 88, Iowa Rules of Civil Procedures, was amended in 1977.

It is concluded therefore that no new cause of action is asserted by the claimant. The issues arising from the low back injuries are of such a nature that they form an integral part of the review-reopening proceedings. As such they ordinarily would be consolidated pursuant to Industrial Commissioner's Rule 500-4.2.

WHEREFORE, it is found that claimant should be granted leave to amend her pleadings to conform to the proof.

THEREFORE, claimant is permitted to reopen this matter for the purpose of amending her petition to allege the injury date of March 21, 1977 in order to conform to the proof. Said amendment is to be filed on or before twenty (20) days after the entry and filing of this ruling. And, thereafter, defendants may have a like period to amend their Answer.

Signed and filed this 17th day of April, 1980.

THOMAS R. MOELLER
Deputy Industrial Commissioner

Appealed to Commissioner; dismissed.
Appealed to District Court; pending.

HARRY DANOLD ALLEN,

Claimant,

vs.

THE SECOND INJURY FUND, STATE OF IOWA,

Defendants.

Review-Reopening Decision

INTRODUCTION

This is a proceeding in review-reopening brought by Harry Darold Allen, claimant, against the Second Injury Fund, State of Iowa, defendants, for the recovery of further benefits as the result of multiple injuries, the last being on August 27, 1970.

* * *

FACTS

Claimant has been employed as a lineman by Iowa Electric Light and Power Company (hereafter referred to as employer) since December 1, 1951. On February 9, 1957, while working part-time for the fire department for the town of Arnolds Park, he received an injury to his left knee when he slipped and fell on a sharp piece of ice. Claimant testified he saw J. J. Buchanan, M.D., who aspirated his knee several times. Claimant remained off work for one month. Claimant stated that the following Spring he was working as a lineman on a telephone pole when his knee popped out of joint. Claimant indicated that he got off of the pole and walked until the knee snapped back into place. Because of the swelling, he returned to Dr. Buchanan who referred claimant to Arch O'Donoghue, M.D. and Edmund S. Donohue, M.D. On May 31, 1957 Drs. O'Donoghue and Donohue performed an arthrotomy on claimant's left knee. The June 21, 1978 report of Mrs. Helen Smith, Medical Records Clerk of Marian Health Center, states:

> Pentothal, tourniquet, tincture mercrosin, routine mesial approach to the knee, it is filled with fluid but not blood, dissection reveals a complete tear of the mesial meniscus from the coronary ligament starting at the posterior pole and running two-thirds of the way to the anterior pole, the loose portion flapping around in the joint. The entire cartilage is removed together with some of the fat pad. The patella is inspected and there are no chondral changes. The pouch is ruptured and the wound closed in layers.

Claimant testified that he returned to work and continued to work as a lineman with the same duties as before his injury. Claimant stated that after his knee injury he favored his left leg and put most of his weight on his right leg when on a pole. The evidence also discloses that from 1957 until 1967 claimant had three back fusions because of injuries to his back. Even after these back injuries, claimant was released to return to work.

On August 26, 1970 claimant received an injury arising out of and in the course of his employment with employer. While pulling a pole from a hole, claimant tried to direct the pole's descent and was flipped 12 feet off the ground, but landed on his feet on a steep incline. Claimant was immediately taken to the hospital and x-rays were taken

which showed that claimant's right heel was shattered. Claimant's right heel required several operations. In June of 1975 employer terminated claimant's employment.

ISSUES

The issues presented by the parties at the time of hearing were whether claimant satisfied the entry requirements of Section 85.64 and whether the prior injury to claimant's left knee, which was in 1957, in any way contributes to his industrial disability if Section 85.64 applies.

APPLICABLE LAW

The claimant has the burden of proving by a preponderance of the evidence that a specific injury is the cause of the disability on which he now bases his claim. *Lindahl v. L.O. Boggs,* 236 Iowa 296, 18 N.W.2d 607 (1945); *Bodish v. Fischer, Inc.,* 257 Iowa 516, 133 N.W.2d 867 (1965). 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 testimony. *Bradshaw v. Iowa Methodist Hospital,* 251 Iowa 375, 101 N.W.2d 167 (1960). However, expert evidence must be considered with all other evidence introduced bearing on the causal connection. *Burt v. John Deer Waterloo Tractor Works, supra.*

Section 85.64 reads as follows:

> 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.

ANALYSIS

Although it would seem logical that claimant would have some permanent disability as a result of his 1957 knee injury, the only evidence which supports claimant's testimony that he had any permanent disability is claimant's exhibit J, the slip from S. W. Turay, M.D. Claimant's exhibit J does not meet the requirements of Iowa Industrial Commissioner Rule 500--4.17. It does not contain a history that includes the fall he had in 1970. Furthermore, the accuracy of claimant's exhibit J, which gives claimant a ten percent disability to his knee, is suspect in that it does not contain claimant's correct name, would indicate claimant's knee was injured in 1949 rather than 1957 and was given 22 years after the injury. For the above reasons, no weight is given claimant's exhibit J. After claimant recovered from his knee injury in 1957, he returned to the same job he did previously. More importantly, no evidence other than claimant's own testimony indicates that claimant ever complained about pain in his left knee until January 8, 1979 when he received the slip (claimant's exhibit J) from Dr. Turay. Although claimant had seen many doctors for his back problems and his right heel problems, none of the reports submitted indicate pain in claimant's left knee related to the 1957 injury. Joe F. Fellows, M.D., in his report of December 5, 1978, states:

> During that contact with Mr. Allen he gave no indication to me of any particular problem he was having with the left knee, nor did he indicate any prior difficulty with the left knee before his injury to the right heel.

F. Eberle Thornton, M.D., in his report of November 6, 1978, states:

> I did see Mr. Allen, October 7, 1971, in my private office 3801 Ingersoll, Des Moines, Iowa, at which time a letter of report was requested by B. C. Woodson, Safety Director, Iowa Electric Light and Power Company, Cedar Rapids, Iowa. At the time of that report, the patient's complaints to me referred only to his right heel. When I took his past history, no mention was made of any knee problem. You have a thermofax copy of this report, which I am enclosing with this letter.
>
> At no time can I find, either in my records or the thermofax records, that the patient had any problems with his knee. Even when I later saw this patient at Spirit Lake and Spencer when I was practicing up there, he did not mention his knee in any of his histories. Again, you have all this information in your thermofaxed copies.

Although claimant may have some permanent disability to his left knee, he has failed to show the same by a preponderance of the evidence and without proving the same is not entitled to recover pursuant to Section 85.64 in that he has not shown he has previously lost the use of a member.

The greater weight of evidence also discloses that any industrial disability that claimant has at this time is attributed to his injury in 1970. On July 30, 1957 J. J. Buchanan, M.D. had found claimant "fit to return to full occupational activity." In his report of April 1, 1975 R. D. Beckenbaugh, M.D. considered claimant "permanently and totally disabled from performing his previous work which involves climbing." In that report, Dr. Beckenbaugh only referred to claimant's injury of 1970. The January 20, 1976 report of Carroll B. Larson, M.D. also indicated claimant should not climb poles any longer, but did not mention claimant's left knee injury.

FINDINGS OF FACT

WHEREFORE, it is found claimant has failed to meet his burden in proving he received any permanent functional disability to his left knee or leg as a result of his injury in 1957.

Claimant has also failed to prove that he has any industrial disability that is not directly related to the injury

of 1970 when he injured his heel.

* * *

Signed and filed this 28th day of February, 1980.

DAVID E. LINDQUIST
Deputy Industrial Commissioner

No Appeal.

LYNN ANASTASI,

Claimant,

vs.

CHELSEA CORPORATION,

Employer,

and

UNITED STATES FIDELITY AND GUARANTY COMPANY,

Insurance Carrier,
Defendants.

Appeal Decision

This is an appeal by claimant from an order filed August 2, 1978 sustaining defendants' motion to dismiss claimant's application for arbitration.

* * *

Upon reviewing the pleadings, arguments of counsel and the law related thereto, it is found that Iowa Code section 85.26 as in effect at the time the action was commenced is applicable to this proceeding. As the action was not commenced within the time prescribed by the statute, it is therefore barred by the limitation applicable to original proceedings contained in section 85.26.

* * *

THEREFORE, claimant's petition for arbitration is dismissed.

Signed and filed this 29th day of December, 1978.

ROBERT C. LANDESS
Industrial Commissioner

Appealed to District Court:
Petition for Review dismissed.

JOYCE ANDERSON,

Claimant,

vs.

JACKSON COUNTY PUBLIC HOSPITAL,

Employer,

and

HARTFORD INSURANCE COMPANY,

Insurance Carrier,
Defendants.

Appeal Decision

Claimant has appealed from a proposed review-reopening decision wherein she was denied additional benefits.

* * *

The issues on appeal are: (1) whether claimant has established a causal connection between her claimed conditions of cellulitis, leg pain and back pain, and a work-related incident; and (2) whether claimant is entitled to additional benefits.

Claimant was working as a respiratory technician aide at Jackson County Public Hospital when on February 21, 1977 she received two electrical shocks from a lamp while reaching to unhook an oxygen hose. Claimant experienced a tingling sensation in her neck and arms and was sent to the emergency room of the hospital. When claimant arrived home that night she noticed a small abrasion type patch on the exterior side of her left ankle below the shoe line. The next day claimant's ankle began to swell.

Claimant saw Samuel Williams, D.O., who treated her conservatively with steroids for pain in her left leg and back. Dr. Williams made the following notation in his progress notes based on his examination of claimant:

> 2/23/77
>
> c/o cephalalgia in base of skull
> left ankle red and swollen
> BP - 124/60 pain from hip down leg
>
> O - There is an abscess in the left heel with a large amount of cellulitis. Pain at the posterior portion of the left leg. She has pain on palpation in C1-C2 area bilaterally.
>
> Heart is normal at this time.
>
> A - Abscess, possibly due to electrical shock on Monday.
>
> P - Bedrest. Keflex 500 q.i.d. Epson [sic] salt soaks. Reck on Friday. No work.

It should be noted that on January 3, 1977 the progress notes indicate that claimant had a callous verruca on the left foot.

Claimant then saw Paul Koob, D.O. and Richard Kreiter, M.D. Dr. Koob thought claimant had cellulitis in the left heel area and prescribed antibiotics, bed rest and hot packs. Dr. Kreiter noted claimant had a "painful left calf and Achilles area possibly secondary to resolving phlebitis or cellulitis or Achilles bursitis or tendinitis." Dr. Kreiter thought that swelling might have been associated with the electrical shock but might have occurred without a particular incident. In a report dated March 28, 1977, Dr. Koob noted Dr. Kreiter's evaluation and wrote that claimant no longer had any swelling or cellulitis. Dr. Koob further noted that claimant still had tenderness from the Achilles area up the posterior portion of the leg behind the knee and into

the posterior thigh. Dr. Koob suspected possible nerve root damage, so he referred claimant to Eugene Herzberger, M.D.

Dr. Herzberger examined claimant and based on complaints of persistent left sciatic pain suspected there might be nerve root compression due to a lumbar disc herniation. An EMG and nerve conduction velocity study were conducted and the results were all normal. Dr. Herzberger concluded that claimant's pain was a sequel to her cellulitis and the prognosis for recovery was good.

Claimant saw Dr. Madden, a specialist in internal medicine, on April 25, 1977. Dr. Madden diagnosed claimant's condition as post-shock myalgia and mild depression. Dr. Madden testified that claimant's primary complaints were of pain in the left leg and back. Based on claimant's history, Dr. Madden thought the pain claimant was experiencing in her calf and leg was related to the electric shocks. Dr. Madden noted that the only physical findings were tenderness of the calf, eczema and a blemish on the left foot. In his deposition Dr. Madden admitted that the abrasion on claimant's left foot could have been caused by a rubbing shoe. In a report dated April 25, 1977, Dr. Madden recommended that claimant remain off work for three months.

Dr. Williams essentially concurred with Dr. Madden's opinion and diagnosis in a letter dated August 26, 1977. Dr. Williams also wrote the following: "The effect of this [post-shock myalgia] did incapacitate the patient and make her unable to work for some time. (An exact date I am unable to give you at this time.)"

According to claimant's own testimony, she attempted to return to work on July 18, 1977, but only worked for one and three-quarter days.

On August 15, 1977 claimant entered Jackson County Hospital with complaints of back pain. She received physical therapy while in the hospital and was discharged on August 22, 1977. Claimant quit her job on August 24, 1977 because she was not getting enough hours towards her certification as a respiratory technician and she was having problems with her back.

Claimant was not employed again until November or December of 1978 when she received a job at Jane Lamb Memorial Hospital. The record is not clear as to what claimant did between August, 1977 and November, 1978, except for the summer of 1978 when claimant had more back problems. In July, 1978 claimant did some gardening and ten days later developed a sore back. Dr. Kreiter saw claimant and reported a lumbar disc syndrome with sciatica on the left side. Dr. Kreiter attributed the back problems to the gardening.

On November 7, 1978 claimant saw Dr. Jarrett, who specializes in physical medicine and rehabilitation. Dr. Jarrett diagnosed claimant's problem as probable deconditioned low back. He recommended that claimant discontinue use of a back support and start doing vigorous exercises. Dr. Jarrett testified that claimant told him the back pain started ten days after receiving the electrical shocks. Dr. Jarrett did not think claimant's back problems were related to the electrical shocks because her back did not start to hurt immediately after the incident.

Claimant has the burden of proving by a preponderance of the evidence that the electrical shocks received on February 21, 1977 are the cause of her disability on which she now bases her claim. *Bodish v. Fischer, Inc.*, 257 Iowa 516, 133 N.W.2d 867 (1965); *Lindahl v. L. O. Boggs Co.*, 236 Iowa 296, 18 N.W.2d 607 (1945). A possibility is insufficient to establish causal connection; 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).

Temporary total disability does not necessarily contemplate that all residuals from an injury must be completely healed and returned to normal. It is only when the evidence shows that because of the effects of the injury gainful employment cannot be pursued. *Kline v. K-Mart Division*, Appeal Decision (Industrial Commissioner, Oct. 19, 1979).

The deputy concluded that claimant failed to produce competent medical evidence to establish a causal connection between the electrical shocks and the disability on which she now bases her claim. In her brief on appeal, claimant contests the deputy's proposed decision on three grounds.

First, claimant contends that the deputy in his decision did not record the correct chronology of events and used wording from the evidence which was taken out of context. A careful review of the deputy's decision shows that a strict chronological order of events was not reported. However, this had little, if any, bearing on the outcome of the deputy's decision. The deputy reported all the crucial facts presented in the evidence. The facts have been re-reported in this decision in hope of clearing up any confusion that may have resulted from the deputy's proposed decision. Claimant also contends that certain wording was taken out of context -- specifically, claimant refers to the August 26, 1977 letter of Dr. Williams which was quoted in relevant part earlier in this decision. In paraphrasing the report, the deputy used different wording. Upon review of the deputy's proposed decision, the change in wording was not crucial to the ultimate findings. Therefore, there is no reason to reverse the deputy's decision on claimant's first contention.

Second, claimant contends that the deputy was incorrect in finding that she failed to present medical evidence which would causally connect the electrical shocks with the foot, leg and back problems.

Dr. Madden thought the leg pain was related to the electrical shocks. Dr. Kreiter thought the swelling might have been associated with the electrical shocks but also indicated that the swelling might have occurred without a particular incident.

Defendants point out in their appeal brief that there were various diagnoses given for claimant's foot and leg problems. The diagnoses include cellulitis, Achilles tendinitis and phlebitis. Of these three diagnoses, only one, cellulitis, was thought to be possibly connected to the electrical shocks as stated in the progress notes from Dr. Williams and his colleagues at the Medical Associates of Maquoketa. A possibility is not sufficient to establish causal

connection.

Also, defendants contend that Dr. Madden's opinion must be given little weight because the doctor's description of how the electrical shocks entered and exited claimant's body was incorrect. It is impossible to tell from the record exactly how the electrical shocks entered and exited claimant's body. However, the precise injury mechanism is not crucial to Dr. Madden's opinion.

Based on Dr. Madden's opinion relating the pain or post-shock myalgia in claimant's leg to the electrical shocks, it is found that claimant has established a causal connection between the pain or post-shock myalgia and the electrical shocks. However, claimant has failed to establish a causal connection for the cellulitis, the Achilles tendinitis or the phlebitis.

In his report dated April 25, 1977 and in his testimony, Dr. Madden recommended that claimant not return to work for three months from the date of the examination. As mentioned earlier in this decision, claimant testified that she returned to work on July 18, 1977. Based on Dr. Madden's opinion and claimant's return-to-work date, claimant is entitled to temporary total disability compensation from February 22, 1977 through July 17, 1977.

Claimant has failed to establish a causal connection between the electrical shocks and her back pain. Claimant reported back and hip pain to several doctors, but none of these doctors indicated any causal connection between the back pain and the electrical shocks.

Third, claimant contends that the deputy was incorrect in stating that claimant attempted to return to work on July 18, 1977. However, claimant, in her own testimony, stated that she returned to work on July 18, 1977. Therefore, the deputy was correct in this determination.

* * *

Signed and filed this 19th day of November, 1979.

ROBERT C. LANDESS
Industrial Commissioner

No Appeal.

LUCILLE ANDERSON,

Claimant,

vs.

CARLON, A DIVISION OF INDIAN HEAD, INC.,

Employer,

and

COMMERCIAL UNION ASSURANCE COMPANY,

Insurance Carrier,
Defendants.

Ruling

BE IT REMEMBERED that on March 26, 1979 defendants herein filed a motion for protective order pursuant to Iowa Rule 123 of Civil Procedure and Industrial Commissioner Rule 500-4.35. Specifically, said motion prays the Industrial Commissioner enter an order granting defendants reasonable travel expenses and four hours of legal fees for attendance at the evidentiary deposition of Dr. Seymour Diamond, M.D., to be taken on behalf of the claimant at Foster-Western Medical Building in Chicago, Illinois. Defendants allege that Dr. Diamond is not a physician authorized to practice under the laws of Iowa in accordance with Code Section 85.39, that claimant could offer Dr. Diamond's already authored narrative reports into evidence, that claimant is forcing defendants to undergo considerable additional expense for transportation and fees in order to be represented by counsel at Dr. Diamond's deposition, that it would be in the interest of justice to permit the deposition to occur as scheduled and to require claimant to reimburse defendants' counsel for transportation and fees, and that precedence for their request can be found in a number of decisions and orders entered by deputy industrial commissioners during the course of litigation before the agency.

On April 2, 1979 claimant herein filed a resistance to motion for protective order alleging that after consultation with defendants' counsel, a time for the deposition in issue was mutually agreed upon by counsel, that Dr. Diamond's specialty concerns the causes and treatment of headaches, such as those being experienced by the claimant, that Iowa Rule 140 of Civil Procedure permits the claimant to take Dr. Diamond's deposition and does not require expenses to be paid to opposing counsel, that no Iowa Rule of Civil Procedure requires the presence of defendants' counsel at said deposition, that Iowa Rule 123 of Civil Procedure does not support defendants' motion and that Code section 85.39 does not prevent claimant from taking said deposition nor does it provide for expenses of opposing counsel.

The relevant portion of Iowa Rule 140 of Civil Procedure, upon which claimant relies, states that "[a]fter commencement of the action, any party may take the testimony of any person including a party, by deposition upon oral examination. Leave of court, granted with or without notice, must be obtained only if the plaintiff seeks to take a deposition prior to the expiration of ten days after the appearance date for any defendant . . . ." The file reveals that the qualification does not apply and that the deposition in issue does not otherwise require leave of court.

The relevant portion of Iowa Rule of Civil Procedure 123, upon which defendants rely, states "[u]pon motion by a party . . . and for good cause shown, the court in which the action is pending . . . may make any order which justice requires to protect a party . . . from . . . undue . . . expense, including one or more of the following: . . . ." The only provision that might allow the award of expenses such as those requested in the present proceeding would be subsection b which states that the court may make an order "[t]hat the discovery be had only on specified terms and conditions including a designation of the time or place."

General review of the Iowa Rules of Civil Procedure relating to depositions reveals no provision for requiring the party taking a deposition to pay transportation costs and fees of opposing counsel attending the deposition except when the party taking the deposition fails to attend or the deposition witness fails to appear due to the party's failure to subpoena him or her. Iowa Rules 140(c) and 157(b) of Civil Procedure.

* * *

Signed and filed this 10th day of April, 1979.

LEE M. JACKWIG
Deputy Industrial Commissioner

No Appeal.

LAVON ATKINSON,

Claimant,

vs.

WILLOW GARDENS CARE CENTER,

Employer,

and

UNITED FIRE & CASUALTY COMPANY and UNITED LIFE INSURANCE COMPANY,

Insurance Carrier,
Defendants.

Arbitration Decision

This is a proceeding in Arbitration brought by Lavon Atkinson, the claimant, against Willow Gardens Care Center, the employer, and United Fire & Casualty Company and United Life Insurance Company, the insurance carriers, to recover benefits under the Iowa Workers' Compensation Act by virtue of an incident which occurred on January 9, 1978.

* * *

The issue requiring determination is whether or not the admitted injury sustained by the claimant on the date in question arose out of and in the course of the claimant's employment activities on behalf of the defendant-employer.

The material facts in this case are not in dispute, and are found to be as follows, to wit:

Claimant, age 49, a Caggon, Iowa resident, a nurse's aid, had been so employed by the defendant-employer located in Marion, Iowa since August, 1977. On January 9, 1978, the claimant, working the 3:00 P.M. to 11:00 P.M. shift, was requested by a co-employee, Ann Harschberger, to assist her in starting the Harschberger vehicle. The weather was extremely cold and windy, the temperature being -20 degrees Fahrenheit. Due to weather conditions, the nursing home parking lot was very icy. Upon leaving the building at 10:45 P.M., the claimant, after having started her own motor vehicle, was standing nearby with her own set of "jumper cables" awaiting Mrs. Harschberger's successful attempt to push her own car closer to the claimant's vehicle so as to allow the cables to be properly placed. While so standing, the claimant slipped on the icy surface of the defendant-employer's parking lot, sustaining an injury to her right knee.

Section 85.61(6) Code of Iowa 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.

In applying the facts in this case to the foregoing language, it is clear that the claimant was in the course of her employment at the time of the injury since the injury occurred on the defendant-employers' premises. There remains the issue of whether the injury arose out of claimant's employment. The defendants urge that claimant's activities at the time of the injury had as their primary purpose, the personal benefit of Ann Harschberger, the co-employee, and thereby did not arise out of her employment.

We disagree. Neither claimant nor her co-employee reside in Marion, Iowa, and are necessarily required to journey to the defendants' place of business by use of private passenger cars. The use of private transportation was clearly contemplated by the defendant-employer at the time of the commencement of employment. No public transportation is available to employees during the 3:00 P.M. to 11:00 P.M. shift.

Although there are no Iowa cases involving Workmen's Compensation claims arising out of parking-lot injuries, other jurisdictions supply a logical basis for awarding compensation in such cases.

In *Buerkle v. United Parcel Post Service,* 26 N.J. Super. 404, 98 A.2d 327 (1953), the employer maintained a parking lot on his premises and the injured party after reaching a fellow employee's car to go home had to return to the building wherein he was employed to get a booster battery to start the car. The employee was injured when he slipped and fell on a patch of ice while carrying the battery back to the parking lot. The Court upheld an award of compensation stating at 98 A.2d 329:

> "An employee does not have to be actually engaged in work for the employer at the time of the accident . . ." "If the injury arises out of a risk which is reasonably incidental to the conditions and circumstances of the employment, the requirements for recovery are satisfied . . ." "It is not necessary that the particular accident or injuries be foreseen." "It is sufficient if they flowed as a rational consequence from a risk connected with the employment." Fenton v. Margate Bridge Co., . . ." "And the application of these rules to a particular case must be engaged in with the remedial objective of this social legislation in

mind . . .

The employer having established the parking lot, it is reasonable to charge him with the knowledge that an employee's automobile might have a flat tire or that its battery might become dead during the course of the working day and that some repair measures might be undertaken in order to accomplish the employee's departure from the premises. Therefore, in the circumstances present here the employee's act in obtaining the charger from the garage and carrying it from the very building in which he worked over the parking lot to the car did not take him out of the course of his employment . . ."

Also see *Maure v. Salem Company,* 146 S.E.2d 432 (North Carolina 1966) and *Bates v. Gulf States Utilities Company,* 193 So.2d 255 (Louisiana 1967).

The defendant-employer herein acquiesced in the action of its employees' allowing them to warm up their cars during severe weather conditions. Such conduct has been held not to be a deviation from employment. *Hatch v. Grand Union Company,* 769 N.Y.S. 269 (1966).

In applying the foregoing legal principles to the case at hand, it is found as a finding of fact that the claimant's injury arose out of her employment duties.

Based upon the stipulation of the parties, the claimant's weekly entitlement is found to be eighty-nine and 46/100 dollars ($89.46).

The medical evidence disclosed that the claimant tore her medical collateral ligament and medial meniscus as a result of this incident. (Cl. Ex. No. 1). Dr. L. C. Strathman, M.D., in his report, concluded that following surgical repair, the claimant has a 15 to 20 percent permanent partial disability of the right lower extremity.

* * *

Signed and filed this 18th day of April, 1979.

HELMUT MUELLER
Deputy Industrial Commissioner

Appealed to Commissioner: Affirmed.
SFA with short explanation.

LAVON B. ATKINSON,

Claimant,

vs.

WILLOW GARDENS CARE CENTER,

Employer,

and

UNITED FIRE & CASUALTY COMPANY and UNITED LIFE INSURANCE COMPANY,

Insurance Carrier,
Defendents.

Appeal Decision

Defendants have appealed from a proposed arbitration decision wherein claimant was awarded healing period benefits and permanent partial disability compensation.

* * *

The issue presented is whether the injury claimant sustained on January 9, 1978 arose out of and in the course of her employment.

Claimant injured her knee when she slipped on some ice in defendant-employer's parking lot while helping a co-employee start her car. This incident occurred before claimant finished her regular shift.

The parking lot where claimant was injured is owned and maintained by defendant-employer. It was a custom of the employees both to park their cars in the lot and to start their cars periodically throughout their shift during cold weather. Claimant testified that she always notified her immediate supervisor when she was going to start her car early.

It is found that claimant's injury of January 9, 1978 arose out of and in the course of her employment. *See Buerkle v. United Parcel Post Service,* 26 N.J. Super. 404, 98 A.2d 327 (1953).

* * *

Signed and filed this 23rd day of August, 1979.

ROBERT C. LANDESS
Industrial Commissioner

No Appeal.

DOUGLAS B. AUTEN,

Claimant,

vs.

CELOTEX CORPORATION,

Employer,

AETNA LIFE & CASUALTY,

Insurance Carrier,
Defendants.

85.39 Decision

BE IT REMEMBERED that on May 20, 1980 defendants having filed an application for physical examination and the claimant having filed no resistance thereto or request for hearing on said application as indicated in Industrial Commissioner Rule 500--4.4, the same comes on for determination.

Section 85.39, of the Code of Iowa, contains the following:

> After an injury, the employee, if so required by his employer, shall 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, without cost to the employee; but if the employee requests, he shall, at his own cost, be entitled to have a physician or physicians of his own selection present to participate in such examination. Whenever an employee is required to leave his work for which he is being paid wages to attend upon such requested examination, he shall be compensated at his regular rate for the time he shall have lost by reason thereof, and he shall be furnished transportation to and from the place of examination, or the employer may elect to pay him the reasonable cost of such transportation. The refusal of the employee to submit to such examination shall deprive him of the right to any compensation for the period of such refusal. When a right of compensation is thus suspended, no compensation shall be payable for the period of suspension.

It is clear from this portion of the section that defendants are entitled to have claimant examined by more than one physician and on more than one occasion.

Contrary to defendants' request, the undersigned lacks the authority to force claimant to have an examination but can suspend compensation for the period of claimant's refusal.

WHEREFORE, IT IS FOUND that claimant has refused an examination requested by defendants' designated physician and continues said refusal.

THEREFORE, claimant's right to compensation is suspended as of the date of this decision and shall continue for the period of his refusal to be examined by defendants' physician.

* * *

Signed and filed this 17th day of June, 1980.

DAVID E. LINQUIST
Deputy Industrial Commissioner

No Appeal.

PATRICIA AUXIER,

Claimant,

vs.

WOODWARD STATE HOSPITAL,

Employer,

and

THE STATE OF IOWA,

Insurer,
Defendants.

Appeal Decision

This is a proceeding brought by defendant, Woodward State Hospital-School, and its insurer, The State of Iowa, appealing a proposed review-reopening decision wherein claimant was awarded permanent partial disability compensation, healing period compensation, and seventy percent of certain medical expenses.

* * *

On June 7, 1971, the employer defendant filed a memorandum of agreement in which claimant was paid $47.81 for 113 weeks. Payments were stopped on August 2, 1973. Claimant then filed an application for review-reopening on September 14, 1973.

On November 20, 1974, a deputy industrial commissioner rendered a decision in a review-reopening proceeding. In that decision the deputy found that claimant had sustained an industrial injury on May 26, 1971 which resulted in a permanent partial disability to her body as a whole in the amount of fifteen percent. Furthermore, the deputy found that claimant was entitled to 45 weeks of healing period compensation. Thus claimant was awarded 75 weeks of permanent partial disability at the rate of $56 per week and 45 weeks of healing period compensation at the rate of $57.39 per week. Claimant was also awarded certain medical expenses and interest.

Claimant appealed to the district court, which ruled as a matter of law that claimant is entitled to a hearing prior to termination of weekly compensation. The court then ordered that compensation be paid to claimant for the period of August 1, 1973 to November 20, 1974. The court also ordered a "running award" for 300 weeks or until such time that defendants at a hearing establish that temporary disability has terminated or that claimant has a permanent disability.

While the case was on appeal to the Iowa Supreme Court, a deputy industrial commissioner rendered a decision on a second review-reopening proceeding on April 29, 1977. That decision is the subject matter of this appeal. The deputy duly noted the decision of the district court but chose to rely on the previous deputy's decision as to the finding of permanency, because the case at that time was on appeal to the supreme court and not finally determined. The deputy found that there was a change of condition and increased the permanent partial disability rating to thirty percent and increased the healing period 90 weeks. Thus claimant was awarded a total of 150 weeks of permanent partial disability compensation at the rate of $56 per week and 90 weeks of healing period compensation at the rate of $57.39 per week. This award was to be set off by any amounts previously paid. Claimant was also awarded seventy percent of certain medical expenses.

The Iowa Supreme Court upheld the district court's decision in the first proceeding, finding that the record did not support a finding of any permanent disability. The supreme court further found that the defendants' challenge to the district court's allowance of a running award was without merit. In light of the supreme court's decision the deputies' decisions on permanency no longer have any force and effect.

Since the deputy's decision in the second review-reopening proceeding was based in part on the findings of the first review-reopening, the decision to that extent was premised

on an erroneous hypothesis. Normally, in such a case the proper channel would be to remand the case to the deputy for an appropriate finding and award. However, as this would only cause further delay and as a third review-reopening is pending, it has been determined that the status of the claimant through the second review-reopening will be decided herein. The supreme court impliedly adopted the district court's finding that the claimant was entitled to temporary disability benefits until (1) claimant's temporary benefits had terminated or (2) claimant had become permanently disabled.

The issue, then, is: Has the temporary disability terminated or has a permanent disability been established? If neither of these is found, then the temporary benefits must continue until either is later established at a hearing or 300 weeks of benefits are paid.

The hearing on the second review-reopening commenced in August 1976. Due to intervening matters the record was not closed until late January 1977. The decision was rendered April 29, 1977. Computation discloses that 300 weeks of benefits commencing with the date of injury, May 26, 1971, would be paid out on February 23, 1977, which is before the date of the second review-reopening decision. It is therefore necessary to determine if the claimant's temporary total disability concluded prior to that time.

The testimony of Dr. Bunten establishes that claimant's condition was essentially the same between 1974 and 1975. Therefore, claimant's disability, which has been determined by the courts to be temporary in nature, continued as such during that period.

Although neither Dr. Bakody nor Dr. Jones was willing to give a rating of claimant's permanent functional impairment, both doctors concluded that claimant did have a permanent disability. Dr. Bakody performed surgery on the claimant March 30, 1976. Dr. Bakody, subsequent to the surgery, was of the opinion that claimant does have permanent physical impairment of the low back as related to her industrial capacity or lack thereof; and that the condition for which he saw claimant was the result of the May 1971 work incident. Dr. Bakody in his deposition of August 16, 1976 believed it reasonable to conclude that claimant was at that time totally disabled and that he was unable at that time to determine when claimant may be able to become gainfully employed.

Dr. Jones in his deposition of August 16, 1976 was of the opinion that claimant does have some permanent physical impairment and, assuming her symptoms to be unchanged, that she was at that time totally disabled from some enumerated employment activities in which she had previously engaged.

These opinions of Drs. Bakody and Jones would lead to the conclusion that the onset of claimant's permanent disability would necessarily date from the surgery of March 30, 1976. As a result, claimant's temporary disability would cease at that time.

Claimant sustained her injury on May 26, 1971 and is subject to the law applicable at that time.

Code of Iowa 1971 provides:

85.33 *Temporary disability.* The employer shall pay to the employee for injury producing temporary disability . . . weekly compensation benefit payments for a period not exceeding three hundred weeks . . . .

85.34 *Permanent disabilities.* Compensation for permanent disabilities and during a healing period for scheduled permanent partial disabilities shall be payable to an employee as provided in this section. In the event weekly compensation had been paid to any person *under any provision of this chapter . . . other than as required by subsections 1 and 2* hereof, *for the same injury* producing a permanent partial disability, any *such amounts so paid shall be deducted from the total amount of compensation payable* for such permanent partial disability.

1. *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 . . . beginning on the date of the injury . . . . In the unusual case . . . the commissioner may . . . extend the healing period . . . but not beyond a total of sixty percent (of the period during which weekly compensation is required to be paid for permanent partial disability).

* * * *

2. *Permanent partial disability.* Compensation for permanent partial disability shall begin at the termination of the healing period provided in subsection 1 hereof. * * *

3. *Permanent total disability.* * * * In the event compensation has been paid to any person under any provision of this chapter . . . 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.* (emphasis supplied)

As the claimant continued to be incapacitated from gainful employment, compensation benefits should continue as healing period through February 23, 1977 unless degree of permanency can be established prior to that time. This date is selected because in no event could the healing period benefits extend beyond this date as even a subsequent finding of the greatest degree of permanent partial disability imaginable would not lend itself to a healing period in excess of 300 weeks.

The record in this case does not lend itself to a determination of the degree of claimant's permanent disability. As a third review-reopening proceeding for this same injury is pending, the degree of such permanent disability, be it partial or total, will be left for determination in that proceeding. Whatever that determination may be, amounts previously paid or awarded will be credited against such permanent partial and healing period or permanent total award as set out in the above quoted statutory sections.

It is further found that the deputy's decision that the defendants were to pay only seventy percent of the medical expenses contained in the hospital bill of Mary Greeley

Memorial Hospital and Dr. Baird is reasonable as the 1971 work injury was not the sole cause of claimant's medical problems that are now in dispute.

In addition to the medical expenses awarded by the deputy, it is found that the bill from Drs. Bakody and Jones amounting to $765 which the deputy mentioned but failed to award is compensable in full as the testimony reveals that all of their treatment was for conditions related to the 1971 injury. Also, claimant is entitled to $336 of a Dr. Bunten bill of $499. The remainder of the bill appears to be for treatment following an unrelated fall and an automobile accident. The Mercy Hospital bills are also totally compensable as the expenses are related to the treatment by Drs. Bakody and Jones.

Defendants' application for taxation of costs is overruled.

THEREFORE, it is ordered:

That defendants pay to claimant the following medical expenses:

Dr. Baird	$ 9.00 x 70% =	$ 6.30
Mary Greeley Memorial Hospital	$1,780.90 x 70% =	$1,252.30
Mercy Hospital		13.00
Mercy Hospital		$2,808.81
Drs. Bakody and Jones		$ 765.00
Dr. Bunten		$ 336.00

That defendants pay to claimant in lump sum any accrued benefits which have not already been paid to claimant along with interest as contemplated by Iowa Code §85.30 (1971).

That costs of this proceeding are taxed to the defendants.

* * *

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

ROBERT C. LANDESS
Industrial Commissioner

No Appeal.

CARL L. BAKER,

Claimant,

vs.

EBASCO SERVICES, INC.,

Employer,

and

UNITED STATES FIDELITY and GUARANTY COMPANY,

Insurance Carrier,
Defendants.

Review-Reopening Decision

This matter came on for hearing at the Woodbury County Courthouse on December 8, 1978 and was fully submitted on January 29, 1979.

* * *

The issue for determination is the amount of permanent partial disability had by the claimant in addition to the healing period entitlement.

Claimant received an injury arising out of and in the course of his employment on January 4, 1977 when he hurt his back as he was setting a template into an inlet. The claimant had prior back injuries and had seen the company physician. He had injured his back in February, 1976, and missed work for about two weeks. He had injuries to his back in July and November, 1976 but did not miss any work. After the January, 1977 injury, the claimant noticed that his pain was worse and that he had numbness down the back of his right leg. He went to the nurse, who arranged for an appointment for the claimant to see Alan Pechacek, M.D., an orthopedic surgeon. Although claimant did not immediately leave work, the record fairly indicates that he physically reported to work each day but did little in the performance of actual duties.

He saw Dr. Pechacek on January 7, 1977. X-rays revealed a grade one spondylolisthesis at the lumbosacral junction. Dr. Pechacek prescribed a back brace, told the claimant not to work and advised the claimant to get as much bed rest as possible. The claimant saw Dr. Pechacek in January and February, 1977 and no improvement was noted. The claimant was hospitalized on February 28, 1977 to March 15, 1977. He was treated with traction, heat, massage and muscle relaxants. Upon his release he noted some improvement, but his condition worsened and he was rehospitalized on March 30, 1977. A myelogram showed a disc protrusion at the L-3/L-4 level on the right, and narrowing of the vertebral canal over the L-5 area with encroachment on the canal from the back side consistent with the displacement and problem resulting from the spondylolisthesis. Dr. Pechacek felt that the injuries activated the process.

On April 5, 1977, Dr. Pechacek and a Dr. Eckman, a neurosurgeon, performed a removal of the third and fourth lumbar discs, along with a laminectomy of L-5 and decompression of the nerve roots in the area of the spondylolisthesis. A spinal fusion was also performed whereby Dr. Pechacek tried to fuse the area from L-4 to the sacrum. Claimant was discharged from the hospital on April 16, 1977. Recovery was relatively uneventful, but in October, 1977, the claimant's condition worsened somewhat. In April, 1978 the claimant was having continuous backache, soreness and stiffness, and Dr. Pechacek recommended the claimant use his back brace. The claimant remained off work and did not improve.

Dr. Pechacek thought the fusion was unsuccessful and discussed redoing the fusion. Dr. Pechacek thought the claimant had reached maximum medical recuperation on April 5, 1978 and that the claimant had a permanent impairment of 18% of the body as a whole. Dr. Pechacek thought that the claimant's three injuries were either additive or that the last one caused the most trouble. Dr. Pechacek wrote a letter in September, 1977 stating that the claimant could return to work, but a fair reading of the

record indicates that a reassessment of this opinion took place.

Prior to the 1977 injury, claimant was seen by John McCarthy, D.C., being seen professionally the last time in December of 1976. Dr. McCarthy indicates that the spondylolisthesis preexisted the injury of January, 1977 and that the various injuries aggravated the condition. The claimant has not returned to his former employment, but he has assisted in helping out at a local tavern and helped roof a one-story home.

The other witnesses at the hearing of this matter were private investigators engaged by defendants to show the activities in which the claimant engaged. Some of the activities engaged in by these individuals bordered on the unethical end of legitimate investigative activity, e.g., letting the air out of claimant's tire to see the claimant change a tire. Some of the other behavior was less reprehensible, like putting ice down the claimant's pants in order to note activity. While surveillance in a passive mode may be of valid evidential use, the active mode of surveillance engaged in in this case is reprehensible at its worst and ludicrous at its best. In other words, the behavior of the private investigators shocks the conscience of this Deputy Industrial Commissioner and is not an example of proper claims investigation.

The claimant has the burden of proving by a preponderance of the evidence that the injury of January 4, 1977 is the cause of his disability on which he now bases his claim. *Bodish v. Fischer, Inc.,* 257 Iowa 516, 133 N.W.2d 867 (1965). *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).

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. *Nicks v. Davenport Produce Co.,* 254 Iowa 130, 115 N.W.2d 812 (1962). *Yeager v. Firestone Tire & Rubber Company,* 253 Iowa 369, 112 N.W.2d 299 (1961).

Based on the foregoing principles, it is found that claimant has established his claim. This succession of injuries can be seen to have culminated in the January 4, 1977 injury. While Dr. Pechacek was not "100%" sure of the definite causation, the test is a preponderance. The evidence in this case is indicative of a finding that the January incident was the one which pushed the claimant "over the top." This finding is dictated by the evidence that after the prior injuries, the claimant returned to heavy labor.

Functional disability is an element to be considered in determining industrial disability which is the reduction of earning capacity, but consideration must also be given to the injured employee's age, education, qualifications, experience and inability to engage in employment for which he is fitted. *Olson v. Goodyear Service Stores,* 255 Iowa 1112, 125 N.W.2d 251 (1963). *Barton v. Nevada Poultry,* 253 Iowa 285, 110 N.W.2d 660 (1961).

Claimant graduated from high school in 1950. He worked briefly in a supermarket before his induction into the United States Navy. He was an aircraft mechanic. He worked in a plastic factory, returned to the supermarket and later worked at a feed mill. He went to work for a state institution as a recreational coordinator and then became employed on a street repair gang. He then became a driver salesman for a beer distributor. He later was employed selling wholesale tires on a route. This job involved heavy lifting. During this period of time, he also helped his father in the construction of houses. He then became a carpenter and was involved in carpentry work which was not finish work and involved heavy lifting. He will, no doubt, never return to heavy carpentry work. Based on the foregoing principles, it is found that the claimant sustained a permanent partial disability for industrial purposes of 40% of the body as a whole.

The next issue which requires exploration is the claimant's entitlement to healing period compensation pursuant to section 85.34(1), Code of Iowa. The benefit of clear hindsight indicates that the claimant should be paid this compensation from January 7, 1977 until April 5, 1978, the date when Dr. Pechacek indicated that maximum medical recuperation had taken place, a period of 64 4/7 weeks.

Costs of this action as submitted will be allowed as submitted by claimant, except that Dr. Pechacek's fee will be reduced to $150. See sections 622.72 and 86.39, Code of Iowa.

* * *

Signed and filed this 12th day of July, 1979.

JOSEPH M. BAUER
Deputy Industrial Commissioner

No Appeal.

RONALD EDWARD BALLARD,

Claimant,

vs.

UNITED PARCEL SERVICE,

Employer,

and

LIBERTY MUTUAL INSURANCE COMPANY,

Insurance Carrier,
Defendants.

Appeal Decision

This is an appeal by defendants from a proposed arbitration decision wherein claimant was awarded medical expenses for certain chiropractic treatments.

On October 31, 1977 claimant sustained an injury arising out of and in the course of his employment. Claimant missed no working time as a result of the injury, and the sole issue for determination is whether or not the defendant-employer is obliged to pay claimant's medical expenses incurred as a result of claimant's injury.

Iowa Code section 85.27 states, in relevant part:

> For purposes of this section, the employer is obliged to furnish reasonable services and supplies to treat an injured employee, and has the right to choose the care. The treatment must be offered promptly and be reasonably suited to treat the injury without undue inconvenience to the employee. If the employee has reason to be dissatisfied with the care offered, he should communicate the basis of such dissatisfaction to the employer, in writing if requested, following which the employer and the employee may agree to alternate care reasonbly suited to treat the injury. If the employer and employee cannot agree on such alternate care, the commissioner may, upon application and reasonable proofs of the necessity therefor, allow and order other care. In an emergency, the employee may choose his care at the employer's expense, provided the employer or his agent cannot be reached immediately.

The record shows that on November 3, 1977, three days after claimant was injured, he reported his injury to his immediate supervisor, Gene Jackson. On the same day claimant also told Ed Allen, the employer's dispatcher in Des Moines, that he was going to see a chiropractor. Claimant testified that Mr. Allen had instructed him to go see David Tan Creti, M.D., the company physician.

On November 3, 1977 claimant began chiropractic treatments with T. E. Blankenbaker, D.C., without being instructed to do so by his employer. On November 14, 1977 claimant was first seen by Dr. Tan Creti. Dr. Tan Creti placed claimant on two weeks of light duty and authorized one week of chiropractic care. Claimant's exhibit one indicates that claimant's visits to Dr. Blankenbaker on November 14, 15 and 16 were paid for claimant. These visits were within the week of care authorized by Dr. Tan Creti, and the record indicates that the defendant-employer paid for these visits.

Claimant next saw Dr. Tan Creti on November 28, 1977, when claimant was discharged from light duty to resume his normal employment. When asked whether additional chiropractic treatment was discussed with Dr. Tan Creti at that time, claimant testified that "We probably discussed something about it, but I don't remember if what -- or what it was about. Maybe just mentioned the fact. I don't remember."

Claimant never saw Dr. Tan Creti again regarding his injury, but continued chiropractic treatment with Dr. Blankenbaker. In his testimony claimant admits that all but one week of his chiropractic treatment was unauthorized with respect to the defendants or Dr. Tan Creti. When asked whether he realized that Dr. Tan Creti's services were always available to him during the time in question and that he had been instructed to see Dr. Tan Creti for whatever care was needed, claimant replied affirmatively.

In applying Iowa Code section 85.27 to the facts of this case, it is clear that with the exception of one week all of claimant's treatments with Dr. Blankenbaker were unauthorized. There has been no showing that the defendant-employer had not tendered reasonable services to treat claimant. Claimant himself testified that he was instructed to see the company doctor, and that he was aware that Dr. Tan Creti's services were available to him. There also is no showing of an emergency which would bring the unauthorized care under Iowa Code section 85.27.

* * *

Signed and filed this 29th day of October, 1979.

ROBERT C. LANDESS
Industrial Commissioner

No Appeal.

CHARLES C. BARKER,

Claimant,

vs.

DARLING AND COMPANY,

Employer,

and

FIRE & MARINE INSURANCE CO.,

Insurance Carrier,
Defendants.

Appeal Decision

This is a proceeding brought by claimant, Charles C. Barker, appealing a proposed review-reopening decision wherein he was denied permanent partial disability benefits under the Iowa Workmen's Compensation Act.

* * *

Claimant contends in his appeal brief that the deputy commissioner failed to consider two disability reports of Dr. Brackin as well as portions of his deposition; however, it is noted that the deputy states on page one of his decision that the deposition of Ray E. Brackin, M.D., was a part of the record in this proceeding. Dr. Brackins' reports of July 14, 1975 and December 13, 1976 accompany the deposition as exhibits 1 and 2 respectively. Therefore, there is no basis for claimant's contention.

Claimant has a history of psychiatric illness. The evidence indicates that his work related injury incurred in July of 1974 aggravated this condition, thus extending claimant's temporary disability.

In *Gosek v. Garmer & Stiles Co.*, 158 N.W.2d 731 (Iowa 1968), the Iowa Supreme Court stated at 737:

VIII. Referring against [sic] to evidence introduced during [the] second review hearing, the record discloses claimant may have suffered some degree of emotional disturbance prior to any employment related physical injury. It also reveals this same injury may have triggered a trauma connected neurosis not previously experienced or recognized. In other words, possible aggravation of a pre-existing condition.

> In that regard this court has consistently held, where an employee is afflicted with some known disease or infirmity which is aggravated, accelerated, worsened or "lighted up" by an employment connected injury so as to result in a disability found to exist, the claimant is entitled to compensation accordingly. [Citing authorities]

On reviewing the record, it is found that the evidence shows that the claimant received an injury resulting in temporary disability, that the claimant's emotional disturbance extended the period of disability but that the claimant on December 4, 1974 had returned to the same condition he was in prior to the injury and that any disability claimant may have had subsequent to that time was not connected to his injury. Claimant is thus found to be entitled to temporary disability benefits from July 23, 1974 to December 9, 1974.

WHEREFORE, the proposed review-reopening decision is adopted as the final decision of the agency.

THEREFORE, it is ordered:

That defendants pay claimant twenty (20) weeks of temporary disability benefits at the rate of ninety-seven dollars ($97) per week with credit to defendants for amounts previously paid.

That defendants pay the medical charges of Ray E. Brackin, M.D., in the amount of one hundred seventy-five dollars ($175).

* * *

Signed and filed this 30th day of October, 1978.

ROBERT C. LANDESS
Industrial Commissioner

No Appeal.

VINTON JOHN BARKER,

Claimant,

vs.

CITY WIDE CARTAGE,

Employer,
Defendant.

Ruling

BE IT REMEMBERED that on March 8, 1979 defendant herein filed a motion to dismiss and motion for more specific statement. Said motion to dismiss alleged that claimant failed to state a claim upon which relief may be granted because the claimant did not specify the nature of the proceeding he filed. In the alternative, said motion for more specific statement requested that claimant be ordered to provide the information required by paragraphs 8 and 21 of the original notice and petition. No response nor resistance has been filed to date.

A motion to dismiss is properly sustained where it appears to a certainty that the claimant would not be entitled to *any* relief (provided for by the workers' compensation law) under any state of facts which could be proved in support of the claim asserted by him. *Van Camp v. McAfoos,* 156 N.W.2d 878 (Iowa 1968). *Liken v. Shaffer,* 64 F. Supp. 432 (D.C. Iowa 1946). The original notice and petition filed February 14, 1979 states that no payments have been made for an alleged industrial injury sustained on December 1, 1978 (paragraphs 17 and 22). Whether claimant's avenue of seeking recovery is an arbitration or a review-reopening proceeding is not determinative in this case of whether he is entitled to any relief. Additionally, it is noted that although it may be argued that rules of pleading require a lawsuit to be presented in a clear and forthright manner and that the nature of the lawsuit should not have to be determined by innuendo, the original notice and petition is not a formal pleading and is not to be judged by technical rules of pleading. *Coughlan v. Quinn Wire & Iron Works,* 164 N.W.2d 848 (Iowa 1969).

The defendant's motion for more specific statement with regard to paragraphs 8 and 21 of the original notice and petition has merit insofar as the number of exemptions and the amount of expenses incurred with Dr. James C. Mooney, M.D., are not sufficiently definite to allow defendant to plead to said paragraphs.

* * *

Signed and filed this 9th day of April, 1979.

LEE M. JACKWIG
Deputy Industrial Commissioner

No Appeal.

ROBERT G. BARLOW,

Claimant,

vs.

WESTINGHOUSE CREDIT CORPORATION,

Employer,

and

LIBERTY MUTUAL INSURANCE CO.,

Insurance Carrier,
Defendants.

Appeal Decision

This is a proceeding brought by claimant appealing an

order by a deputy industrial commissioner. On April 10, 1978, claimant filed a petition in review-reopening relating to an injury on May 7, 1971. After a number of subsequent filings, defendants filed a motion for summary judgment alleging that claimant's cause of action was barred by Iowa Code §85.26. Claimant resisted that motion. An order was issued denying claimant's application for rehearing on an order granting defendants' motion for summary judgment regarding weekly benefits, but overruling defendants' motion regarding 85.27 benefits.

Under Iowa Rule of Civil Procedure 237, 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. Peockes,* 249 N.W.2d 663 (Iowa 1977). Rule 237 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). Summary judgment is improper in a situation in which reasonable minds could come to different conclusions. *Daboll, supra.*

In the matter sub judice there is not a strict showing of disputed facts in affidavits, but the inference by allegations of what the facts are perceived to be leads to the conclusion that the facts are not so undisputed as to sustain a motion for summary judgment. While the pleadings presented here do not conform in all respects with the provisions of the Rules of Civil Procedure, the Iowa Supreme Court has repeatedly pronounced that pleadings before administrative agencies, and, specifically, pleadings in workmen's compensation matters should not be judged by technical rules. *Hoenig v. Mason & Hanger, Inc.,* 162 N.W.2d 188 (Iowa 1968); *Yeager v. Firestone Tire & Rubber Co.,* 253 Iowa 369, 112 N.W.2d 299 (1961); *Cross v. Hermanson Brothers,* 235 Iowa 739, 16 N.W.2d 616 (1944).

* * *

THEREFORE, it is ordered:

That defendants' motion for summary judgment is overruled.

Signed and filed this 7th day of December, 1978.

ROBERT C. LANDESS
Industrial Commissioner

No Appeal.

EUGENE L. BARRETT,

Claimant

vs.

ARMOUR & COMPANY,

Employer,
Self-Insured,
Defendant.

Review-Reopening Decision

This is a proceeding in review-reopening brought by Eugene L. Barrett, the claimant, against his self-insured employer, Armour & Company, to recover additional benefits under the Iowa Workmen's Compensation Act on account of an injury he sustained on June 21, 1976.

* * *

There are no official filings regarding a June 21, 1976 injury.

In an arbitration decision filed May 24, 1978 Deputy Industrial Commissioner Helmut Mueller found that on June 21, 1976 claimant aggravated a pre-existing abnormality of his left arm and a pre-existing back condition when "a large hog fell off the assembly line belt, knocking the claimant backwards as the claimant pulled on the loin in an attempt to remove it." He further found that claimant sustained a 40 percent impairment of the left upper extremity and a 20 percent industrial disability of the body as a whole. Claimant was awarded 71 3/7 weeks of healing period and 100 weeks of permanent partial disability benefits.

An approved application for partial commutation of permanent partial disability benefits (from the latter part of the period during which such benefits were payable) filed February 26, 1979 indicated that the healing period benefits were paid to November 6, 1977 and permanent partial disability benefits were paid to February 25, 1979. Twenty of the remaining 33 weeks were commuted. In a letter dated April 19, 1979 defendant advised claimant that permanent partial disability benefits would be terminated as of May 21, 1979 in accordance with the award filed May 24, 1978 and as a result of 20 weeks being previously commuted.

The issues to be determined are whether claimant sustained a change in condition since the prior hearing or whether the condition which exists today existed at the time of the prior hearing but could not have been discovered by exercise of reasonable diligence; whether any such change in condition is causally related to the work-injury; whether any such causally related change actually results in increased industrial disability over that previously awarded.

Since the issues in the present proceeding must be analyzed and construed in light of the previously decided findings of fact and conclusions of law, portions of the May 24, 1978 decision are hereby set forth in order of their appearance.

> Claimant, age thirty-eight, married with three dependent children, who has been employed by the defendant as a laborer for the last twenty years, alleges that he experienced an industrial injury first on May 10, 1976, and June 21, 1976, and that he has not worked since. The plant nurse, Catherine Beyerink, denied the fact by way of impeachment as it relates to the May injury. (Deposition, page 6) * * * However, the claimant did visit Aaron L. Katz, D.O.S., on May 13, 1976, alleging neck and shoulder pain, numbness down the left arm, low back pain and bilateral sciatica and his reports were mailed to the defendant. * * * *

* * * Dr. Fromm reported on July 27, 1976 after ulnar nerve surgery in part as follows:

> Regarding the causation of the injuries on 4-22-74, the patient initially gave a history of numbness and weakness of the small muscles of the left hand with numbness of the 4th and 5th fingers of the left hand. He does not describe any injury to the left elbow.
>
> We do know that tardy ulna palsy or left ulnar neuropathy with the ulnar nerve caught behind the medial epicondyle can occur with repetitive motions and flexion of the elbows such as the patient describes as part of his daily work. I would not know, however, during the accident of 4-22-74 as described as pulling the left shoulder whether he injured the left ulnar nerve. Certainly there are no symptoms dating from that particular date except for pain in the shoulder and neck. I do feel that the type of ulnar neuropathy for which we have treated him is work related in that as to the aforementioned repetitive actions of the elbows. There need not be a single accident or incident to cause this.

By agreement of the parties, the June 21, 1976 industrial episode is declared to have arisen out of and in the course of claimant's employment. That is, defendant agrees claimant hurt his arm on that day but does not agree that he hurt his back at that time. * * * *

This record contains much medical history. In 1974 the claimant was admitted to a hospital for an "anxiety neurosis" and "pathological intoxication." (Commissioner's Exhibit No. 1, page 22) According to the Beyerink deposition (Deposition, Exhibit No. 1), the claimant was assigned to the "loin" pulling duty in February 1970. The left arm problems appear to become evident in January 1971 and continuing, e.g. "2-28-72 States he felt something snap in his left shoulder again when he was pulling loins." * * * *

* * *

Upon release on June 3, 1976, the claimant resumed his employment and on June 21, 1976 reported the injury complained of in which a large hog fell off the assembly line belt, knocking the claimant backwards as the claimant pulled on the loin in an attempt to remove it. The admitting history was in part as follows:

> He was admitted to the hospital on June 30 and was allowed to leave the hospital on June 2, 1976. He will return to the hospital on July 5, 1976 in the afternoon under Dr. Fromm's orders at which time he will have a myelogram upper cervical region for brachial neuralgia ulnar neuralgia at the left elbow.
>
> Chief complaint: brachial neuralgia with pain radiating down the left arm with pain at the elbow and ulnar nerve root irritation. His last hospitalization was May 25, 1976 until June 3, 1976. At that time he was complaining of severe vertigo, neck pain, left brachial neuralgia. The patient was treated with osteopathic manipulation, traction, sedation, check the abdominal contents for nausea and vomiting. At that time the impression was cervical dorsal vertebral subluxation with occipital myalgia with nerve root irritation of the brachial plexus. * * * He has had cataracts. Wears very thick lenses and sees very little without. * * * MS: he had a lot of pain in the low back, had dorsal pain. He had pain in the shoulders. * * * *

It is significant to note that the first diagnostic procedure performed upon readmittance on July 6, 1976 was a myelogram done by S. R. Fromm, M.D. . . . .

> . . . for the first time the cervical and thoracic abnormalities suspected by the previous physicians are found to be groundless. The claimant did show a significant abnormality at the L4-L5 level.

* * *

The claimant's evidence with regard to the May 10 incident fails to carry his statutory burden of proof.

* * *

Dr. Blume then expressed the following medical opinion (deposition, page 34, line 1):

> My opinion, within reasonable medical certainty, is that the injury to the low back at the time of the injuries sustained on 6-21-1976 had aggravated a pre-existing low back condition, and that this accident, within reasonable medical certainty, is most likely responsible for the ruptured disk pushing against the nerve root S-1 on the left side. It is also my opinion, within reasonable medical certainty, that the injury to the ulnar nerve is work-related.

* * *

The doctor also testified that in his opinion the claimant is a chronic alcoholic and that this condition has exaggerated the pain produced by the June 21, 1976 episode.

The claimant was injured in an automobile accident in June of 1977, and Dr. Blume stated that although the car accident may have contributed to the claimant's total percentage of disability, he found it difficult to state a percentage.

Dr. Blume then attributes a 10-15% disability to the body as a whole.

Dr. Smith, indicates that the claimant has a 25% disability of the body as a whole.

The claimant has not performed any employment activities since June 21, 1976. Dr. Blume stated that the claimant was unable to work for the period of time that the claimant was under his care up to and

including November 3, 1977.

The claimant is accordingly awarded a healing period of a duration of 71 3/7 weeks.

* * *

. . . it is concluded that the claimant has sustained an industrial disability of 20% of the body as a whole. This conclusion takes into account claimant's age, lack of education, job skills, experience, his alcoholism, prior spinal injuries and preexisting conditions, all of which contribute to the claimant's continuing disability but are found not to be the responsibility of the defendant.

At the most recent hearing claimant testified that in the course of pulling loins, a 350-pound sow came off a hook on the conveyor-like table, knocked him backwards into a steel pipe and landed on top of him when he ended up on the floor. Claimant noted immediate low back and left shoulder pain.

After the October 1977 hearing claimant saw Drs. Katz, Dougherty and Grossman for his shoulder pain. He recalled that x-rays were taken and surgery merely suggested. Claimant testified that he later went to the University of Nebraska where Dr. Jardon performed surgery upon the left shoulder in August of 1978 and upon the right shoulder in January of 1979. Each surgery entailed 8-10 months recuperation time.

On cross-examination claimant could not remember whether or not he told Dr. Jardon and his associates about the June 22, 1977 car accident. He agreed that his car was hit on the right side and on the left side but could not recall if he himself had been thrown to the right and to the left. On redirect, he insisted the accident resulted in head, not shoulder, pain.

Claimant disputed his doctors' opinions regarding shoulder mobility and lifting ability. He testified that whereas he could lift 100-150 pounds in June of 1976, presently he was able to lift a maximum of 15 pounds. At the time of the October 1977 hearing claimant recalled doing general housework and some yard work, carrying groceries, and dressing himself and caring for his personal hygiene. He admitted he had some pain in these activities but did not recall limitation of shoulder motion. Presently, claimant indicated he was unable to do any of those things.

Claimant also testified that he attempted to return to light work with defendant-employer in February of 1978 but the defendant-employer had nothing they felt he could do in view of the degree of disability claimant evidenced to them. Claimant had not worked since the date of the last hearing. Claimant added that he had been involved with the rehabilitative center in Sioux City and completed his GED. He did not believe he could return to work at this time because of his shoulder, back and leg pain. Since April of 1979 he has worn a lift in the right shoe for a 3/4 inch leg length difference.

Claimant agreed the defendant-employer furnished him with the services of Dr. Blume. Claimant testified that he sought treatment on his own from Dr. Dougherty for his shoulders and from Dr. Satterfield for his alcoholism. He paid the former doctor; the defendant employer paid the latter doctor, but the claimant did not know if the payment was made under group health insurance. Dr. Satterfield referred the claimant to the University of Nebraska pain center. Claimant conceded he did not make formal application for a change of doctors.

Ida Barrett, claimant's wife for 21 years, verified his complaints. She felt claimant's overall physical condition had worsened but his mental attitutde had improved since the time of the last hearing. . She agreed her husband no longer used a cane as he did at the time of the first hearing, but stated that he now wears a shoe lift.

Defense witness James Seybert, plant superintendent for ten years, has worked for the defendant for 21 years. He was familiar with the loin pulling work claimant performed for the defendant. Seybert explained that as a side of hog, minus the hams and shoulders and hooked on a table that is moving, approaches the loin puller's station, the loin puller cuts the loin and pulls it out as the side moves on. The side would normally weigh from 30 to 70 pounds. There is no lifting of the side although it could come off the table. On cross-examination, Seybert testified that a sow weighs between 140 and 150 pounds and that both sides of the sow come down the conveyor belt side by side. The sides are not attached.

Robert Ahlberg, a vocational rehabilitation counselor for four years, testified that on May 15, 1978 he first interviewed the claimant who was referred to him by the Department of Social Security. At that time claimant reported having shoulder problems. Ahlberg recommended that claimant complete his GED. Ahlberg expressed frustration over the slow progress he made with claimant because of the intervening "doctoring". However, he noticed improvement in claimant's physical and emotional being since May of 1978. Prior to the identification of the shoulder problem, claimant was viewed as a candidate for light sedentary work. "Light" meant lifting not over 25 pounds and not repeatedly for a long period of time. Medical reports that Ahlberg had reviewed indicated claimant had a specific 15-pound weight restriction. In Ahlberg's opinion the claimant is presently marginally employable. Claimant could be a security guard if he was not required to use a gun. Ahlberg later added that guards who do not carry guns are usually assigned to be floor-walkers. The job pays minimum wage. Although there is a market for security guards, Ahlberg said he had not had particularly good success pacing individuals with back disabilities and could only speculate that the shoulder problem would be a further limitation. On cross-examination, Ahlberg agreed that the fact claimant had steel from his shoulders down his arms would not be a detriment in placing him if such form of treatment actually improved his physical capability. He also explained that his conclusions took all of claimant's impairments into consideration.

Oscar Max Jardon, M.D., Associate Professor of Orthopedic Surgery at the University of Nebraska Medical Center first examined claimant in mid-August of 1978 upon the request of Dr. Berman, a neurosurgeon at the Pain Unit of the Medical Center. Dr. Jardon diagnosed a vascular aseptic necrosis of the humeral head, a condition which can take 3 months to 3 years to appear following the triggering incident. He described the condition:

. . . which is the result of a decrease in the blood supply to the subchondral bone so it eventually collapses and gives an incongruity of the joint and this will create a large gap or defect in the bone as it articulates in the socket and begins to give a lot of noise and pain and limitation of motion and eventually degenerative arthritis and it is a result of a shutoff of the blood supply to that area of bone right under the cartilage.

* * *

* * * [i]t is the small, little terminal vessels right under the surface of the cartilage that get apparently compressed or impacted with a little breaking of the trabeculae and then this interrupts the circulation. We are not absolutely a hundred per cent positive what does do this, to be brutally frank, but the mechanism is thought to be the interruption of the small terminal circulation vessels right under the subchondral bone.

Dr. Jardon related that he treated claimant by putting a Neer prosthesis in the left shoulder in late August of 1978 and in the right shoulder in early January of 1979. He described the procedure:

> * * * What it essentially is is an amputation of the upper end of the humerus bone, the upper arm bone right at the so-called anatomical neck, which is where the joint capsule hooks on and you remove this and replace it with metal which is cemented into the medullary canal and repair the soft tissues around it that you had to go through to put the thing in. This provides a fresh, new concentric, smooth surface that can articulate with the joint.

Dr. Jardon indicated that the claimant was in the hospital for 5-10 days on both occasions. The claimant is still under his care although the time between visits continues to lengthen. As of April 12, 1979 the doctor testified that optimum recovery of claimant's right shoulder required 6 more months. However, he was of the opinion that claimant already could do sedentary work if claimant had the skills and opportunity. "Overall range ability" was very near normal. The only additional limitations claimant had to abide (in addition to those he faced in light of the back and leg condition treated by other doctors in the previous proceeding) were refraining from repetitive lifting and from lifting more than 15 pounds. Dr. Jardon emphasized that he had encouraged the claimant to find work.

He was of the opinion that the claimant sustained 50 percent permanent impairment to both shoulders as a result of the disabling condition and surgical procedure. This translates to 60 percent disability to the body as a whole. This estimated impairment to the body did not include separate impairments to the back or legs. (Dr. Jardon said he last saw the claimant in early April of 1979, when claimant complained of back and leg pain and Dr. Jardon prescribed a shoe lift for a leg length difference he felt resulted in some strain.)

Dr. Jardon expressed these views in writing to claimant's counsel on February 28, 1979:

> * * * Mr. Barrett has done very well and I think that he will have an outcome which is good and will allow light work. He will of course, have occasional mild pain and of course, this extremity is not suitable for heavy manual labor. He can do more sedentary work that requires little lifting. I think that all in all his range of motion will be pretty good and near normal. However, in the presence of an arthroplasty having had to be done in both shoulders, I would state that he has permanent disability in both shoulders between 40 and 50% of the function of each shoulder.

Dr. Jardon was questioned about his understanding of what actually happened to the claimant on the date of injury:

> The history I received was that he had been involved in an accident on a catwalk in a meat packing plant wherein carcass of hog came off of a tramway or hook in such a fashion as to hit him in the side and knock him into a railing, which he subsequently fell over, sustaining injury to the shoulders, back and ulnar nerve, the elbow, and that he'd had the back operated on and the ulnar nerve transferred and that he was having increasing pain and difficulty mainly with his shoulders, which is why he had gone to the Pain Unit.
>
> * * *
>
> . . . Now, my understanding is this was a fairly heavy hog, over a couple of hundred pounds, falling off the track at a sufficient distance to pin him against a wall and that would have been enough force to do this similar to a fall down the stairs.

Based on the history from the claimant and on the appearance of the lesion seen on the radiography and at the time of surgery, Dr. Jardon was of the opinion that the injury in issue was responsible for the subsequent avascular necrosis in both of claimant's shoulders. His opinion did not change despite the fact that a history of other traumatic incidents (including a 1974 shoulder injury, a 1976 fall, and a 1976 fight) and intermittent shoulder pain were presented to him by way of a hypothetical. Moreover, although he did not know about claimant's 1977 car accident prior to questioning during the deposition, he appeared to give such incident little weight as a causative factor of the claimant's shoulder problem. The doctor explained his reasoning on these matters.

(On direct examination)

Q. Based on the history that was given to you, what is your opinion as to the cause of his condition?
A. Well, I think that this is a logical thing that could affect both shoulders, the mechanism is appropriate to be hit hard on the other side and bang the other side against a wall or railing would simultaneously injure both shoulders and it fits.
Q. You are speaking of the mechanism?
A. Mechanism that was described of the carcass hitting him and squeezing him.
Q. A squeezing of the shoulders together?
A. Yes, hit both of them.
Q. Is that the way he described his accident to you?
A. Yes, uh-huh.

* * *

A. Well, from the report of this accident, it sounds like he was knocked out against the wheel. I suppose that it's possible he could have had enough trauma at that time. But it is -- now, I'm being asked for something I know nothing about and --
Q. I understand that.
A. And sure, an automobile accident would be a sufficient amount of trauma, although the exact mechanism or direction of the, you know, force applied to the shoulders, there is nothing in here. I still have to assume the story I'm told is correct. I'm sorry.
Q. I understand that, Doctor, and I'm simply asking you to make some assumptions here.
A. I can't assume that. I'm sorry.
Q. It would be correct, though, wouldn't it, that an automobile accident in which the driver of the car was hit broadside on the passenger side and was then forced against the steering wheel could provide the same kind of squeezing mechanism?
A. It is possible.
Q. That Mr. Barrett described?
A. It is possible

* * *

Q. --would it be as likely that the car accident could be the cause of this condition as the incident.
A. I can't really say that because I don't know the exact mechanism or direction that that car was hit nor the physical examination immediately afterward, what it looked like. I would be engaged in an exercise in futility to say absolutely because I don't know what direction he was hit, how hard, what the speed was, what the physical examination was like afterward, whether there was bruising. So I really can't honestly answer that.

* * *

. . . do you have an opinion whether the problem in the shoulder for which you treated Mr. Barrett could have existed prior to November of 1977, which is approximately the last of those assumptions?
A. I don't think so, and the reason is that the numbness went on in a short episode that seemed to be rather acute. Numbness and tingling of the hand doesn't seem to fit with the problem of avascular necrosis and arthritis of the shoulder. It sounds more like a nerve problem of some kind of this nature and I have never seen this happen from a beating. * * * But it takes a blow sufficient, you know, to bruise that cartilage and subchondral bone.
Q. All right. The presence of pain in the shoulder for approximately a year or two prior would not change your opinion about the time --
A. It doesn't really change it because -- Can I say something that I feel because of the fact that I know this thing?
Q. Go ahead?
A. In other words, if this had started back that far and had become that symptomatic, I would have expected more destruction in the joint on the uneffected side of the joint, the scapula side of the joint that was present when I operated on him. It didn't appear to have broken down that far and really started to chew up the other side of the joint. It seems to me that if he had started having symptoms back that far, that it would have been further along and it is hard for me to really -- the main symptom with this stuff is pain at the time the thing collapses. I have a hard time relating traumatic incidents to this. Everybody gets a little hurt here and a little hurt there and it is really difficult -- you have to hang your hat on something and the only thing I have to hang my hat on is what the man told me. I still can't see that there would be enough trauma from a good beating to do this. That's all I can say, assuming these things. I'm sorry.
Q. But again, your opinion is based very heavily on the history given to you by the patient?
A. The mechanism is right. That is the one thing about it. The mechanism is correct, the weights involved. If the history I got is accurate, it is the one that would do it. It would do it.

* * *

(On cross-examination)

A. Can you tell me what that opinion is within a degree of medical certainty, the cause of his condition in his right and left shoulder?
A. I have a feeling that it was a blow to the shoulders, a simultaneous blow to the shoulders.
Q. When you say a feeling, do you believe that within a medical certainty?
A. Yes. It happened about the -- with the blow to both shoulders about the same time and the incident with the pig seems to fit.
Q. And that was in June of 1976 while employed at Armour?
A. Yes.

* * *

(On redirect examination)

Q. * * * We've talked about this mechanism of the accident, the squeezing of the shoulders. If in fact the accident happened so that the hog came straight back into his chest and that he fell straight back and the shoulders were not squeezed together, then the mechanism wouldn't fit, would it?
A. It wouldn't be the same. It wouldn't be the same.
Q. Wouldn't be sufficient to cause the problem that you treated him for?
A. If that's what happened, but I've got to go with what I'm told.
Q. I understand that, but I'm asking it, you know, if it had happened the way I'm suggesting for the moment.
A. True.

In *Henderson v. Iles,* 250 Iowa 787, 96 N.W.2d 321, 324 (1959), the Supreme Court stated that in a review-reopening proceeding:

> ". . . the applicant has the burden of showing the additional consequences, facts and circumstances on which he bases his application and that they resulted proximately from the original accident." * * * *

* * *

"The question is, then, did claimant, by sufficient competent evidence, show a change since the award was made, in his capacity to perform gainful labor? Was there a change in the degree of his industrial disability -- a reduction of earning capacity?"

As noted by the Supreme Court in *Polson v. Meredith Publishing Company,* 213 N.W.2d 520 (1973), the above-quoted decision

"is no longer the sole controlling decision in such matters. *Gosek v. Garmer & Stiles Co.,* 158 N.W.2d 731 (Iowa 1968), added a new dimension to review-reopening hearings. That case decided that a plaintiff may recover additional compensation on a showing of a change of condition *or* a condition which, although existing at the time of a previous award, was 'unknown and could not have been discovered by the exercise of reasonable diligence' at the time of the prior award or settlement. (158 N.W.2d at page 735.)"

Claimant does not actually contend that a shoulder problem per se was unknown at the time of the prior hearing. Rather claimant apparently argues that he was unaware of the nature of the problem and of the treatment it would eventually entail. As indicated in the arbitration decision the admitting diagnosis following claimant's June 21, 1976 work injury mentions that the claimant had pain in both shoulders. It is not clear to the undersigned whether such hospital notation refers to a period of time following the injury in issue or whether it refers to previous complaints claimant had with respect to his shoulders. Another admitting diagnosis for June 30, 1976 found in the medical record of the prior proceeding mentions a burning sensation claimant experienced under his shoulder blades which claimant reported as occurring intermittently and as being unrelated to strenuous exercise. It is also noted that claimant at both the present and prior hearings testified only to left shoulder pain. Clearly, the medical evidence at the time of the prior hearing did not reveal any shoulder disability existed as a result of the work injury. Accordingly, the present record compared with that of the former proceeding supports a finding that claimant's condition with respect to his shoulders has undergone a change which could not have been detected at the time of the prior proceeding.

The claimant has the burden of proving by a preponderance of the evidence that the injury of June 21, 1976 is the cause of his disability on which he now bases his claim *Bodish v. Fischer, Inc.,* 257 Iowa 516, 133 N.W.2d 867 (1965). *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).

The defendant attacks Dr. Jardon's opinion that the shoulder disability was proximately caused by the June 21, 1976 injury because Dr. Jardon did not have what the defendant considered to be an accurate description of the injury and because Dr. Jardon was unaware of the 1977 car accident. The undersigned finds that the description Dr. Jardon had in mind when he testified was substantially similar to that given by the claimant at the hearing. The claimant seemingly exaggerated the weight of the sow (350 pounds) at the present hearing; at the prior hearing he testified that the whole hog, being two loins and a side, weighed between 150 and 200 pounds. Although James Seybert offered the testimony disputing the weight of the sow as testified to by the claimant and contending that the sides, weighing 30 to 70 pounds each are not attached, the undersigned is inclined to believe that the claimant's recollection of what happened should be accepted as true. Additionally, it is noted that although the claimant did not testify at the first hearing that the carcass landed on top of him, he did relate such a fact to Dr. Blume on June 30, 1976.

The redirect examination of Dr. Jardon regarding the matter of whether claimant's shoulders were squeezed during the injury incident on June 21, 1976 is not developed enough for the undersigned to dismiss Dr. Jardon's testimony regarding causal connection. As stated above the claimant's description of the injury as given at the time of both hearings and to different doctors treating him since the date of injury is essentially the same as that reported by Dr. Jardon on cross-examination.

It is further pointed out that the record before the undersigned does not substantiate the defendant's theory that the 1977 car accident is the likely incident on which claimant's shoulders would have been squeezed in such a way as to result in the condition which necessitated Dr. Jardon's operations. Claimant did not recall, at either hearing, any shoulder pain following said car accident. He was admitted to St. Vincent Hospital for three days. Hospital records indicate that he had sustained trauma to the occipital-dorsal area and to the lumbar area. He had no rib fractures. No mention of shoulder injury or pain is found in such records. Thus, claimant has sustained his burden of proving that the change with respect to his shoulders was causally related to the June 21, 1976 injury.

It is further clear that the claimant has sustained an industrial disability which is defined in *Diederich v. TriCity Railway Co.,* 219 Iowa 587, 593, 258 N.W.2d 899 (1935) 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.

Claimant argues that he has sustained 60 percent increase industrial disability because he has a 60 percent functional impairment related to the shoulder disabilities. However, the record does not reveal any such greatly increased loss in claimant's earning capacity as a result of the increased functional impairment. Claimant had not returned to work at the time of the prior hearing. Dr. Blume indicated that claimant could not return to his former work but could attempt to do some form of

sedentary employment. Claimant was advised to avoid prolonged standing and heavy lifting. At the time of the prior hearing, claimant indicated his daily routine included washing dishes, vacuuming and walking a couple blocks. He could not mow the yard. He complained of back and left leg pain. At the present hearing claimant testified that he was unable to do any housework or yard work or caring for his personal hygiene. He noted increased limitation of shoulder motion. He did not believe he could return to work because of his shoulder, back and leg pain. However, Dr. Jardon indicated that claimant could do sedentary work and pointed out that claimant's range of shoulder motion was near normal. He advised the claimant against lifting more than 15 pounds. The vocational rehabilitation expert noted some improvement in claimant's physical and emotion well-being since he first saw the claimant in May of 1978. The claimant has received a GED since the date of the prior hearing. Thus, the claimant has not sustained a substantially increased loss of earning capacity as a result of the increased functional impairment resulting from the shoulder disabilities.

WHEREFORE, IT IS FOUND that claimant sustained a change in condition since the prior award as evidenced by permanent impairment in both shoulders; that said change is causally related to the work injury that occurred on June 21, 1976; and that said change resulted in a ten (10) percent increase in industrial disability.

* * *

Signed and filed this 16th day of October, 1979.

LEE M. JACKWIG
Deputy Industrial Commissioner

No Appeal.

CHRISTOPHER B. BECKE,

Claimant,

vs.

TURNER-BUSCH, INC.,

Employer,

and

AMERICAN MUTUAL LIABILITY INSURANCE COMPANY,

Insurance Carrier,
Defendants.

Appeal Decision

This is a proceeding brought by claimant, Christopher B. Becke, appealing a proposed decision in review-reopening wherein claimant was awarded permanent partial disability under the Iowa Workmen's Compensation Law.

* * *

On May 10, 1973, claimant was doing remodeling at a shopping center. Claimant was injured when he fell to the floor following the collapse of a stepladder. At that time he felt pain in his middle back. He was hospitalized and he has not worked since that time. Claimant, who now walks with a cane, said that he continued to experience a "grinding, gritting . . . dull pain" in his lower back which made it difficult for him to walk long distances, to lift or to maintain any position for more than a short period. He also complained of shortness of breath since the time of his accident. Claimant stated that he used aspirin to relieve his pain and that he had commenced taking blood pressure medication "[r]ight after the accident." Claimant's spouse verified his complaints and lack of activity.

William Province, M.D., family practitioner, who had been claimant's doctor since 1951, saw claimant immediately following his accident and treated his scalp laceration. He discharged claimant with tenderness and limitation of motion in his back. He reported claimant's returning to his office on several occasions prior to August 1974, continuing to report back pain. Although Dr. Province stated that pain was a subjective symptom, he saw claimant's walk, his rising from a chair and his slowness in moving as evidence of suffering. Dr. Province prescribed analgesic. The doctor believed that the injuries claimant received were of a permanent nature and that claimant was permanently unable to do carpentry work and that claimant's entire body was affected by this accident in that "[h]e was immobilized, [sic] he was unable to be active, he was unable to keep his joints supple, he was unable to keep moving about . . . ." Dr. Province said that he found no neurological disease and that he had not ruled out a vascular problem as part of the cause of claimant's disability.

Dr. Cairns first saw claimant on May 11, 1973 at the request of Dr. Province. Dr. Cairns related the following history: "He [claimant] was at work at Kennedy Mall when he apparently fell through a roof, and he fell about ten feet landing on his legs and then rolled, suffering pain in his back." The doctor testified to finding limited back motion, spasm, minimal compression fractures at T-12 and L-2 and a neurological examination within normal limits. He also noted "fairly marked degenerative arthritic changes in his [claimant's] neck and also in the lower lumbosacral region." Dr. Cairns felt the two fractures were the only thing "directly caused by the accident." In a November 15, 1973 report this doctor wrote, "He [claimant] certainly also had preexisting degenerative disk disease in his lumbar and cervical spines which he probably aggravated." This aggravation of spinal arthritis, testified the doctor, was of a temporary, not permanent, nature. The doctor's feeling was that the arthritis "had been aggravated somewhat" and that the aggravation explained claimant's problem with exercise. He said, however, "I could find no objective evidence . . . that there was any permanent aggravation of this underlying problem." According to the doctor, the significance of the repeatedly negative neurological examinations, which consisted of palpation for tenderness and spasm, exploration of range of motion, inspection for atrophy and attention to reflexes, was "that there is no obvious pressure on any nerves causing paralysis or causing any obvious changes in the extremities that one could detect with the

usual objective means." Dr. Cairns believed that by November 1973 claimant should have been able to return to his job. He rated claimant's permanent impairment at thirty percent of the body with fifteen percent secondary to the compression fractures and fifteen percent to preexisting problems. The preexisting problem was degenerative arthritis. Claimant's testimony regarding his visits to Dr. Cairns was that he took pain pills so he could travel to the doctor. The implication was that pain might be masked by drugs.

It was February of 1977 when the doctor next saw claimant' who complained of an inability to walk, a loss of balance and back pain. Dr. Cairns noted healed compression fractures at T-12 and L-2 and believed there were only two possible conditions which would cause claimant's symptomatology -- a vascular problem in the abdomen or a spinal stenosis.

Claimant was admitted to the hospital and evaluated by various medical experts. The examining neurologist, Sarah Werner, M.D., found no objective neurological findings. She believed claimant's pain was of musculo-skeletal origin and some of claimant's complaints were secondary to trauma. Eugene Herzberger, M.D., a neurosurgeon, looked to a myelogram to tell whether or not there was a compression of the Cauda equina. Ratnum Mullapudi, M.D., a vascular specialist, suspected a small aneurysm of the aorta. Dr. Cairns' assessment of permanent impairment remained unchanged after this hospitalization.

The claimant must prove by a preponderance of the evidence that the injury is the cause of the disability on which the claim is based. *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 the 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 (1961).

The deputy, in his decision, found that "claimant has sustained his burden of proof that the injury of May 10, 1973 caused the health impairment upon which he bases his claim." This commissioner does not find that claimant has sustained his burden of proof on such broad grounds. Rather, based on the testimony of Dr. Cairns, it is found that claimant has established some disability relating to the compression fractures he suffered in the fall. However, claimant has failed to establish that other health problems --- degenerative arthritis, obesity, shortness of breath, or vascular difficulties -- are related to the fall. Although Dr. Cairns said there was an aggravation of the arthritis, he further stated that the aggravation was temporary not permanent.

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 also 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 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 (1961).

Claimant was sixty-one years old at the time of the injury and has an eighth-grade education. He began working as a carpenter when he was about fifteen years old, and he said that he has no other training. He described his work as a carpenter as involving lifting, carrying, stooping, bending, stretching, and entailing the use of various carpenter tools. While claimant attested to having had opportunities to do carpenter work, he had not tried to do so as he was unable to perform the physical maneuvers or to use the tools required. Dr. Cairns, in discussing claimant's ability to do carpenter work, said, "[H] is spine is not normal. It's full of arthritis. Chances of him aggravating this arthritis with the demand put on in any construction activity would be far higher than a person with a normal spine." Dr. Province, who appears to have been speaking of industrial disability, believed claimant was permanently unable to do carpentry work.

The deputy's decision dealt with the age factor thusly:

> The claimant testified at the hearing that he had planned on working for another five years, but this statement must be taken lightly since this statement occurred after the injury in question and involves a number of subjective factors which cannot be taken into account when determining the factual basis for this statement.

Claimant argues that retirement at age of 65 should be disregarded in fixing industrial disability. Claimant's brief points out Iowa Code §601A.6(a) prohibits the refusal to employ because of age "unless based upon the nature of the occupation . . . ." This would seem to indicate that the nature of the occupation would allow for age to be a consideration in determining the employability of a worker. Also it is noted that Iowa Code Chapter 601A deals with the Civil Rights Commission and discrimination in employment and not with a person's industrial disability as a result of an injury which is within the province of the Industrial Commissioner.

Claimant does indeed have a loss of earning capacity. It is only the loss of earning capacity attributable to the injury, however, for which the employer is responsible. This

is not limited to his employability only in the occupation in which he was engaged while injured but extends to the total field of employment for which the claimant is fitted.

Numerous attempts have been made by the industrial commissioner's office in seminars and symposiums to educate concerning the factors considered in determining industrial disability. These factors include the employee's medical condition prior to the injury, after the injury and present condition; the situs of the injury, its severity and the length of healing period; the work experience of the employee prior to the injury, after the injury and potential for rehabilitation; the employee's qualifications intellectually, emotionally and physically; earnings prior and subsequent to the injury; age, education, motivation, functional impairment as a result of the injury and inability because of the injury to engage in employment for which the employee is fitted. These are matters which the finder of fact considers collectively in arriving at the determination of the degree of industrial disability.

Although the deputy indicated the claimant is approaching or has already achieved normal retirement age, he does not indicate what age he considered this to be or what weight he placed on this factor in arriving at his disability determination.

Although the Iowa Supreme Court has indicated that age is a factor to be considered in determining industrial disability, it does not indicate what the effect of young age, middle age or older age is supposed to be. Obviously, it is a factor that cannot be considered separately but must be considered in conjunction with the other factors. For example, the effects of a minor back injury upon a young person with extensive formal education would limit the scope of his potential employment less than that of a middle-aged person with no formal education.

How to apply age as a factor when a person is nearing the end of his normal working life is a dilemma. When considering the age factor, it is apparent that the scope of employment for which claimant is fitted is narrowed simply because of the reluctance of employers to initially employ persons of advanced years. Therefore, the advanced age alone without the combination of an injury is limiting. Lack of education or at least a showing of diminished educability is in and of itself also a limiting factor for entry into many fields of employment.

When considering a loss of earning capacity for employments for which a person is fitted, it is not considered initially that a person before an injury is fitted for every employment from abbot to zymologist. Consideration must be given only to those employments which the employee, taking into account his age, education, qualifications and experience, had the ability to engage in prior to the injury. This would include employments for which, based upon the employee's characteristics, it can reasonably be anticipated that the employee would be trainable without undue inconvenience. Next is considered the earning capacity within the fields of endeavor for which the employee was fitted which has been lost as a result of the injury to determine the degree of industrial disability.

Rarely, if ever, is the industrial commissioner blessed with a record which contains very enlightening evidence dealing with the areas of employment for which an employee could have been fitted prior to an injury. It therefore becomes necessary for the commissioner to draw upon prior experience, general and specialized knowledge to make the finding of fact with regard to degree of industrial disability.

There are no weighting guidelines that are indicated for each of the factors to be considered. There are no guidelines which give, for example, ages twenty through twenty-five a score of one and ages sixty-five through seventy a score of ten or vice versa. Intelligence quotients are not graded. In other words, there are no formulae which can be applied and then added up to determine the degree of industrial disability. It should also be noted that these factors are not added to the percentage evaluation of functional impairment to arrive at the degree of industrial disability. The percentage of functional impairment is only one of the factors to be considered in arriving at the overall degree of industrial disability.

The Michigan Supreme Court has stated regarding retirement:

> Compensation benefits are geared to weekly wage loss. It is consistent with the concept of tying weekly compensation benefits to weekly wage loss to factor into the benefit program the statistically established generalization that workers, even if not disabled, retire between 60 and 75 and no longer earn weekly wages. There is no discrimination against disabled workers over 65 in taking into account the wage loss they would "presumptively" suffer due to normal retirement. *Cruz v. Chevrolet Grey Iron, Div. of Gen. Motors,* 247 N.W.2d 764, 775 (Mich. 1976)

It is held that the approaching of later years when it can be anticipated that under normal circumstances a worker would be retiring is, without some clear indication to the contrary, a factor which can be considered in determining the loss of earning capacity or industrial disability which is causally related to the injury.

The findings of the deputy regarding healing period and the extent of industrial disability of the claimant as it relates to his injury of May 10, 1973 are supported by the record and adopted in this decision.

* * *

Signed and filed this 31st day of January, 1979.

ROBERT C. LANDESS
Industrial Commissioner

Appeal to District Court: Affirmed.

REBECCA BERRYHILL, a minor, by her mother and next friend, BONNIE SUE ROSSMAN

Plaintiff,

vs.

ROYAL GLOBE INSURANCE COMPANY and SIOUX CITY BOYS' CLUB

Defendants.

Declaratory Ruling

This declaratory ruling results from the petition filed by Rebecca Berryhill, a minor, by her mother and next friend, Bonnie Sue Rossman, plaintiff against the Royal Globe Insurance Company and Sioux City Boys Club, the workmen's compensation insurance carrier and employer, respectively. The petition states that Rebecca Berryhill is a minor, born July 24, 1975; plaintiff's father was killed in a work-related accident, and the insurance carrier has paid benefits under the workmen's compensation law. These payments have been made to the plaintiff's mother.

The petition further states in paragraph six:

> That the Royal Globe Insurance Companies by and through their claim supervisor has advised that they will terminate the payment of worker's compensation benefits which are presently being received by Rebecca Berryhill, as a minor and dependent of Marvin Berryhill, should the adoption proceedings proceed to decree. That under the Iowa Workers Compensation Laws, Chapter 85, Sections 85.42 and 85.43, and the case law of the State of Iowa, such a decision and action by the insurance carrier would be contrary to law.

The plaintiff's prayer basically asks that this office rule that the insurance carrier continue the payment of workmen's compensation benefits to the plaintiff after she has become the adopted child of Mr. Lewis Rossman.

The question therefore is whether or not plaintiff loses her entitlement to compensation benefits upon being adopted. The answer quite clearly is that she does not lose her workmen's compensation benefits. In *Davey vs. Norwood-White Coal Company,* 195 Iowa 459; 192 N.W. 304(1923), the court held that the right to compensation is determined by claimant's status at the time of the injury to the employee. In that case, the court specifically held that the dependent minor children did not lose their right to compensation benefits when their mother remarried and they became stepchildren. The view that the right to compensation accrues at the time of death was again stated in *Kramer vs. Tone Brothers,* 198 Iowa 1140; 199 N.W. 985 (1924).

Further, Professor Larson in his *Workmen's Compensation Law,* §64.40 at page 11-122, citing authorities, states that when "rights as a dependent under an award have been acquired, they are not lost by a subsequent change in the dependent's financial position" such as being adopted.

It should be noted that defendants oppose this declaratory ruling because no justifiable controversy exists between the parties. Neither §17A.9, Code nor rule 500-5.1(1)-(7), I.A.C., require a justifiable controversy in order that a declaratory ruling be issued; the rules of civil procedure do not apply because the requirements for declaratory rulings are adequately covered in the applicable statutes and rules.

* * *

Signed and filed at Des Moines, Iowa this 20th day of April, 1979.

BARRY MORANVILLE
Deputy Industrial Commissioner

No Appeal.

MICHAEL BESCH,

Claimant,

vs.

FORT DODGE LABORATORIES,

Employer,

and

LIBERTY MUTUAL INSURANCE COMPANY,

Insurance Carrier,
Defendants.

Review Reopening Decision

This is a proceeding in review-reopening brought by Michael Besch, the claimant, against his employer, Fort Dodge Laboratories, and the insurance carrier, Liberty Mutual Insurance Company, to recover additional benefits under the Iowa Workers' Compensation Act on account of an injury he sustained on March 17, 1977.

* * *

The issues to be determined are whether there is a causal relationship between claimant's alleged permanent partial disability and the March 17, 1977 work injury and, if so, the extent of claimant's permanent partial disability. Certain medical expenses are also in issue.

Claimant testified that in August of 1971 he began working as an animal caretaker for defendant-employer. In 1976 he bid on a maintenance job with aspirations of becoming an "O" worker -- one who has skills in at least two of six areas (mechanics, plumbing, welding, refrigeration, carpentry and electricity). On March 17, 1977 the claimant, wearing a helmet and safety glasses, was welding a lid on a barrel that apparently was filled with ammonia. The barrel exploded. The claimant was knocked unconscious.

Claimant recalled being hospitalized and treated by a Dr. M. E. Kraushaar initially and then by Robert A. Hayne, M.D., from March 24, 1977 to April 10, 1977. Upon discharge from the second hospitalization, his complaints were deafness in the left ear and loss of taste and smell. After claimant had returned to work he noticed some loss of hearing in the right ear and also frequency of headaches when in noisy environments. In addition to these problems, the claimant's present complaints include constant ringing in the left ear that sometimes prevents him from sleeping, some dizziness upon rising in the morning, passing out occasionally, stomachaches and loss of concentration.

Claimant testified that prior to the date of injury he had been in good health, had passed hearing tests and had headaches only of a hangover nature.

Claimant further testified that he is still working for the defendant-employer in a maintenance position. He stated he no longer welds because he is unable to smell the fumes and because the noise gives him headaches. Claimant said he worked in the boiler room prior to the date of injury but would not do so now because he could not detect the ammonia fumes. He does minor electrical work but fears major projects that depend on team work -- team communication. He also notes that since the date of injury he fears high places. He now relies on machines rather than his hearing to diagnose certain problems. He commented he would be unable to detect a gas leak.

Claimant no longer thinks he will attain the status of "O" worker. He needs one more skill. Claimant doubts he could learn carpentry because, in his opinion, he lacks the necessary talent. He rules out attaining a skill in plumbing because of the required welding and working at varied heights, and in refrigeration because of ammonia and other fumes that one needs to be able to detect.

On cross-examination the claimant testified that he did not notice a problem with his right ear until about five months after his discharge from the hospital. He has no ringing in the right ear. Claimant admitted being advised by Dr. Updegraff that a lot of shooting might affect his hearing. He denied being told by Dr. Updegraff that he should stop shooting altogether. Although claimant is in a trap league, he testified that he did not participate in the spring of 1978. He has curtailed his shooting activities in general. He is left-handed and places the stock of the gun on his left shoulder. He also goes pheasant and elk hunting. He uses a 12 guage shotgun for trapshooting and pheasant hunting and a 7 millimeter magnum rifle for elk hunting. He testified that he shot the latter a total of four times last year and once the year before. He also previously hunted fox in Iowa with a .22-250 rifle. On redirect claimant pointed out that he wears ear plugs when he shoots.

Claimant denied recently telling Dr. Updegraff that his headaches, stomachaches, nervousness and vertigo were gone.

Although claimant agreed that the employee whose place he took before the date of injury was an "O" worker, he explained that at the time of the injury he was not actually in training to become an "O" worker. Claimant denied ever saying he did not want to pursue any additional skill necessary for his "O" rating. He explained that he merely was unsure which skill he wanted to develop. Claimant also denied telling anyone early in 1977 that he wanted to pursue an "O" rating. He did not want to leave the garage area. On redirect claimant explained that mechanical work changes constantly and that he wants to keep up with the new developments.

Claimant's witness, Charles Flickinger, an employee of defendant-employer since April 1, 1970, testified that he has worked with the claimant for five years. He is an "O" worker with skills in welding, plumbing and electricity. He did not think the claimant could perform satisfactorily in these areas due to his sense losses. Flickinger stated he would not want to work with the claimant because of claimant's hearing deficiency that would be of hazardous import in an emergency situation. On cross-examination he admitted he has not actually worked with the claimant since the date of injury. Flickinger's observations of claimant's change in personality, such as loss of patience and terse conversation, occurred in the shop area where he would go to pick up tools.

Defense witness Edward West, a past employee of defendant-employer for two years and currently maintenance supervisor, testified that in November or December of 1978 he met with claimant to discuss what procedure to follow in becoming a multi-skill employee. Although the claimant indicated he would not petition to be on such a program at that time, he did prepare such petition in January of 1979 at which time West and the claimant discussed training area openings. According to West, claimant reacted negatively to the idea of being called out of the garage to work in other fields but agreed to try welding. West testified that after the claimant commenced such program in January, he just quit -- he did not report to West, and West would find others doing work assigned to the claimant. West testified that both prior to the short-term "O" worker training and for a while after the date of injury claimant did his own welding in the garage.

Defense witness Billie B. Hancock, vice-president and technical director for defendant employer and a Doctor of Veterinary Medicine, testified that he worked with the claimant both before, at the time of, and after the date of injury. He testified that claimant was a trainee at grade 3 level, which is one step below a single skilled mechanic, which is one step below a multi-skilled rating. Hancock testified that claimant has since obtained the single skill level. Hancock believed the claimant could enter training in any of the remaining five areas and that claimant's biggest problem was not so much his physical loss of some senses, but his attitude. Hancock pointed out that claimant's attitude has not really changed that much from what it was before the date of injury. He explained that claimant will be very enthusiastic about his work sometimes and then very indifferent at other times. Hancock did admit however that claimant's inability to smell and hear would create a handicap for which cliamant would have to compensate and which would affect his ability to complete the necessary training to accomplish an "O" rating. However, Hancock believed the claimant could succeed.

In a letter dated September 13, 1977 and addressed to defendants' counsel, Robert A. Hayne, M.D. relates claimant's early course of treatment:

> [Claimant] had a history dating back to March 17, 1977, at which time while working at the Fort Dodge Laboratory a container exploded striking the patient in the facial region. Fortunately he was wearing a welding mask which gave partial protection to his face. He was reported to have been knocked unconscious for a short period of time. Approximately an hour after the accident, he was admitted to the emergency room at Fort Dodge. He was hospitalized at that time and improved so he was up and about walking on March 22,

1977. At that time he was discharged. Around 10:00 a.m. on March 23, 1977, he developed headache and became dizzy and vomitted on several occasions. His temperature was reported to be around 100° and he was seen by Doctor M. Kraushaar in Fort Dodge with spinal fluid examination showing glucose of 125 with a cell count being 1,900 most of which were polymorphs. Skull x-rays were negative. The white count in Fort Dodge in the evening on March 23, 1977, was 22,000.

In a letter dated April 12, 1977 and addressed to Maurice Eugene Kraushaar, M.D., Dr. Hayne reports on his treatment of Dr. Kraushaar's patient, the claimant, during the hospitalization from March 24, 1977 to April 10, 1977:

> A neurological examination at the time of his admission to the hospital here showed the patient to be awake and able to talk in an oriented fashion. His neck was 3+ stiff. X-rays of the chest and skull showed no abnormalities. The facial bone x-rays on April 8, 1977 showed a healing undisplaced fracture involving the lateral and inferior margins of the right antrum. There were no other injuries identified. The sinuses were clear and contained air.
>
> The patient's course in the hospital was one of steady improvement. An isotope study was carried out on April 3, 1977. This study showed more drainage of cerebrospinal fluid into the right nostril than was considered normal with the latter drainage being 3 times as much as on the left side. A computerized axiotomographic scan of the brain on April 6, 1977 showed no evidence of cranial involvement such as the nature of air or abscess formation.
>
> The patient did not show any definite dripping of cerebrospinal fluid from the nose and it was felt at the time of his discharge from the hospital that the prognosis for spontaneous healing of what appeared to be apparently a cerebrospinal fluid leak was good.

Although Dr. Hayne comments about claimant's loss of taste, smell and hearing on the left and says nothing of loss of hearing on the right in a letter addressed to defendants' counsel and dated May 10, 1977, in a similar letter dated July 26, 1977 he notes that his neurological examination revealed "the right ear was not up to par." Dr. Hayne did release the claimant to return to work as of June 1, 1977 but advised that the claimant should be given work that would not endanger him in light of his hearing and smelling deficiencies.

In the September 13, 1977 letter referred to above, Dr. Hayne reports that during claimant's hospitalization from March 24, 1977 to April 10, 1977 "[f]urther examination showed marked hearing loss on the left side and partial loss on the right." He concludes such letter by stating:

> The final diagnosis is hearing impairment on the right with loss of hearing in the left ear, both secondary in all probability to basilar skull fracture sustained in the accident of March 17, 1977. There was also injury to the olfactory bulbs and nerves bilaterally resulting in impairment of smell and secondary impairment of taste. He sustained a cerebral concussion incident to the trauma. Mr. Besch, I fell, (sic) has undoubtedly some permanent disability resulting from the effects of the injury. This could be perhaps more accurately assessed by an otolaryngologist. I would suggest that he be checked by Doctor Robert Updegraff * * * *

According to his letter dated October 10, 1978 Dr. Hayne saw the claimant again on October 2, 1978 for complaints of nerves, headaches and two "blackouts." Dr. Hayne recommended that claimant be placed on anti-convulsant medication if the "seizure-like episodes" continue. He also suggested that claimant avoid situations that would be harmful physically if claimant fell during one of those episodes.

Robert Rice Updegraff, M.D., specializing in otolaryngology, testified that he first examined the claimant on September 23, 1977. An audiometric study conducted by his audiologist, Julia A. Shirk, revealed no evidence of hearing on the left and essentially normal hearing on the right. Dr. Updegraff had been provided with an audiometric study done on April 4, 1977 at Dr. Hayne's request. He stated that this too revealed normal hearing on the right. However, an audiometric study conducted by Ms. Shirk on September 1, 1978 revealed some change in hearing on the right. Similar downward trends were shown by the studies done on December 22, 1978 and March 23, 1979. The last audiometric study by Ms. Shirk was conducted on July 27, 1979 and revealed: (1) a speech reception threshold of 25 decibels (a decibel is a measurement of hearing) -- "[t]hat means essentially being able to hear relatively simple words, such as 'blackboard,' at a level of sound of 25 decibels, which means that you raise the amount of sound going to the ear to the level of 25 in order to hear those words at that level," and (2) an air conduction level of approximately 40 decibels -- which "means the transference of sound through the ear itself, through the outer ear, through the middle ear and into the inner ear, and into the brain. That's the air perception, as the sound waves move through the ear, through the outer, middle, inner ear."

Dr. Updegraff testified that he referred the claimant to Lee A. Harker, M.D., a professor at the University of Iowa Hospitals and Clinics, Department of Otolaryngology and Maxillofacial Surgery. Dr. Updegraff noted that three audiometric studies conducted by Steve Otto for Dr. Harker on August 23, 1977 fluctuated from 50 decibels to 40 decibels to 20 decibels. The latter finding being just below the normal range of hearing and consistent with Ms. Shirk's September 1, 1978 study. (Using the American Academy of Ophthalmology & Otolaryngology 1971 report, Dr. Updegraff testified that the 20 decibel findings and Ms. Shirk's September 1, 1978 study translated to 2.4 percent loss on the right and 100 percent loss on the left, or 18.6 percent binaural loss. Using the Office of the Worker Compensation Program 1969 report, he stated such losses would be 7.5 percent, 100 percent and 22.9 percent respectively.) The worst test finding of 50 decibels was consistent with Ms. Shirk's March 23, 1979 study. (Dr. Updegraff translated such findings into 32.4 percent loss on the right, 100 percent loss on the left and 43.66 percent

binaural loss. The two reports referred to above were consistent at the 50 decibels level.) Dr. Updegraff pointed out that the fluctuation in test results could be attributable to the functional component which is "a non-organic, not a specific infection or specific growth, tumor or lesion." Examples of the functional component include the communication between the examiner and the patient and the patient's response to the test.

In a letter dated August 27, 1979 and addressed to Dr. Updegraff, Dr. Harker commented on his observations:

> * * * The third set of pure tones as well as the final SRT and discrimination (sic) scores are no worse than the ones obtained by Julia Shirk September 1, 1978. If that is the case there hasn't been any dramatic progression. * * * In patients who have had a total unilateral sensorineural hearing loss for some time, there is an occasional one who develops endolymphatic hydrops in the same (and rarely in the opposite) ear. Usually however, the loss has been in existence since early childhood and the hydrops does not manifest itself until many years later. I have also seen some people who did exhibit a gradual to progressive sensorineural hearing loss in the opposite ear under these circumstances so I think it is more important that we continue to watch his right ear.

Dr. Updegraff similarily agreed during his direct testimony that there was no way of knowing at present the extent to which claimant's hearing in the right ear might be affected. He speculated that it might take three to five years to determine such fact. He also felt that any determination regarding causal connection at this time would be "a matter, at this moment, of conjecture and philosophy, more than factual." Yet, on cross-examination, Dr. Updegraff stated, "I think his hearing loss would be related to the incident." Dr. Updegraff explained his position in more detail during redirect examination:

Q. Doctor, in response to Mr. Johnson's questions as to what problems Mr. Besch presently has as a result of the accident, you indicated a hearing loss. I assume you are referring to the left ear hearing loss as a result of the accident?
A. Primarily, yes.
Q. As I understand the right hearing loss, at least what has been measured and when it was measured, it's impossible to relate it back to the accident in March of '77?
A. It isn't possible to relate it absolutely specifically, no, because there are other factors that we talked about; but we have tried to outline that when you do have a severe loss in one ear, that you will sometimes, for various medical reasons that are a little indeterminate, but they are still present, that it can reflect in the opposite ear; so we have left room for that possibility.
Q. In other words, if there has been a hearing loss, and apparently there has been some hearing loss in the right ear, although it may not be directly related to the accident, you are saying it may possibly have come from the loss, or as a result of the loss to the left ear?
A. We would not like to completely exclude that possibility.
Q. But it's just a possibility, as I understand it?
A. That's correct.

Dr. Updegraff conceded that if claimant ends up with a substantial level of 25 decibels, that will be of some importance to his occupation. He agreed that claimant's complaints are consistent with one who has a loss of hearing in the inner ear which makes it more difficult to distinguish and separate sounds coming from different directions. He noted that one depends upon hearing in both ears to hear directionally. Dr. Updegraff also testified that inner ear hearing loss can result in tinnitus, noise in the ear, and in vertigo, dizziness, which in turn can result in nausea. However, he did not think headaches were related to tinnitus *per se*. He commented that headaches following trauma were not unusual but he deferred to Dr. Hayne's opinion. Likewise he did not believe claimant's blackout spells were inner-ear related but deferred to Dr. Hayne's opinion on that matter. He noted claimant was not complaining of headaches or nausea or vertigo, but only of lightheadedness on July 27, 1979. He warned claimant to avoid noise exposure. He recommended the claimant not shoot high powered rifles or even participate in trap shooting. At the very least, he advised claimant to wear appropriate ear protection.

Dr. Updegraff testified that the rhinorrhea, loss of spinal fluid through the nose, which claimant experienced as a result of the explosion, affected his olfactory system. He opined that it was reasonable to assume claimant's loss of sense of smell and related sense of taste were causally related somewhat to the work-injury. He added that vertigo was associated subjectively. Dr. Updegraff described the loss of smell as "more of an inconvenience and a personal hindrance, more so, than an impairment of most job functions. With respect to the loss of taste, he said: "In most jobs and situations, it would be more of a personal loss than an actual job loss."

The claimant has the burden of proving by a preponderance of the evidence that the injury of March 17, 1977 is the cause of his disability on which he now bases his claim. *Bodish v. Fischer, Inc.*, 257 Iowa 516, 133 N.W.2d 867 (1965). *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 (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).

The opinions of experts need not be couched in definite, positive or unequivocal language. *Sondag v. Ferris Hardware*, 220 N.W.2d 903 (Iowa 1974). An opinion of an expert based upon an incomplete history is not binding upon the commissioner, but must be weighed together with the other disclosed facts and circumstances. *Bodish v. Fisher, Inc.*, 257 Iowa 516, 133 N.W.2d 867 (1965). The 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 regard to medical testimony, the commissioner is

required to state the reasons on which testimony is accepted or rejected. *Sondag v. Ferris Hardware, supra.*

Although Dr. Updegraff's opinion regarding claimant's hearing loss on the right being causally related to the date of injury in issue is qualified, Dr. Hayne's final diagnosis states that such hearing loss is probably secondary to the injury. It is noted that Dr. Hayne makes this diagnosis despite what were apparently normal findings from right ear audiometric studies taken in April of 1977. Additionally, claimant's lack of hearing problems prior to the date of injury and the lack of any intervening causative factor of hearing loss on the right support a finding that his present binaural hearing loss is causally related to the work injury.

The defendants imply that claimant's loss of hearing is related to his rifle and shotgun hobbies. However, no medical expert suggests such conclusion (although recommendation to avoid such exposure is made). Also, claimant testified that the stock of the gun is placed on his left shoulder, not the right. Again, he did not indicate hearing problems prior to the date of injury although he formerly devoted a great deal of time to such sport.

The extent of binaural hearing loss is uncertain as of this date. Dr. Updegraff seems to think the true extent of loss will be determined three to five years from now. He notes the inconsistency or vacillation in claimant's test results. Accordingly, at this time an award for binaural hearing loss in accordance with Code section 85.34(2)(r) will be based on the median between the highest and lowest findings or percentages of loss as testified to by Dr. Updegraff. [The median between 22.9 percent and 43.66 percent is 33.28 percent. Such percentage of 175 weeks (rounded to the nearest whole number) is 58 weeks.]

The loss of sense of smell and of taste are not scheduled losses, and accordingly, shall be compensated pursuant to Code section 85.34(2)(u).

Functional disability is an element to be considered in determining industrial disability which is the reduction of earning capacity, but consideration must also be given to the injured employee's age, education, qualifications, experience and inability to engage in employment for which he is fitted. *Olson v. Goodyear Service Stores,* 255 Iowa 1112, 125 N.W.2d 251 (1963); *Barton v. Nevada Poultry,* 253 Iowa 285, 110 N.W.2d 660 (1961).

Twenty-nine year old claimant, divorced and father of one child, testified that he had a high school education plus one and one-half years of college. His plans of becoming a veterinarian were abandoned when he married and could no longer afford the expense of higher education. Although claimant was aware of the fact that the defendant-employer reimburses employees for college courses taken and passed, claimant has not taken advantage of such program. He said he learned some mechanical skills on a farm and in building race cars. His work history includes selling insurance, mounting motors, driving cement trucks, diesels and school buses, and bartending.

Claimant testified that but for the injury he thinks he would have attained "O" worker status by this time. The undersigned questions whether claimant really wanted to become an "O" worker in light of defense witnesses' testimony and because of claimant's obvious desire to pursue and perfect mechanical skills. There is a $.60 difference per hour between his present level and that of an "O" worker. Claimant admitted earning more now than at the date of injury, but seemingly attributed this to routine contract provisions.

Neither Dr. Hayne nor Dr. Updegraff specify the actual functional impairment to the body as a whole as a result of claimant's loss of sense of smell and of taste. Neither loss is total. Claimant's job duties with defendant-employer did not really entail use of the sense of taste. Claimant did not express any present or future vocational plans that would be affected by such a loss. However, claimant's loss of smell does hinder him in detecting gas leaks when working in the garage and in detecting hazardous fumes when performing in some of the other "O" worker areas. Both the claimant's witness and the defense witnesses appear to think loss of smell is not as serious to the claimant in his working environment as is his loss of hearing. Yet, loss of hearing is a scheduled disability and is not to be considered in assessing claimant's loss of earning capacity as a result of the work injury in issue. The degree of the loss of the sense of smell has had a minimal effect on claimant's earning capacity.

* * *

Signed and filed this 17th day of December, 1979.

LEE M. JACKWIG
Deputy Industrial Commissioner

No Appeal.

O. W. BIERMA,

Claimant,

vs.

STORY COUNTY,

Employer,

and

HAWKEYE-SECURITY,

Insurance Carrier,
Defendants,

and

O. W. BIERMA,

Claimant,

vs.

STATE OF IOWA,

Employer,
Self-Insured,
Defendant.

Appeal Decision

This is a proceeding brought by claimant appealing two

proposed decisions in arbitration wherein he was denied benefits under the Iowa Workmen's Compensation Law. In the first arbitration proceeding claimant sought benefit from defendant Story County; in a second proceeding the State of Iowa was named defendant. On September 25, 1978 claimant filed a motion to consolidate the cases on appeal.

* * *

On March 9, 1976 claimant reported for duty as a grand juror in Story County and was appointed foreman. After the swearing in, the grand jurors talked to various officials in the courthouse and toured the building. Claimant testified that shortly after three o'clock he began sweating and feeling "a little pain" in his chest. The grand jury adjourned around four o'clock. Claimant went to Dr. Sterbenz, who sent him to the hospital. An EKG showed an acute inferior myocardial infarction.

The issue to be resolved in the first proceeding was whether or not a grand juror is an employee of the county; in the second proceeding, whether or not a grand juror is an employee of the state.

The similar issue of whether or not a petit juror was an employee entitled to workmen's compensation benefits was presented to the Maryland Court of Appeals in *Lockerman v. Prince George's County,* 281 Md. 195, 377 A.2d 1177 (1977). The court ultimately concluded a juror is not an employee, thereby aligning itself with the courts of Colorado, Florida, Massachusetts, New Jersey, New Mexico, and North Carolina. The Supreme Court of Ohio, the only other court addressing the issue reached a contrary result under a statute covering service under an appointment for hire. The *Lockerman* court examined the nature of the employment relationship with particular emphasis being given to contractual elements and determined that the element of agreement was absent in that one summoned for jury duty could not elect not to appear. Suggesting that inclusion of jurors under the workmen's compensation act was a matter to be addressed by the legislature, the court cited with approval the principle applied by the Colorado Supreme Court in *Board of Commissioners of Eagle County v. Evans,* 99 Colo. 83, ---, 60 P.2d 225, 226 (1936):

> The county does not negotiate with a citizen for his services as a juror, nor does the citizen apply to the county for such preferment. When a citizen is summoned to jury service he responds to process running in the name of the people, which imparts such dignity that it commands respect, and is of such force that none disobeys. By the majesty of the law, therefore, not by contract, he becomes a juror.

On reviewing the records, it is found that the deputy industrial commissioner's findings of fact and conclusions of law are proper.

* * *

Signed and filed this 20th day of October, 1978,

ROBERT C. LANDESS
Industrial Commissioner

Appeal to District Court. Remanded
District Court on Rehearing:
Affirmed Commissioner.

ROPHY CHARLES BISHOP,

Claimant,

vs.

CARVER CONSTRUCTION & CONSULTING,

and

TRAVELERS INSURANCE COMPANY,

Insurance Carrier,
Defendants.

Review-Reopening Decision

This is a proceeding in review-reopening brought by Rophy Charles Bishop, the claimant, against his employer, Carver Construction & Consulting, and the insurance carrier, Travelers Insurance Company, to recover additional benefits under the Iowa Workers' Compensation Act as a result of an injury he sustained on January 5, 1977.

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

Claimant, age 29, married with two dependent children, is a working construction foreman building Pizza Hut restaurants throughout the middle west for the defendant-employer.

On January 5, 1977 a forklift truck, which the claimant was operating at the time, tipped over onto him injuring his neck, right hand and left knee (claimant's exhibit 2). Claimant was under the care of local Oklahoma City physicians and was paid healing period benefits from January 6, 1977 until August 31, 1977 and again from September 9, 1977 until October 27, 1977. Some 13 months after the industrial episode under review, surgical intervention of claimant's right knee was finally undertaken and "a tear in the posterior one third of the medial meniscus" was found by David R. Brown, M.D., (claimant's exhibit 2, report of February 21, 1978).

Claimant alleges he has not been able to return to any form of gainful employment since the date of the industrial accident in question.

The issue requiring a ruling is the nature and extent of claimant's disability, if any.

Marcus L. Cox, M.D., the primary care physician, reported on February 24, 1977 as follows (claimant's exhibit 2):

> DISCUSSION: At this time, this 27-year-old man suffered severe injuries when he was caught between the ground and the forklift. His reports from the emergency room at Waverly, Iowa did indicate, that in addition to the severe laceration mangling of his hand, he had an abrasion on the side of his head and

> complained of some stiffness of back and neck. These have collaborated since that time as well as his knee symptons [sic]. It is impossible to make a prognosis on this case at the present time; however, he is totally temporarily disabled and one can expect that for at least four to eight weeks in the future and the total damages cannot be assessed at this time.

Following the tardy knee surgery Dr. Brown, the attending orthopedic surgeon, concluded that the claimant has a functional impairment of 10 percent of the right leg (claimant's exhibit 2, report of June 5, 1978).

Edward A. Shadid, M.D., a plastic surgeon, concluded on November 11, 1977 that the claimant has a permanent functional impairment of 50 percent of his right middle finger.

Claimant's current subjective complaints center around rib cage, shoulder and neck pain. Claimant further testified that his discomfort is sufficiently severe so as to require use of Valium in attempting to sleep.

Based upon personal observation of the claimant it is concluded that the greater weight is to be given to his testimony. The attempted impeachment of the claimant, in that the history contained in the reports of D. L. Trent, M.D., and J. Raymond Stacy, M.D., failed to contain any reference concerning claimant's previous industrial fall of 1974, failed. The actions of this claimant belie any such inference that he was attempting to conceal a prior injury. At the time of his injury claimant was earning $7.00 per hour. After attempting and failing to obtain and hold employment as a clothing salesperson, he is now "self employed" in driving his one-half ton pickup truck in a home appliance delivery business which grosses $70 - $80 per month.

The primary cutting issue is the continuing existence of claimant's back, neck and shoulder pain.

Dr. Stacy, in his report dated January 3, 1979 (joint exhibit 1), fails to find evidence of involuntary muscle spasm in the cervical or lumbar musculature.

D. L. Trent, M.D., however, in his examination of August 2, 1978 finds "palpable cramping and tightness of the right shoulder muscle groups, including the deltoid and trapezius" together with a restricted range of motion (claimant's exhibit 2).

The claimant has the burden of proving by a preponderance of the evidence that the injury of January 5, 1977 is the cause of the disability on which he now bases his claim. *Bodish v. Fischer, Inc.,* 257 Iowa 516, 133 N.W.2d 867 (1965). *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 testimony. *Bradshaw v. Iowa Methodist Hospital,* 251 Iowa 375, 101 N.W.2d 167 (1960).

In applying the foregoing legal principles to the case at hand, it is concluded that the claimant has sustained his burden of proof. The medical opinion of Dr. Trent, which is given the greater weight in this decision, confirms the existence of continuing neck and shoulder pain some 18 months after the industrial injury.

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.2d 899 (1935), 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 *Martin, supar,*]. 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. * * * *

Functional disability is an element to be considered in determining industrial disability which is the reduction of earning capacity, but consideration must also be given to the injured employee's age, education, qualifications, experience and inability to engage in employment for which he is fitted. *Olson v. Goodyear Service Stores,* 255 Iowa 1112, 125 N.W.2d 251 (1963). *Barton v. Nevada Poultry,* 253 Iowa 285, 110 N.W.2d 660 (1961).

Dr. Stacy concludes that the claimant has a five percent functional impairment of the body as a whole and that the claimant has sufficiently recovered so as to be able to resume his prior duties as a carpenter.

Dr. Trent concludes that the claimant has a disability of "65 percent for the performance of ordinary manual labor."

In applying the foregoing legal principles to this matter it is concluded that the claimant has sustained an industrial disability of 40 percent of the body as a whole. The 27-year-old construction worker finds himself in a position of having to find a new, less physically demanding occupation at the early portion of his career. Fortunately, the claimant has found a substitute vocation through the efforts of the state of Oklahoma Department of Vocation Rehabilitation and is currently engaged in taking business courses.

This claimant sustained an industrial spinal injury in 1974 for which he received an award of 20 percent of the body as a whole. While this record fails to contain any medical evidence which would tend to shed light as to how and why this award was made the claimant appeared by his work activities to have made a reasonable recovery therefrom. In the absence of supportive medical evidence, the

claimant's award in this matter is reduced by the amount previously awarded since as a general rule a claimant should not be compensated twice for the same condition.

Based upon the claimant's knee condition found during the February 1978 surgery it is clear that the claimant is entitled to additional healing period benefits for that period of time prior to the surgery. Claimant testified he worked a total of two weeks and four days in December 1977 and January 1978 and that due to the knee discomfort he was experiencing at that time, he was unable to discharge the necessary duties of retail salesperson.

* * *

Signed and filed this 27th day of March, 1980.

HELMUT MUELLER
Deputy Industrial Commissioner

No Appeal.

FRANK E. BLACKSMITH,

Claimant,

vs.

MASSEY-FERGUSON, INC.,

Employer,

SENTRY INSURANCE,

Insurance Carrier,
Defendants.

Arbitration Decision

This is a proceeding in arbitration brought by Frank E. Blacksmith, the claimant, against his employer, Massey-Ferguson, Inc., and the insurance carrier, Sentry Insurance, to recover benefits under the Iowa Workers' Compensation Act as a result of an injury he sustained on September 28, 1977.

* * *

The issue in this matter is whether or not the claimant's work activity between April, 1977 and September 28, 1977 aggravated the preexisting osteoarthritic condition in his right knee.

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

Claimant, age 44, married, began his employment career with the defendant-employer in 1968. Claimant had surgery on his right knee in 1951. In 1973 claimant became a patient of A. G. Grundberg, M.D., who reported, in part, as follows (defendants' exhibit 2):

> Mr. Blacksmith age 39 was admitted to Iowa Methodist [sic] Hospital on 11 July 1973, with a torn medial meniscus in the right knee. Treatment on the day following admission consisted of a right medial meniscectomy. At the time of surgery, the meniscus was found to be torn and frayed anteriorly. There was also severe degenerative arthritis of the knee. There was mild to moderate instability of the medial collateral ligament. Postoperatively he was put in a pressure dressing. This was changed on 15 July; by 16 July he was walking well and exercising well. He was relatively comfortable and afebrile. He was discharged home. He was asked to return again to my office again in one week for further followup.
>
> He was given Percodan No. 30 for pain.
>
> FINAL DIAGNOSIS: 1. Torn medial meniscus, right knee. 2. Degenerative arthritis, right knee.
>
> PROCEDURE: Right medial meniscectomy.

In June of 1976, James E. Laughlin, D.O., performed a total right knee arthroplasty (the making of an artificial joint).

In September, 1976, claimant had a revision performed on the prosthesis previously installed and which had become painful requiring additional surgical intervention.

In April, 1977 claimant resumed his employment activities for the defendant-employer, being able to discharge his work assignments until September 28, 1977 at which time the claimant found himself unable to continue. Claimant described his knee as "like it was locked up" (transcript, page 13, line 13).

Claimant's knee has recently been fused by John P. Albright, M.D., at the University of Iowa Hospitals and Clinics.

Dr. Dubansky and members of his group saw the claimant beginning in October, 1977. Examination disclosed that "claimant's prosthesis is stable" (deposition, page 8, line 8) but that due to pain, suggestion was made that the claimant see Dr. Albright in Iowa City. Dr. Dubansky expressed the opinion that claimant had not sustained an injury in the course of his employment on September 28, 1977.

The following question and answer appears in the deposition of James Laughlin, D.O. (deposition, page 16 - 17 and 18):

> Q. Doctor, in your opinion, would the work activity have either caused or contributed to the further deterioration in the knee and the increase in the pain symptomatology that the patient experienced in the knee commencing on about September 28?
>
> A. In answer to your question, the basic problem is that I don't know at this point in time, which is April or September 1977, why the patient was having pain in the knee. If I knew for sure why he was having pain, I could give a lot better answer as to whether his job would have irritated or aggravated the condition in his knee.
>
> I think as strong as I can say it is that we have a patient who had had two surgeries on his knee previously and still had a painful knee. The choices of what is wrong with it would be infection, loose components, just the nebulous thing that we say "a

painful prosthesis," which means we don't know why it is painful. The other possibility is the neurological pain tract theory that I just talked about.

If what is wrong with his knee was something related, basically, to the knee, such as infection, loose components, some muscle spasm around the knee, that type of thing, then I can say "Yes, his occupation -- having to get up and down, carry objects, and such -- would aggravate a pre-existing condition." And a pre-existing condition was obviously whatever was wrong with the knee prior to the time he started back to work. If it was the neurological pain tracts that I talked about, the working would have a psychological effect but would probably not have the physical effect if it was truly at this point an established psychological reflex, which I don't know that there is any way for anybody to tell at this point in time -- April to September -- whether it was a purely psychological-neurological type of reflex.

So I guess what I am saying is I can't really say. It depends entirely on what was wrong with that knee at that time that was causing the pain or what was wrong with the patient, because it may have been at that time something not even related to his knee. It may have been the psychological-neurological reflex type of thing.

The claimant has the burden of proving by a preponderance of the evidence that the injury of September 28, 1977 is the cause of his disability on which he now bases his claim. *Bodish v. Fischer, Inc.*, 257 Iowa 516, 133 N.W.2d 867 (1965). *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 testimony. *Bradshaw v. Iowa Methodist Hospital,* 251 Iowa 375, 101 N.W.2d 167 (1960).

In applying the evidence contained in this record to the foregoing legal principles it is clear that the claimant has failed to produce supportive medical evidence that his pre-existing osteoarthritis was aggravated by his work activities during the six-month period immediately preceeding his last day worked.

* * *

Signed and filed this 24th day of January, 1980.

HELMUT MUELLER
Deputy Industrial Commissioner

No Appeal.

CAROLYN ANN BLAKELY,

Claimant,

vs.

EVERCO INDUSTRIES, INC.,

Employer,

and

EMPLOYERS INSURANCE OF WAUSAU,

Insurance Carrier,
Defendants.

Appeal Decision

Claimant, Carolyn Ann Blakely, has appealed from a proposed arbitration decision wherein claimant was awarded 29 weeks of temporary total disability compensation and defendants were ordered to pay certain medical expenses.

* * *

On reviewing the record it is found that the deputy's findings of fact and conclusions of law are proper with the following modifications.

Claimant contends that she is entitled to certain transportation costs incurred in traveling to various locations for medical treatment. Iowa Industrial Commissioner Rule 500-8.1 states in relevant part:

> Transportation expense. Transportation expense as provided in sections 85.27 and 85.39 of the Code shall include but not be limited to the following:
>
> * * *
>
> 2. All mileage incident to the use of a private auto. The per mile rate for use of a private auto shall be the same as the State of Iowa reimburses its employees for travel.
>
> 3. Meals and lodging if reasonably incident to the examination.

Claimant has submitted claimant's exhibit five along with the testimony of her father, Oris Coop, as proof of the transportation costs she has incurred. As medical treatment through April 24, 1978 has been found to be reasonable, the transportation costs incurred from the date of injury through April 24, 1978, which were reasonably necessary for this medical treatment, are compensable. It appears from claimant's exhibit five that there are four compensable trips to Iowa City, which include November 28, 1977; January 3, 1978; February 6, 1978; and March 20, 1978. Meal expenses incurred on these trips are compensable. Apparently there also were several trips to both Bloomfield and Ottumwa for reasonably necessary medical treatment from J. J. Finneran, M.D., and Dr. Meyer, a chiropractor, which are compensable if made between the date of the injury and April 24, 1978. Any and all compensable transportation costs are personal to claimant and are to be paid to claimant.

Claimant seeks a remand because the deputy did not mention a report and evaluation of John Hunolt in his proposed arbitration decision. Since no permanency was found, it was not necessary to mention the report and therefore the request for remand is denied.

WHEREFORE, it is found:

* * *

That claimant is entitled to the following transportation costs:

Trips to Iowa City		
November 28, 1977	130 miles	
January 3, 1978	130	
February 6, 1978	130	
March 20, 1978	130	
	520 miles	
520 miles x $.15 =		$78.00
Meals:		
4 trips x 2 people at $2.50/meal		20.00
	Total	$98.00

That claimant is also entitled to any other transportation cost incurred between the date of the injury and April 24, 1978 which was reasonably necessary for medical treatment of claimant's injury and resultant condition which arose out of and in the course of her employment.

* * *

Signed and filed this 6th day of April, 1979.

ROBERT C. LANDESS
Industrial Commissioner

No Appeal.

ELMA A. BOER,

Claimant,

vs.

UNIVERSAL-RUNDLE CORPORATION,

Employer,
Self-Insured,
Defendant.

Ruling

BE IT REMEMBERED that the above captioned proceeding in arbitration came on for hearing before the undersigned deputy industrial commissioner on March 8, 1979 at which time the claimant offered claimant's exhibit 7 which is a letter-report addressed to claimant's counsel, signed by Dr. Jack W. Brindley, M.D., and dated October 11, 1978. Defendant acknowledged that he had received a copy of said item more than thirty days prior to the date of the hearing but objected to its admission into evidence because claimant had not at any time prior to the hearing served the defendant with notice of intent to offer the same at the hearing.

The letter-report was received into evidence while the defendant's objection was taken under advisement. It was agreed by the parties that the undersigned would rule in the near future regarding said exhibit. In case of an adverse ruling to the offer, claimant indicated that in the meantime a deposition of Dr. Brindley would be scheduled within thirty days of the hearing. Claimant also asked that the offer of Exhibit 7 be considered an offer of proof in the event the defendant's objection is sustained.

Defendant's objection relies upon Industrial Commissioner's Rule 4.17 which reads:

> 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 decision-making 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 underlined language above indicates that if defendant wants to cross-examine Dr. Brindley, he shall do so no later than thirty days after March 8, 1979 because notice of intent to offer claimant's exhibit 7 was not given prior to the hearing. Had notice been given prior to the hearing, cross-examination would have been limited to within thirty days of the receipt of such notice by the defendant. See *Shirley J. Murra v. AMF Lawn & Garden Division and Fireman's Fund Insurance,* appeal decision filed February 21, 1978. Rule 4.17 does not require that claimant should have served defendant with notice of intent to offer exhibit 7 as a prerequisite to the admission of said exhibit into evidence.

THEREFORE, defendant's objection to the admission of claimant's exhibit 7 is overruled and said exhibit is so received into evidence.

Signed and filed this 14th day of March, 1979.

LEE M. JACKWIG
Deputy Industrial Commissioner

No Appeal.

DARRELL A. BOETTCHER,

Claimant,

vs.

THE GARST COMPANY,

Employer,

and

EMPLOYERS MUTUAL CAS. CO.,

Insurance Carrier,
Defendants.

Appeal Decision

Defendants have appealed from a proposed arbitration decision wherein claimant was awarded temporary disability benefits plus certain medical and hospital expenses.

* * *

Claimant drove a truck for the defendant employer on a route between Coon Rapids and the Omaha-Council Bluffs area, hauling grain and fertilizer. If he worked hard, he could make two trips per day. It was Company policy (defendants' exhibit A), and claimant was told specifically that claimant was not to take the semi tractor-trailer to his home. Claimant picked up and left the truck at the "Home Farm" just southeast of Coon Rapids. As to the route to take from Coon Rapids to Omaha-Council Bluffs, there were no specific instructions, but claimant was expected to take the shortest route. There was a prohibition against drinking on company time.

At the hearing, claimant admitted to not telling the truth in his discovery deposition. The deputy industrial commissioner gave his testimony low credibility.

On September 5, 1978 claimant took a load of grain to Council Bluffs, but the plant was closed and he was unable to make delivery. He spent some time in the area (here his testimony is vague) and decided to drive back. Beginning about 6:00 p.m., he spent some two hours at a tavern in the town of Hamlin where he drank six or seven beers. After leaving Hamlin, he proceeded east to the intersection of N46 (going north) and highway 44 (which continues east). If he took the shortest route to the Home Farm, he would have gone north on N46.

Instead, he testified, because of darkness he overshot the intersection and did not want to back up on the highway. He therefore continued on highway 44 easterly and turned north on a country road which took him to the southwest corner of Bayard. He then turned westward on highway 141 on a direct path toward the Home Farm.

Claimant's residence was a mile south of 141. Before proceeding to the Home Farm, he went to his home because his wife did not answer his CB radio call. He drank two beers and watched some television and during this time, his wife arrived home. The family then left to get something to eat, he in the truck, she and their child in a car (because, she says, she did not want to strain the prohibitions with the company by riding with him because she had the baby). They drove west one mile, then north to a point where the country road meets 141. The intersection forms a "T", the country road being the stem of the "T". Claimant overshot the intersection, wrecked the semi and hurt himself. The time was perhaps 10:30 or 11:00 p.m.

There was considerable evidence as to why the accident happened: Claimant claimed that a U-joint broke, causing the truck to free wheel. Defendants claim that claimant was drunk and produced an expert to show that the u-joint was broken in the accident, not before the accident, and suggesting that claimant should have been able to stop the truck.

The recover compensation benefits, claimant must show that the injury arose out of and in the course of the employment.

Musselman v. Central Telephone Co., 261 Iowa 352, 154 N.W.2d 128 (1967). "In the course of the employment" refers to time, place, and circumstance of the injury. *McClure v. Union County,* 188 N.W.2d 283 (Iowa, 1971). Whenever an employee leaves the line of duty, compensation coverage ceases. *Walker v. Speeder Machine Corp.,* 213 Iowa 1134, 240 N.W. 725 (1932). However, to disqualify the employee from compensation coverage, the departure from the usual place of employment must amount to an abandonment of the employment or be an act wholly foreign to the usual work. *Crowe v. DeSoto Cons. Sch. Dist.,* 246 Iowa 402, 68 N.W.2d 63 (1955).

After a deviation from the employment, if the employee returns to the course of the employment, and is then injured, such an injury is compensable. *Crees v. Sheldahl Telephone Co.,* 258 Iowa 292, 139 N.W.2d 190 (1965). See also *Volk v. International Harvester Co.,* 252 Iowa 298, 106 N.W.2d 649 (1960), and *Arthur Larson, Workmen's Compensation Law,* Vol. I, §§19.31, et. seq., beg. p. 4-321, and especially §19.33, p. 4-326.

Claimant deviated from the employment either when he failed to turn north on route N46, or when he turned south off highway 141 and went to his home. Claimant had *not* made the turn westward onto highway 141 which might have returned him to the course of the employment. Instead, the truck continued northward, careened across the highway and into the ditch. Claimant was on a private errand in his employer's vehicle. The impetus of the accident was occasioned by claimant's deviation from the employment, not from any activity within the course of the employment.

* * *

THEREFORE, claimant must be and is hereby denied recovery of compensation benefits.

Signed and filed this 22 day of May, 1980.

ROBERT C. LANDESS
Industrial Commissioner

Appealed to District Court; pending.

VIRGIL BONORDEN,

Claimant,

vs.

JOHN DEERE WATERLOO TRACTOR WORKS,

Employer,
Self-Insured,
Defendant.

Arbitration Decision

This is a proceeding in arbitration filed by Virgil Bonorden, the claimant, against his employer, John Deere Waterloo Tractor Works, holder of a certificate of exemption as contemplated by §87.11, Code of Iowa, 1976, to recover benefits under the Iowa Workmen's Compensation Law by reason of an alleged industrially induced condition which became physically disabling on November 14, 1976.

* * *

The consensus of all of the physicians appearing in this case, both by deposition and report is that the claimant suffering from interstitial fibrosis.

The issue requiring resolution is whether or not the lung disease present was caused by claimant's exposure to various chemicals and gases used by the defendant in its manufacturing process.

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

Claimant, age 48, married with one dependent, began his employment with the defendant in 1947 and since 1961 he has been a spray painter (claimant's exhibit 10). In close proximity to claimant's work station, in the paint booth, is a parts "washer" containing a degreasing compound. The washer tank's heating unit malfunctioned over a period of years (transcript, page 39, line 1) resulting in incomplete combustion and the infusion of raw L.P. gas into the atmosphere. The odorant materials, placed in the natural gas fuel, effect the mucous membrane, (transcript, page 45, line 10) due to a production of alcohols, ketones, alkyloids, organic acids, and carbon monoxide (transcript, page 74, line 3) because of the incomplete combustion. The contents of the wash tank, phosphoric acid phosphate wash, were heated to 200 degrees (F) (transcript, page 78, line 18). No samples were taken of the area over the ash and rinse tanks (transcript, page 80, line 22), not withstanding the many complaints of nausea and vomiting made by employees over the years. Claimant testified that when the wash tank burners were on, surface vapor was always present. Claimant was required to add "acid" to the wash tank on a daily basis and was, as well, asked to fish out parts from the bottom of the tank which had fallen from the overhead rail during previous production periods. The "wash tank" was cleaned and recharged on a weekly basis by the defendant's maintainence department.

A water "bath" system, together with a "collector" system, was used to reduce the amount of paint in the atmosphere of the 20 foot by 30 foot paint booth. However, in an attempt to further control the atmosphere in the paint booths, the defendant has provided a separate air handling system, the source of which is taken from outside the roof.

Much controversy appears in this record concerning the amount of "wash" tank exhaust fumes which were introduced into the air intake involving the paint booth system. Claimant and his witnesses were adamant that during days of certain wind direction and atmospheric pressure, the air intake was being contaminated by exhaust gases from the wash tank due to their proximity one to another.

The exhaust system used to control the vapors from the wash tank appears to have been constructed in such a manner so as to have a portion of the exhaust fumes reenter the air intake used to supply outside air to the paint booth.

The parts which the claimant was to paint entered the spray paint booth on a conveyer chain after having been treated at the "wash tank." Claimant testified that while respirators were available in later years he never wore such a device (defendant's exphibits D & F), nor was he required to do so by the defendant. Claimant further stated that his work clothes would have a paint accumulation of one eighth of an inch after a three week period of daily use. In 1970 the method of paint spraying was changed from air pressure to one involving an electrostatic mode. No apparant change in the atmosphere of the paint booth was noted by the claimant nor by any of his co-employees. Some items of production such as a large "pressed wheels" resulted in an increased amount of blow back.

In order that the paint being sprayed dry in a short period of time, numerous and various solvents having the property of rapid evaporation are mixed into the formula. To further accelerate the desired drying process, the conveyer chain is routed through a large drying oven containing temperatures of 200° (F). When a stoppage of the line occurred due to an accumulation of parts which fell from the chain into the drying oven, claimant was assigned the duty of removal. Claimant stated that due to the intense heat and over powering fumes he was able to stay in the oven no longer than a minute or two at a time. Claimant has not performed acts of gainful employment since his date of resignation on November 14, 1976.

Kenneth Nugent, M.D., an internal medicine specialist with a pulmonary fellowship, testified to having a "fairly limited experience in connection with organic solvents and acids, saying however, that large exposure to some acids may damage the lungs" (deposition, page 26, line 2).

Michael Deters, M.D., specializing in internal medicine testified that he began to treat the claimant in February, 1977 and that following a period of hospitalization, performed a pulmonary function study based upon claimant's history of an onset of a shortness of breath beginning in May, 1974.

The abnormality found as a result of this study was causally connected to the claimant's employment activities of spray painting (deposition, page 19, line 3). Dr. Deters, seeking a second opinion sent the claimant to the department of internal medicine University of Iowa Hospitals and Clinics where he came under the care of John Seidenfeld, M.D., who concurred in Dr. Deter's diagnosis and opinion as to causal connection.

Dr. Nugent of the staff at Iowa City testified that he knew of no studies which would allow him to conclude that a connection existed between the lung disorder and claimant's occupation.

Dr. Nugent expressed uncertainty as to the environmental effect of the claimant's presence in the drying area (deposition, page 31, line 24) containing temperatures of 180 to 240 degree range.

The medical opinion of Dr. Deters is given the greater weight in this decision. His educational background is on a par with Dr. Nugent. Dr. Deters also acted as claimant's attending physician and thereby would be in a position to obtain a more detailed history from which to form an opinion.

The claimant has the burden of proving by a preponderance of the evidence that the condition which became disabling on November 14, 1976 is the cause of his disability on which he now bases his claim. Bodish v. Fischer, Inc., 257 Iowa 516, 133 N.W.2d 867 (1965). 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).

In applying the foregoing legal principles to the case at hand it is concluded that the claimant has sustained his burden of proof by establishing by a preponderance of the evidence that his interstitial fibrosis is causally connected to his 25 year employment and activity as a spray painter for the defendant.

Dr. Deters indicates that the claimant has sustained a 100 percent functional impairment of the body as a whole and that the claimant's lung condition will not improve but may worsen.

Dr. Nugent disagrees, feeling that the claimant should be able to do some work, particularly secondary desk work.

Functional disability is an element to be considered in determining industrial disability which is the reduction of earning capacity, but consideration must also be given to the injured employee's age, education, qualifications, experience and inability to engage in employment for which he is fitted. Olson v. Goodyear Service Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963). Barton v. Nevada Poultry, 253 Iowa 285, 110 N.W.2d 660 (1961).

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.2d 899 (1935), 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 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 Martin, supra,]. In determining industrial disability, consideration may be given to the injured employee's age, education, qualifications, experience and his inability, because of the injury, to engage in employment for which he is fitted. * * * *

In applying the foregoing legal principles to the case at hand it is concluded that the claimant has sustained an industrial disability of seventy percent (70%) of the body as a whole.

The results of the most recent physical examination of this 48 year old spray painter is in part, as follows (claimant's exhibit 2):

> The patient's physical examination has not changed. Breath sounds are distant. He has no rales or wheezes present.
>
> The only finding in the history of the patient does note, is that living in the warmer climate he does not have as much problem if he does go outside with marked increase shortness of breath due to the exposure of cold air.
>
> On physical examination with exercise in the office, patient can walk approximately 20 feet and his respiratory rate jumps from 18 at rest up to 28/minute. Heart rate jumps from 88 to 130. With rest his heart rate and respiratory rate return to normal in approximately 3-4 minutes. The patient can walk approximately 60 feet and heart rate immediately after that is 160 and his respiratory rate is 44. The patient appeared in marked respiratory distress and both returned to normal in 5 minutes. The patient shows great difficulty in walking up one flight of stairs which is even interrupted by a short landing and his respiratory rate and heart rate again jumped to 2-3 times the normal rate with the patient showing obvious respiratory distress.
>
> I do not feel that Mr. Bonorden shows any significant improvement in his respiratory status and his history from him indicates that he has a small improvement only because he is not exposed to cold air but continues to be short of breath with any type of excertion (sic) with involves using either his arms for heavy work, as example; driving a car without power steering or ambulating greater than 20-25 feet.

THEREFORE, after having heard and seen the witness and after taking all of the creditable evidence contained in this record into account, the following findings of fact are made, to wit:

1. That the claimant has been employed as a paint sprayer by the defendant since 1960.

2. That the terms and conditions of this occupation required the claimant to be in an atmosphere which was at

times super-heated and which contained numerous foreign agents which were detrimental to his health.

3. That by reason of such exposure the claimant found himself in such a physical condition that he could no longer perform the duties required of him.

4. That on November 14, 1976 the claimant resigned his position, choosing not to accept offers of lesser employment made by the defendant.

5. That the claimant thereby is not entitled to any healing period benefits, but has sustained a functional impairment of seventy percent (70%) of the body as a whole.

* * *

Signed and filed this 20 day of November, 1979.

HELMUT MUELLER
Deputy Industrial Commissioner

No Appeal.

GERRIT BOSMAN,

Claimant,

vs.

BOYDEN-HULL COMMUNITY SCHOOL DISTRICT,

Employer,

and

EMPLOYERS MUTUAL CASUALTY COMPANY,

Insurance Carrier,
Defendants.

Ruling

NOW on this 20 day of July, 1979 the matter of defendants' Petition for Declaratory Ruling comes on for determination.

Defendants seek a declaratory ruling allowing the defendant-employer and insurance carrier credit against any recovery to the extent of up to $19,000 in a review-reopening proceeding filed on September 12, 1978.

Defendants are under no obligation to pay any amount on the claim in the review-reopening proceeding until an award has been made. Therefore, the need to determine whether defendants are entitled to a credit is not urgent. Also, if in the review-reopening proceeding the defendants are found not liable, then the question of credit becomes moot. The review-reopening proceeding will provide a full and immediate adjudication of the parties' rights, including the question of credit. *See Ostrander v. Linn,* 237 Iowa 694, 22 N.W.2d 223 (1946).

THEREFORE, the request for a declaratory ruling is hereby denied.

Signed and filed this 20 day of July, 1979.

ROBERT C. LANDESS
Industrial Commissioner

No Appeal.

DONALD L. BROCKWAY,

Claimant,

vs.

JOHN DEERE WATERLOO TRACTOR WORKS,

Employer,
Self-insured,
Defendant.

Review-Reopening Decision

This is a proceeding in review-reopening incorrectly styled as an arbitration, filed by Donald L. Brockway, the claimant, against John Deere Waterloo Tractor Works, his employer, self-insurer and holder of a certificate of exemption as contemplated by §87.11, Code of Iowa, 1977 to recover additional benefits under the Iowa Workers' Compensation Act by virtue of two industrial episodes occurring on February 20, 1978 and May 22, 1978, respectively.

* * *

Pursuant to a pre-hearing order signed and filed on February 8, 1979, the sole issue requiring determination is whether or not the claimant is entitled to receive temporary total disability benefits.

Claimant, age 38, married with two dependent children, alleges two separate industrial mishaps involving his right foot, the first being February 10, 1978 and the second being May 22, 1978.

On June 20, 1978 defendant entered into a "memorandum of agreement" with the claimant, (claimant's exhibit "F") and pursuant thereto issued four workers' compensation benefit checks discharging their statutory obligation thru October 5, 1978.

A copy of this agreement was never sent to the office of the Iowa Industrial Commissioner for his approval as required by §86.13, Code of Iowa. Defendant now urges that they never intended to enter into such an agreement, notwithstanding the payments for weekly benefits made thereunder.

A similar problem was presented in Witters & Sons, Inc. v. Karr, 180 N.W.2d 444, Iowa, wherein the court said:

> A Careful reading of the statute indicates the memorandum is not the agreement itself but notice an agreement has been reached: "If * * * (they) reach an agreement * * * a memorandum thereof shall be filed * * *." (Emphasis supplied). Section 86.13. Only a memorandum that the agreement has been made is required.
>
> The view that the memorandum is merely evidence of the agreement and need not be signed by both parties

is supported in Biggs v. First Nat. Bk., (1934) 218 Iowa 48, 52, 53, 254 N.W. 331, 333, * * *

[4] II. Of course an agreement between the employer or its insurance carrier on one side and a claimant on the other side may be set aside for fraud, duress or mutual mistake. We have held the power to take such action is in the courts not in the industrial commission. Ford v. Barcus, (1968) 261 Iowa 616, 155 N.W.2d 507 * * *

The failure on the part of the defendant to file this agreement does therefore not alter the terms of the agreement itself, and it is held that an agreement as to the payment of weekly compensation exists between the parties.

In light of this determination, the memorandum of agreement now settles the propositions that an employment relation existed at the time of the injury and that the injury arose out of and in the course of claimant's employment. Freeman v. Luppes Transport Company, Inc., 227 N.W.2d 143 (Iowa 1975).

In light of the foregoing, it is found and held that the claimant's injury of May 22, 1978 did arise out of and in the course of his employment duties for the defendant.

Signed and filed this 27 day of November, 1979.

HELMUT MUELLER
Deputy Industrial Commissioner

No Appeal.

ROBERT L. BRUCE,

Claimant,

vs.

JOHN DEERE WATERLOO TRACTOR WORKS,

Employer,
Self-Insured,
Defendant.

Review-Reopening Decision

INTRODUCTION

This is a proceeding in review-reopening by Robert L. Bruce, claimant, against John Deere Waterloo Tractor Works, employer, self-insured, for the recovery of further benefits as a result of an injury on June 4, 1974.

* * *

FACTS

Claimant is 35 years old, is married and has two children. While growing up in the state of Mississippi, claimant received up to a tenth grade education. Claimant's work has always consisted of manual labor and he has worked for defendant for over twelve years.

Claimant suffered an injury arising out of and in the course of his employment on June 4, 1974 while working for the defendant. A barrel of caustic soda, which claimant was lifting with a hoist, slipped, fell into a tank of water and splashed chemicals onto the claimant's arm, thighs and lower leg. The chemicals caused the claimant to have first, second and third degree burns. Claimant was taken to the hospital where he was treated by Dr. Sand for approximately a month. After leaving the hospital, claimant stayed at home for awhile but then returned to work. On October 11, 1974 claimant was seen by Donald J. Ahrenholz, M.D., who four days later performed the first of eleven skin grafts on the claimant's thighs. The last skin graft was performed in January 1977.

Claimant is presently working for defendant and has even had an increase in wages. Claimant's complaints at this time are itching, burning, numbness and susceptibility of injury in his legs. Claimant states he experiences muscle cramps and spasms and feels like his legs will give out on him. Claimant also states that during the summer his legs tend to blister and during the winter they can't be kept warm. Claimant's present job consists of lifting iron trays. Claimant takes medication in order to relieve the pain he receives from the job.

ISSUE

The issue presented is the nature and extent of permanent partial disability.

APPLICABLE LAW

Claimant has the burden of proving by a preponderance of the evidence that the injury on June 4, 1974 is the cause of the health impairment upon which he now bases his claim. *Lindahl v. Boggs,* 236 Iowa 296, 18 N.W.2d 607 (1945); *Bodish v. Fischer, Inc.,* 257 Iowa 516, 133 N.W.2d 867 (1965). 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).

If claimant is entitled to benefits, it is necessary to determine his industrial disability. Functional disability is an element to be considered in determining industrial disability which is the reduction of earning capacity, but consideration must also be given to the injured employee's age, education, qualifications, experience and inability to engage in employment for which he is fitted. *Olson v. Goodyear Service Stores,* 255 Iowa 1112, 125 N.W.2d 251 (1963); *Barton v. Nevada Poultry,* 253 Iowa 285, 110 N.W.2d 660 (1961).

ANALYSIS

Based on the foregoing principles, it is found that claimant has established his claim.

One of the factors in determing claimant's industrial disability is the functional disability. The reports of Dr. Acker and Dr. Ahrenholz stated it was their opinion that claimant's permanent partial disability is one percent of the body as a whole. In his deposition Dr. Ahrenholz indicated

that the skin that was grafted would be thinner and therefore not as strong as it would be normally, lack sweat and oil glands and not have an adequate nerve supply for nerve sensation. Dr. Ahrenholz also indicated that claimant would have a permanent loss of insulating quality in the area of the skin grafts. Dr. Ahrenholz stated his rating was a bit conservative because he did not think claimant was "shooting square" with him.

Dr. Walker in his deposition estimated claimant's permanent partial disability as fourteen percent of the body as a whole. However, on page 21 of his deposition he testified claimant will "retire 14 per cent before he would have ordinarily done." Although by Dr. Ahrenholz's own testimony that his one percent permanent partial disability to the body as a whole is conservative, Dr. Walker's testimony discloses that he took into consideration industrial disability rather than functional impairment.

In determining claimant's industrial disability, other factors must be taken into consideration. Claimant is 35 and has received a tenth grade education. He has always been engaged in manual labor. By the record it does not appear that claimant is qualified to do work outside the manual area. Although claimant is getting along with his disability at this time, he has had a reduction in his earning capacity. This is true even though the claimant is making more money now than he was on the date of injury. Considering the factors of industrial disability, claimant has shown a permanent disability for industrial purposes of 12 percent of the body as a whole.

* * *

Signed and filed this 31st day of January, 1979.

DAVID E. LINQUIST
Deputy Industrial Commissioner

No Appeal.

BLAINE BRYNER,

Claimant,

vs.

PAUL FUNK,

Employer,
Self-Insured,
Defendant.

Arbitration Decision

INTRODUCTION

This is a proceeding in arbitration brought by Blaine Bryner, claimant, against Paul Funk, employer, for benefits as a result of an injury on May 10, 1978.

* * *

FACTS

Defendant has owned Reliable Roofing since June 10, 1977. In November 1977, while acting as a general contractor building a new house, claimant asked defendant to do the roof and discovered defendant was interested in selling Reliable Roofing. Claimant told defendant he was interested in buying the business and went to defendant's home to go over the books in December of 1977. Defendant was looking for someone to work for him the following spring and claimant decided he would do some roofing so he would know the business. Claimant and defendant had discussed a price of $3,000, which was for the business name, two trucks and equipment. Claimant testified that in February of 1978 defendant called him and he started working shortly thereafter. Defendant testified he told claimant he had no employees and that anyone who did the work were subcontractors.

On May 10, 1979 claimant was injured when he fell off a ladder. Claimant originally thought he had sprained his arm but later went to the hospital and found out he had a fracture of his carpal navicular as well as a fracture of the radial head.

Claimant testified that on August 1, 1978 he was released to go back to work.

ISSUES

The issues presented by the parties at the time of prehearing and hearing are whether claimant's injury arose out of and in the course of his employment; whether there is a causal relationship between the alleged injury and the disability; whether claimant is entitled to benefits for temporary disability; and whether an employer-employee relationship existed between the claimant and defendant.

APPLICABLE LAW

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. *McDowell v. Town of Clarksville,* 241 N.W.2d 904 (Iowa 1976); *Musselman v. Central Telephone Co.,* 261 Iowa 352, 154 N.W.2d 128 (1967).

Nelson v. Cities Service Oil Co., 259 Iowa 1209, 146 N.W.2d 261 (1967), held that a claimant had proved the initial burden of proving an employer-employee relationship by a preponderance of the evidence. Upon such proof a defendant may use evidence to negate the factual pattern or may allege an affirmative defense such as independent contractor status.

In *Usgaard v. Silvercrest Golf Club,* 256 Iowa 453, 127 N.W.2d 636 (1964), the court discussed the elements required to establish an employer-employee relationship: (1) employer's right to select or employ at will; (2) responsibility for the payment of wages by the employer; (3) right to discharge the payment of wages by the employer; (3) right to discharge or terminate the relationship; (4) right to control the work; (5) is the party sought to be held as employer the responsible party in charge of the work or for whose benefit the work is being performed; (6) the intention of the parties who are creating the relationship; (7) the customary outlook taken by the community towards similar working relationships.

In *Nelson, supra,* the court enumerated some elements constituting a test as to whether an individual is an independent contractor: (1) the existence of a contract of

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 job is part of the regular business of the employer.

The claimant has the burden of proving by a preponderance of the evidence that the injury of May 10, 1978 is the cause of disability on which he now bases his claim. *Bodish v. Fischer, Inc.*, 257 Iowa 516, 133 N.W.2d 867 (1965). *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).

ANALYSIS

It is clear from the principles previously stated that for purposes of workers' compensation, a label given to an individual is not as important as the relationship of the parties. The evidence presented clearly indicated defendant controlled the work on a particular job and paid the workers at an hourly rate as testified by claimant. Defendant supervised the work by determining where the work would start and by determining how the job was to be performed. It is clear from the evidence that defendant wanted all his workers to be independent contractors so that he could save on insurance and have fewer reporting requirements for tax purposes. At the same time no contract between claimant and defendant existed. Neither was there a specific piece of work to be done at a set price. There was no independent nature in the work performed by claimant for defendant. Although defendant argues the workers supplied their own hammers and tin snips, it is clear defendant supplies the rest of the equipment such as trucks and ladders. Based on these facts, it is determined that claimant has met his burden in showing an employer-employee relationship existed between claimant and defendant, but defendant failed to prove that claimant was an independent contractor.

Claimant has also met his burden in proving that his injury was causally connected to his disability. Claimant's testimony is supported by the report of Dennis F. Miller, M.D., dated April 25, 1979. The discrepency noted by Dr. Miller in the emergency and clinic notes with the form filled out by claimant on May 26, 1978 is not considered alarming to the undersigned. As claimant testified, the ladder slipped off the porch. The emergency record and doctor's record evidently mentioned deck. This discrepancy would only be a matter of semantics. This would also be true with the words "home" and "house." It is noted that defendant has not argued nor is there any evidence that claimant had two falls on the date of injury. The parties have stipulated claimant was off work from May 10, 1978 until August 1, 1978 and that the medical bills in exhibits 1 and 3 are fair and reasonable.

* * *

THEREFORE, defendant is ordered to pay the claimant eleven (11) weeks and five (5) days of temporary total disability benefits.

* * *

Signed and filed this 26th day November, 1979.

DAVID E. LINQUIST
Deputy Industrial Commissioner

No Appeal.

LEO OSCAR BUELOW,

Claimant,

vs.

CENTRAL HYDRAULICS CO. and CENTRAL STEEL TUBE CO.,

Employer,

and

EMPLOYERS INSURANCE OF WAUSAU,

Insurance Carrier,
Defendants.

Decision on Motion for Summary Judgment

INTRODUCTION

This proceeding is on a motion for summary judgment filed by defendants Central Steel Tube Co., employer, Central Hydraulics Co., employer, and Employers Insurance of Wausau, insurance carrier, in response to a petition for arbitration filed December 27, 1979 by claimant, Leo O. Buelow, regarding an injury date in August or September 1977.

* * *

ISSUE

The issue is whether defendants are entitled to summary judgment because of claimant's failure to file an action within two years of the date of his injury.

FACTS

Claimant, age 61, testified that in late August 1977, possibly August 17 of that year, he injured himself while working as a security guard for Central Steel Tube Co., when while closing a door he slipped and grabbed the door so he would not fall down. Claimant stated he injured his upper neck as a result of the incident. Claimant indicated he reported the accident to his foreman the following morning but did not miss any work. Claimant revealed that

the company split and Central Hydraulics took over the operation where he worked. Claimant alleged that his injury got progressively worse until September 7, 1979 when his neck was operated on at Veterans Hospital in Iowa City. Claimant testified that for a period of 26 weeks, starting with September 1, 1979, he received $75 per week sick leave. Claimant indicated he knew $75 per week sick leave benefits were provided for in the employment contract. Claimant stated no one ever told him the $75 per week benefits were workers' compensation benefits.

The three affidavits which were received into evidence indicate that the workers' compensation carrier paid the following medical bills:

1. Bluff Pharmacy, Clinton, Iowa -- $22.45 paid on November 3, 1977.
2. Schweinberger Surgical Supply -- $25.20 paid on November 3, 1977.
3. Bluff Medical Center -- $88.00 paid on November 3, 1977.
4. Jane Lamb Hospital -- $112.00 for Physical Therapy paid on November 14, 1977.
5. Neurological Clinic -- $84.00 paid on November 21, 1977.
6. Bluff Pharmacy -- $4.60 paid on November 21, 1977.
7. Jane Lamb Hospital -- $188.00 for Physical Therapy paid on February 14, 1978.
8. Bluff Medical Center -- $11.00 paid on June 7, 1978.

No evidence presented by claimant or in the affidavits suggest that claimant ever received weekly workers' compensation benefits for an injury in late August 1977.

APPLICABLE LAW

The first two paragraphs of Section 85.26, Code of Iowa, state:

> 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.
>
> Any award for payments or agreement for settlement provided by section 86.13 for benefits under the workers' compensation or occupational disease law may, where the amount has not been commuted, be reviewed upon commencement of reopening proceedings by the employer or the employee within three years from the date of the last payment of weekly benefits made under such award or agreement. Once an award for payments or agreement for settlement as provided by section 86.13 for benefits under the workers' compensation or occupational disease law has been made where the amount has not been commuted, the commissioner may at any time upon proper application make a determination and appropriate order concerning the entitlement of an employee to benefits provided for in section 85.27.

While the workers' compensation statutes create a right of action, it is clear that the legislature has limited the right to claim benefits under the act after the lapse of two years. *Mousel v. Bituminous Material & Supply Co.,* 169 N.W.2d 763 (Iowa 1969).

The first paragraph of Section 86.13, Code of Iowa, states:

> 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, and unless the commissioner shall, within twenty days, notify the employer or the insurance carrier and employee of his disapproval of the agreement by certified mail sent to their addresses as given on the memorandum filed, the agreement shall stand approved and be enforceable for all purposes, except as otherwise provided in this and chapters 85 and 87.

The 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 as *Paveglio v. Firestone Tire and Rubber Co.,* 167 N.W.2d 636 (Iowa 1969). If claimant is to be successful in asserting this claim, all four essential elements must be proved.

ANALYSIS

Based on the evidence presented and the principles previously stated, claimant has failed to show that he is entitled to claim benefits under the workers' compensation act.

At the time of the hearing claimant contended he is entitled to benefits because he received benefits under the act and should be under the three year statute of limitations for actions in review-reopening. It is clear that no memorandum of agreement pursuant to Section 86.13, Code of Iowa, has been filed. There also is no evidence that an award of payments has been made to claimant from this agency. Without a memorandum of agreement or award of payments having been made, claimant is not entitled to a review-reopening proceeding. Furthermore, it is noted that claimant never received weekly benefits pursuant to any award or agreement.

Claimant's petition indicates he originally thought this proceeding should be one in arbitration. Section 85.26, Code of Iowa, states clearly that an original action cannot be commenced after two years from the occurrence of the injury. It appeared at the time of hearing that without realizing it, claimant's counsel was contending equitable estoppel should apply. There is no evidence that claimant

was misled about the weekly benefits he received at the time he was in the hospital. Claimant testified he knew those payments were for sick leave provided for in his employment contract and was never informed that they represented workers' compensation benefits.

Claimant stated he felt that he was misled by defendants at the time he gave a statement to defendants on September 20, 1979. Even if defendants made false representation at the time of claimant's statement, which claimant did not in fact prove claimant still would not have shown equitable estoppel because the two year statute of limitations had already ran and no amount of claimant's reliance thereon would have resulted in his prejudice.

WHEREFORE, claimant has failed to show that he filed this original action within two years of the date of his injury or that the essential elements of estoppel apply.

THEREFORE, defendants' motion for summary judgment is sustained and claimant is to take nothing further from these proceedings.

* * *

Signed and filed this 28th day of March, 1980.

DAVID E. LINQUIST
Deputy Industrial Commissioner

No Appeal.

EDNA BURCH,

Claimant,

vs.

ROBERT OHNMACHT,

Employer,
Defendant.

Appeal Decision

Claimant has appealed from a supplemental decision filed July 6, 1979 in which the sole issue was the amount of credit to which defendant was entitled as a result of payments, which were made which were to be considered for workers' compensation.

At the time of injury resulting in death of claimant's decedent included in decedent's gross weekly wages was the amount of $18.33 for the value of LP gas furnished. The present controversy surrounds the amount of credit to which the defendant is entitled for payments for LP gas furnished which is now greater than the amount expended at the time of injury resulting in death.

The parties stipulated that claimant had received certain payments from the defendant since the date of death which were considered as payments made for workers' compensation. Among these the payments for furnishing LP gas were apparently contemplated.

The supplemental decision allowed defendant credit for the total actual amounts expended as compensation from the date of death with which this commissioner concurs.

WHEREFORE, defendants are entitled to the fair and reasonable value of the LP gas furnished to the claimant as a credit against the obligation to provide weekly workers' compensation benefits.

Parties are to assume their own costs of this appeal.

Signed and filed this 3rd day of June, 1980.

ROBERT C. LANDESS
Industrial Commissioner

EDNA BURCH,

Claimant,

vs.

ROBERT OHNMACHT,

Employer,
Defendant.

Decision on Commutation

Claimant's application for commutation of all remaining benefits and defendant-employer's resistance thereto came on for hearing before the undersigned at the Pottawattamie County Courthouse in Council Bluffs, Iowa on September 5, 1979.

* * *

Pursuant to an arbitration decision filed April 11, 1979 and supplemental decisions filed May 11, 1979 and July 6, 1979, claimant, the surviving spouse of Roland Burch is entitled to recover death benefits in the amount of $128.81 per week on account of a work injury which Roland Burch sustained on February 6, 1978 and which resulted in his death on the same day and in accordance with the provisions of Code section 85.31.

Code section 85.45(1) provides that future payments of compensation may be commuted "[w]hen the period during which compensation is payable can be definitely determined." Code section 85.45(4) provides that when a widow is seeking a commutation, the future payments may be commuted but shall not exceed the number of weeks indicated by the life expectancy and remarriage table found in Industrial Commissioner Rule 500-6.3(3).

Claimant was 58 years of age on the date of her husband's death. She testified that Peggy, her 18 year old daughter, who was a dependent at the time of claimant's husband's death, graduated from high school last year, is working, has no plans at present for further education and currently resides at claimant's home. Claimant has other children, none of whom reside with her at this time. Their names and ages are unknown. It is hereby noted that in the stipulation of agreed facts filed in the previous arbitration matter, the parties only indicated Peggy was a dependent of the decedent on the date of death. Thus, the period during which compensation is payable can be determined to be 1007.75 weeks minus the number of weeks in which benefits have been paid to date. Parenthetically, it is noted that claimant failed to file the official commutation Form 9.

Code section 85.45(2) additionally provides that future payments may be commuted.

> When it shall be shown to the satisfaction of the industrial commissioner that such commutation will be for the best interest of the person or persons entitled to the compensation, or that periodical payments as compared with a lump sum payment will entail undue expense, hardship, or inconvenience upon the employer liable therefor.

The defendant-employer does not contend that weekly payments will entail undue expense, hardship or inconvenience. It should be pointed out that neither Code section 85.45(2) nor relevant case law permits consideration of whether a lump sum payment would entail undue expense, hardship or inconvenience on the defendant-employer. *Diamond v. Parsons Co.,* 256 Iowa 915, 129 N.W.2d 608 (1964). Thus, it is the best interest of the claimant that is in issue.

Claimant, presently 59 years of age, testified that she has an eleventh grade education and no other training or skills. Since the date of her husband's death, she has cleaned houses for a dozen residents of Shenandoah, Iowa. She charges $3.00 an hour and earns between $40 - $70 per week. Although she presently is in good health, claimant fears she will not be able to keep up this work for more than a couple years because of the tasks she is asked to perform as part of the cleaning.

Claimant felt that the friendly relationship between the defendant-employer's family and her own changed considerably after her husband's death. She moved from the house on the farm, which had previously been provided by defendant-employer to the decedent employee and his family, to a residence in town in mid-July of this year.

Although claimant's counsel attempted to question claimant about problems encountered in receiving payment from the defendant-employer, she meekly insisted that she received financial assistance from the defendant-employer on an "as need" basis. She testified that she did not receive weekly payments as such but payments amounting to the same. She finally recalled calling her attorney at one time -- "not lately" -- because she thought she had a certain amount coming to her.

She receives no life insurance nor annuity as a result of her husband's death. She received nothing from Social Security. Exhibit 1 indicates that she has $1,000 in a savings account and $100 in a checking account. She owns personal property worth $2,600. She testified that she relies on the $128.81 weekly payment of workers' compensation to meet her expenses.

In response to her counsel's question regarding why she is seeking a full commutation, claimant at first responded that she did not know how to answer the question, and then, upon further questioning, stated that if she became ill, she would have the commutation to take care of her.

On cross-examination claimant testified Peggy assists in paying for groceries and some other items. Peggy makes her own car payments.

Claimant again testified on cross-examination that except for what she earns by cleaning she has no other source of income than what she receives from the defendant-employer. She stated she does not rely on her earnings from cleaning to meet her expenses. She added that the only time there was some problem encountered in receiving payment from the defendant-employer was during a period of time before the April 11, 1979 arbitration decision was entered. Again she stated that some payments to her might have been made late by defendant-employer, but she always received the entitled amount.

Claimant's exhibit 1 set forth the following liabilities:

Name of Creditor	Total Debt	Payment Terms
Security State Bank Mt. Ayr, Iowa	$1,700.00	$79.00 per month
Associates Finance Co.	200.00	20.00 per month
Associates Finance Co.	1,500.00	16.00 per month (portion of total monthly payment)
Hand Comm. Hospital Shenandoah, Iowa	200.00	As able
J & R Furniture Shenandoah, Iowa	200.00	As able
Dr. G. L. Warin Shenandoah, Iowa	75.00	As able

and personal expenses for claimant's support of her daughter and herself:

Rent for House	$150.00 per month	
Meals or food	50.00 per week	
Clothing	300.00 per year	
Car Expense	15.00 per week	
Medical and Dental Expense	200.00 per year ave.	(sic)
Electricity, Heat, Water	50.00 per month ave.	"
Telephone	50.00 per month ave.	"
Insurance		
National Home	31.00 per month	
Automobile	150.00 ea. 6 months	

On cross-examination, claimant indicated that the Security State Bank loan was on both her car and her daughter's car. Peggy apparently has indicated that she will try to make this payment in the future as a way of paying back her mother, the claimant, for all her mother had done for her. Peggy had not been able to do so as of the date of the hearing. The $200 debt to Associates Finance Co. was for money claimant borrowed for herself (on redirect examination, she testified this amount was borrowed five months ago); the $1,500 debt resulted from claimant cosigning for her son's car. She testified that he is making $44 payments per month on the $1,500 debt; to date claimant said she has not been called upon to make any payments on said amount. (On redirect examination, claimant stated that she also borrowed an extra amount when she cosigned for the car for her son. She pays $16 a month for such amount.) Claimant also testified that the $50 monthly telephone expense was more like $10 per month. The $150 semi-annual premium due on the automobile insurance is solely for her car.

Claimant further told defendant's counsel that she had no plans of purchasing a home. She would put the lump sum from a full commutation in her savings account. She felt she could live on $6,000 - $7,000 a year. Although she stated she had not figured out what her weekly compensation would amount to over a year, the weekly amount of $128.81 multiplied by 52 weeks does equal $6,698.12. She

anticipated drawing out what she needed each month and hoped each year's balance would earn enough interest to take care of her in each successive year. She had not discussed such a program with any banker as of the date of the hearing.

Defendant-employer, called by the claimant, testified that he is 45 years of age and has been a general farmer for 24 years. He farms 920 acres, of which 840 he owns in his own name, in his wife's name or in joint tenancy. Eight hundred acres are devoted to growing corn and soybeans. He raises 500 head of feed cattle. Extensive and exhaustive questioning by claimant's counsel revealed in general that defendant-employer appears to be in a financial position to satisfy the lump sum sought by the claimant. However, the evidence on this matter also suggests that claimant's financial position is sound and any possibility that he would be unable to make future weekly compensation payments to the claimant is remote.

In response to questioning by claimant's counsel regarding past payments made to the claimant prior to the April 11, 1979 arbitration decision, defendant-employer related that he began carrying workers' compensation coverage as of 1974; yet on the date of injury he learned that the policy was not in effect. (Apparently there is a dispute between two carriers regarding coverage. Defendant-employer has pursued an action against the carriers but nothing has been resolved or recovered to date). Thus, he proceeded to pay the claimant money when she advised him that she needed some. He did not make regular weekly payments because he was unsure of his status in the matter. Defendant- employer agreed that paragraph 10 of the stipulation of agreed facts filed January 31, 1979 in the arbitration proceeding reflected amounts he paid to the claimant. He testified that the gap in so-called regular payments from March 6, 1978 to September 2, 1978 occurred when claimant and Peggy were drawing Social Security.

Although defendant-employer has had years when the farming operation lost money, he testified on cross-examination that he thinks his financial picture will allow him to continue to make the weekly compensation payments to the claimant even if the lawsuits against the insurance carriers are unsuccessful. Defendant-employer pointed out that he is in good health and has no plan of retiring in the next 10 - 15 years. He added that his operation has grown over the years. Since the April 11, 1979 arbitration decision was rendered, he has timely made all weekly payments and paid a lump sum to cover the period when payments were not made while the rate was being determined.

Upon the undersigned's reservation of ruling on defendant-employer's motion to dismiss and claimant's resistance which were made at the close of claimant's case, defendant-employer's spouse, Elaine Roland, testified on behalf of the defendant. She related that she and the defendant-employer assured the claimant immediately on the date of death that they would assist her. Mrs. Roland admitted that at that time she felt the workers' compensation policy was in effect.

Mrs. Roland related an early discussion she had with the claimant regarding budgeting her finances. The witness left the impression that such discussion was not exactly successful. Although Mrs. Roland wrote the checks to the claimant whenever the claimant would tell her about needed money (before the arbitration decision was rendered), she did not usually question the claimant regarding how the claimant spent the money. Car expenses were one exception because the claimant seemed to have a lot of trouble keeping the car running. Mrs. Roland did express mixture of dismay and surprise over the fact that claimant had an extra phone put in the house on the farm when things were so unsettled. Mrs. Roland was of the opinion that the claimant was called on often by her adult children for financial assistance. She related how the defendant-employer would sometimes give the decedent employee a bonus in an item such as work clothes or via a service such as payment of decedent's dental bills rather than in a money bonus because the decedent and claimant, who rarely spent money on themselves, would probably use the money for the benefit of their adult children.

On cross-examination, Mrs. Roland agreed that it was not unusual for parents to assist their children financially. She then related that claimant's son Lonnie moved home for awhile after he was separated from his wife and at that time his parents helped him. Mrs. Roland admitted that soon after the April 11, 1979 arbitration decision was filed, she began deducting rent from the payments made to the claimant.

In her brief and argument claimant contends that the evidence shows defendant-employer and his wife "are not on close terms" with her and "would not hesitate to terminate payments to her if they felt she was adequately provided for from another source." Additionally, the claimant argues that if defendant-employer would be forced to declare bankruptcy, the claimant's workers' compensation claim could be discharged by the defendant-employer in bankruptcy and that if defendant-employer were to die, claimant's workers' compensation claim against his estate would rank among those of lowest priority and, without a lump sum award, would accrue weekly and would need to be satisfied weekly by means of a judgment lien. Claimant emphasizes the fact that there is no "solid fiscal foundation" in the form of an insurance company in this case, but rather a sole proprietor who cannot guarantee that he will always be financially secure.

In his brief and argument, defendant-employer maintains that claimant admitted her dependency upon weekly payments to meet her expenses and that she did not have any specific plans for investment or management of any awarded lump sum and had no idea what she would do if her outlined life expectancy and funds from the awarded lump sum were expended. Defendant-employer emphasizes that exhibit 1 and claimant's testimony indicate that claimant has become obligated with respect to debts of her children in the past. Defendant-employer argues that weekly benefits, which will continue until claimant's death or remarriage, fulfill the act's purpose which is to provide support and income for a surviving spouse in view of what would have been provided by the decedent-employee.

Professor Arthur Larson in his Treatise on the Law of Workmen's Compensation (Desk Edition, section 82.70)

writes about "lump-summing" of benefits. A portion of this section states:

> In some jurisdictions, the excessive and indiscriminate use of the lump-summing device has reached a point at which it threatens to undermine the real purposes of the compensation system. Since compensation is a segment of a total income-insurance system, it ordinarily does its share of the job only if it can be depended on to supply periodic income benefits replacing a portion of lost earnings. If a partially or totally disabled worker gives up these reliable periodic payments in exchange for a large sum of cash immediately in hand, experience has shown that in many cases the lump sum is soon dissipated and the workman is right back where he would have been if workmen's compensation had never existed. * * *
>
> The only solution lies in conscientious administration, with unrelenting insistence that lump-summing be restricted to those exceptional cases in which it can be demonstrated that the purposes of the act will best be served by a lump-sum award. * * *
>
> * * *
>
> * * * But if the claimant needs his compensation benefits to pay his every-day living expenses, it obviously would thwart the purposes of the act to cut them off in order to allow claimant to gamble a lump sum settlement on a business. * * *
>
> * * * If one assumes that the purpose of periodic income benefits is to provide needed ongoing support to a disabled worker, one can only wonder whether the claimant's current hardship -- at a time when periodic payments were being received -- might not be as nothing compared with the hardship he would face later with both his lump sum and his periodic payments gone.
>
> Of all the excuses put forward to justify lump-summing, the worst is that in a particular instance the claimant can, so to speak, beat the actuarial tables in taking a lump sum. Suppose claimant has an award of 500 weeks and is eighty years old and ill. Should he be allowed to rush in and ask for a lump sum? And should a benevolent commission join with him in his attempt to outfox the system? It has been tried more than once, but has seldom met with favor in the appellate courts, for reasons that hardly need argument.

Apparently the Iowa Supreme Court is not in full agreement with the philosophy espoused by Professor Larson. In the case of *Diamond v. The Parsons Co.*, 256 Iowa 915, 129 N.W.2d 608 (1964), the court recited at 928-929:

> At the time of his injury in 1961, claimant was 65 years old. He was without skill or experience in the management of property or investments. He had some savings but was indebted for doctor bills and attorney fees. He wanted to use the commuted value of his compensation to pay his bills (a commendable purpose) and buy an equity in a three-apartment house. His plan was to live in one apartment, rent the other two and use the rent to retire the carrying charges. He had sons who expressed a willingness to help in the care of the property and competent counsel to advise. He was presently living in rented quarters not convenient as to facilities or location.
>
> * * * However, in determining the "best interest of the person or persons entitled to the compensation" as required by the statute, claimant's condition and life expectancy may properly be considered along with other matters. Here, under weekly payments, if claimant lives out his expectancy, he will outlive his compensation period and be left with nothing. If he dies prematurely his total weekly payments may be less than the present commuted value.
>
> Based upon claimant's estimates and desire, the benefits and convenience from improved living quarters, the availability of family help, the testimony of real-estate agents, and all surrounding circumstances, the trial court approved commutation. Whether the court was right in attempting to look into the future only the passage of time will tell. Claimant's plans may not develop as profitably as he hopes but they are not unreasonable. He may invest or spend unwisely but that possibility is present in every petition for commutation.
>
> The court should not act as an unyielding conservator of claimant's property and disregard his desires and reasonable plans just because success in the future is not assured.

The admonition of Iowa's first industrial commissioner in the First Biennial Report of the Workmen's Compensation Service (1916) at page 12 should most likely be given more heed in the consideration of granting of commutations:

> In exceptional cases . . . commutation promotes personal welfare, but there is a growing tendency in all compensation jurisdictions to a closer scrutiny of circumstances and conditions in each particular case, and to regard weekly payments as a general rule better adapted to the real needs of compensation service. In most cases beneficiaries under the law are not accustomed to deal with considerable sums of cash on hand. They need income rather than ready money, so liable to be used in unwise expenditures. They need to a degree the guardianship of public administration to shield them from their own indiscretion and from the wiles of the designing to the end that the purpose of compensation service to provide support be not defeated by plot or prodigality. Society may well be concerned in this matter, for beyond the incentive of benevolence born of a desire that the poor and unfortunate come not to want is the strong probability that the lump sum settlement tends to a marked increase in the number of those who had to be supported by charity.

The present case is an unusual one. Claimant's conten-

tion that a full commutation of benefits would be in her best interest because the lump sum realized would afford both a continuation of income and preservation of the corpus is reasonable, not withstanding the periodic payment philosophy of wage replacement upon which the theory of workers' compensation is based. Obviously, the fact that an individual farmer and not an insurance company is the claimant's source of weekly benefit payments makes the periodic payment philosophy of wage replacement appear unpersuasive, if not inappropriate, to a determination of whether a full commutation would be in the best interest of this claimant.

Conceding that the Iowa Supreme Court admonished the court not to be an unyielding conservator in these matters, it is of great concern to the undersigned that the record suggests that the claimant demonstrates no sound financial experience, sense, or inquisitiveness. She was only a vague idea of how the principal will generate income through interest. She apparently has not discussed a long-range plan with any banker, certified public accountant or person with similar specialized expertise. Whether this matter has been discussed in any detail with her lawyer was not evident. Likewise, she has demonstrated a very natural tendency to assist her children whenever a need arises. Although her children were not present at the hearing, the undersigned gathered from both the claimant's testimony and her shy, retiring demeanor, and from the defendant-employer's wife's testimony and from exhibit 1 that claimant would likely succumb to any request for financial assistance her children might make to her. The undersigned strongly suspects that the claimant could be a victim of familiar "questionable" investment deals if the wrong person got her attention.

The principal as of the date this decision was being written seemingly amounts, in round figures, to $79,000. [1,007.75 weeks minus 85 weeks for the period covering February 6, 1978 to September 24, 1979 (assuming benefits have been paid to date) equals 922.75 weeks; applying the discount factor to 923 weeks yields 617.2069 weeks which multiplied by $128.81 equals 79,502.42.] Since the claimant needs at least $6,000 to $7,000 to live on per year (not taking into account the effect of any future inflation), and since the principal therefore will have to be invested at 8 - 9 percent interest ($6,360.19 - $7,155.22 uncompounded annual interest), the principal would need to be carefully maintained. An irrevocable trust might be appropriate.

WHEREFORE, IT IS HEREBY FOUND that the period during which compensation is payable can be definitely determined pursuant to Code section 85.45(4) and, Industrial Commissioner Rule 500-6.3(3).

It is further found that a full commutation would not be in the best interest of the claimant at this time. If and when the claimant has formulated an appropriate financial plan to assure hereself some reasonable degree of long range future security, an application for full commutation may be pursued again. A Form 9 shall accompany any such application.

THEREFORE, claimant's present application for full commutation of death benefits is hereby denied.

Cost of the proceedings are taxed to the defendant-employer.

Signed and filed this 28th day of September, 1979.

LEE M. JACKWIG
Deputy Industrial Commissioner

No Appeal.

LEONARD BURMEISTER,

Claimant,

vs.

IOWA BEEF PROCESSORS, INC.,

Employer,
Self-Insured,
Defendant.

Appeal Decision

This is a proceeding brought by defendant employer, self-insured, seeking review of a proposed decision in arbitration wherein claimant was awarded healing period benefits, medical expenses and other incidental expenses resulting from an injury arising out of and in the course of his employment on October 11, 1976.

* * *

On reviewing the record it is found that the deputy's findings of fact and conclusions of law are proper with the following modifications. This commissioner finds the evidence in the record insufficient to sustain a finding of permanency.

D. G. Bock, M.D., a fellow of the American College of Physicians, at the time of claimant's release from the hospital on October 31, 1976 wrote to C. R. Wilson, M.D., that claimant could " return to duty anytime."

Dr. Wilson, a general practitioner who had been claimant's family doctor for about thirty years, testified at the time of his deposition that claimant could not do anything. It was the doctor's belief

> that caustics are different from acids in that an acid, when it hits human tissue, will do some damage and disappear; but a caustic tends to stay there and keeps eating away. This is especially true in places like the eye or membranous tissues of that sort. It's hard to get it all out. You can wash an acid out right away, and your troubles have stopped; but lye or other severe caustics of that type don't tend to do that. Caustics tend to stay in the tissue and keep on causing damage in spite of your efforts to get rid of them. I think that's what happened here. I think he had droplets that got into the mucosa of his lung, and there wasn't any way to get them out. You couldn't wash them out. I think they caused damage that continued for awhile. I think they then have caused some scarring. And right now he gets the burning pain and the dyspnea, the shortness of breath, on doing very little.

Dr. Wilson had no opinion as to when claimant would be able to return to work; however, he thought claimant would have permanency in that scarring would produce irreversible changes in the lung.

S. Vijayachandran Nair, M.D., who holds board certification in both internal medicine and chest disease, saw claimant on November 15, 1976 and again on November 29, 1976. He, too, acknowledged that there might be a slow resolution to claimant's lung problems.

At the time of hearing claimant testified his voice was getting better and it appears his other acute symptoms are becoming less severe.

Defendant's notice of appeal correctly alleges that the deputy industrial commissioner erred in awarding weekly benefits at the rate of $151.52 based on gross weekly wages of $244.00. The record, however, does not disclose what amount should be used for determining claimant's weekly benefits. It appears the base salary for day work was $5.61 with $5.71 for evenings and with claimant guaranteed forty hours work per week.

WHEREFORE, it is found:

* * *

That while there is evidence that claimant may be incapacitated for a prolonged period, the evidence is insufficient to support a finding that permanency will result.

That claimant is entitled to receive weekly temporary total disability benefits.

THEREFORE, it is ordered:

That the parties either stipulate to the rate of compensation or provide actual information regarding wages so that the proper rate may be determined and this order may be supplemented.

That defendant pay unto claimant temporary total benefits at the rate to be ascertained from October 25, 1976 for the period of his disability.

* * *

Signed and filed this 30 day of March, 1979.

ROBERT C. LANDESS
Industrial Commissioner

Appeal to District Court; Affirmed.
Appeal to Supreme Court: 11/9/79.

VERA BURROW,

Claimant,

vs.

D.M.C., INC., d/b/a
PRIME RIB BUFFET,

Employer,

and

IOWA NATIONAL MUTUAL
INSURANCE CO.,

Insurance Carrier,
Defendants.

Appeal Decision

Claimant has appealed from a proposed review-reopening decision filed December 1, 1978 wherein claimant was denied relief on an outstanding medical bill.

* * *

The issue presented on appeal is whether claimant is entitled to payment for a medical bill incurred previous to an arbitration decision and a consent order for agreement for settlement but not submitted until after the arbitration decision was rendered and the consent order for agreement was approved.

Claimant sustained an injury which arose out of and in the course of her employment on March 5, 1975. As a result of this injury claimant was admitted to St. Vincent's Hospital in Sioux City, Iowa for the period from March 16 through April 1, 1975. During her stay at the hospital claimant underwent a myelogram and a semihemilaminectomy at L4-5 on the right. The dispute in this case revolves around the expenses claimant incurred during this stay.

On June 11, 1975 claimant filed an application for arbitration with this agency. In preparation for a hearing on this matter, claimant's attorney sent a written request to St. Vincent's Hospital for the bill incurred by claimant for her hospitalization commencing on March 16, 1975. In response, St. Vincent's Hospital sent claimant's attorney a bill for x-rays taken after her discharge from the hospital amounting to $52.00. No bill was sent for claimant's stay from March 16 through April 1, 1975.

A hearing for the arbitration proceeding was held on December 16, 1975, at which claimant testified that she had not received a bill from St. Vincent's Hospital. In a hearing for the present review-reopening proceeding claimant testified that at the time of the arbitration hearing she was aware that she had incurred an expense for her stay at St. Vincent's Hospital, but she was not aware of the amount of the expense.

The arbitration decision was filed on April 1, 1976 wherein defendants were held liable for the x-ray bill from St. Vincent's for $52.00. Several days later claimant contacted her attorney because there was no mention in the arbitration decision of the expenses she had incurred as an inpatient at St. Vincent's Hospital from March 16 through April 1, 1975. In response claimant's attorney sent a letter on April 6, 1976 to defendants' attorney stating "that the bill at St. Vincent's Hospital for the surgery was in excess of $3,500.00, which of course, must be paid since the Commissioner has ruled this was within the scope of employment." On April 26, 1976 claimant's attorney wrote a second letter to defendants' attorney in which the exact amount of the bill, $2,439.20, was stated and it was noted that the bill had originally been sent to Melvin Burrow, claimant's ex-husband. It should be noted that Melvin Burrow's name and address were printed in the "Bill To" section of the bill in question.

Claimant filed a petition for review-reopening on July 22, 1976 in which the extent of permanent disability was stated as the dispute in the case. Claimant's attorney wrote

in the petition that all section 85.27 expenses incurred through April 1, 1976 had been paid by the insurance carrier. This is a puzzling response when read in conjunction with the two letters mentioned in the immediately preceding paragraph.

An application for consent order and agreement for settlement was filed by claimant and defendants on March 11, 1977 and was approved by a deputy in a consent order filed March 14, 1977. The agreement for settlement dealt with the extent of claimant's permanent partial disability and the termination of healing period compensation, but nothing was mentioned about the St. Vincent's Hospital bill.

On April 29, 1977 defendant insurance carrier received a copy of the bill in question from St. Vincent's Hospital which was forwarded to defendants' attorney. A letter was sent to claimant's attorney stating that defendant insurance carrier declined payment of the bill. Defendants' attorney then sent a letter to claimant's attorney on May 19, 1977 stating that the bill in question was a personal obligation of claimant's.

In August 1977 claimant was contacted by Hawkeye Adjustment Service and told that the St. Vincent's Hospital bill for $2,439.20 was still outstanding. Claimant testified that this was the first time she learned of the amount of the bill. Claimant also testified that she had made no effort to question the bill before August 1977 because she thought the arbitration decision had ordered payment of all bills. This is in contradiction with her earlier statement that she had called her attorney immediately after the arbitration decision was rendered asking why the St. Vincent's bill had not been included.

On August 4, 1977 claimant's attorney sent another letter to defendants' attorney asking that defendants pay the St. Vincent's bill.

Claimant filed a petition for review-reopening on December 8, 1977 contesting the liability for the St. Vincent's bill in question. A hearing was held on May 11, 1978 and a proposed review-reopening decision was rendered on December 12, 1978. In this decision the deputy denied claimant relief for the bill because it was found that the bill could have been procured with reasonable diligence for the arbitration proceeding.

Claimant filed the present appeal from the proposed review-reopening decision on December 5, 1978. This commissioner issued an order on January 9, 1979 granting claimant's request to propound an additional interrogatory to defendant insurance carrier. The defendant insurance carrier filed an answer to this interrogatory on February 23, 1979 in which it was stated that the St. Vincent's bill in question was first received by the carrier on April 29, 1977. This commissioner filed a second order on February 27, 1979 denying claimant's request for admissions on the grounds that it was untimely filed. The final submission for the record was a brief filed by defendants on April 2, 1979.

Since the injury occurred in 1975, Iowa Code section 86.34 (1975) is applicable to the present controversy and confers upon this commissioner the jurisdiction to make a proper determination of the entitlement of claimant to benefits provided for in Iowa Code section 85.27.

For recovery of additional compensation through a review-reopening proceeding, the claimant must make a "proper showing that facts relative to an employment connected injury existed but were unknown and could not have been discovered by the exercise of reasonable diligence, sometimes referred to as a substantive omission due to mistake, at time of any prior settlement or award." *Gosek v. Garmer and Stiles Co.*, 158 N.W.2d 731, 735 (Iowa 1968). The facts in *Gosek* are not entirely on point, for the Iowa Supreme Court was considering facts about claimant's physicial condition and weekly compensation but the legal principle pronounced is applicable to the case *sub judice*. The word "compensation" as used in the Iowa workmen's compensation statues is broadly read and includes section 85.27 medical benefits. *Youngs v. Clinton Foods, Inc.*, 188 F. Supp. 15 (S.D. Iowa 1960). Thus, in a review-reopening proceeding the reasonable diligence test of *Gosek* also applies to the submission of medical bills under section 85.27 when a prior agreement for settlement has been reached or an award given.

The precise questions involved in this case are whether claimant exercised reasonable diligence in determining whether there was a bill outstanding from St. Vincent's and whether through due diligence she could have procured the bill for the arbitration proceeding.

Claimant testified that she was aware of a medical expense from St. Vincent's at the time of the arbitration hearing. Reasonable diligence would have required her to make a further investigation as to the status of the expense. Although claimant's attorney sent a letter to St. Vincent's Hospital requesting claimant's bill for her stay, for some unknown reason the hospital sent a bill only for x-rays and not for the visit and surgery. It is unreasonable to assume that the only bill that would have been incurred during claimant's hospitalization would have been for x-rays. Claimant failed to inquire into the status of other bills and thus did not exercise reasonable diligence. It is even more dilatory that the bill was not taken into consideration in the consent order after it became apparent that the bill was still outstanding.

The piecemeal manner in which this action has been maintained is an undue burden upon the limited staff of this agency and is not to be condoned. This case should not be considered a guide by either party to a claim as to how to handle a workers' compensation claim. Actions contrary to the spirit of the Workers' Compensation Act have been demonstrated throughout this proceeding.

However, claimant has the burden of proof of establishing her claim including the reasonableness and necessity of medical and hospital expenses connected to the claim.

WHEREFORE, it is found:

That claimant failed to exercise reasonable diligence in determining the status and amount of claimant's outstanding St. Vincent's Hospital bill and placing it in the record.

That because of this failure claimant is not permitted to present such bill for consideration in a review-reopening proceeding which has been preceded by an arbitration decision and consent order for agreement for settlement.

* * *

Signed and filed this 17 day of April, 1979.

ROBERT C. LANDESS
Industrial Commissioner

Appeal to District Court. 5/15/79

CARL E. BURT,

Claimant,

vs.

FIRESTONE TIRE & RUBBER COMPANY,

Employer,

and

TRAVELERS INSURANCE COMPANY,

Insurance Carrier,
Defendants.

Appeal Decision

This is a proceeding brought by defendants, Firestone Tire & Rubber Co., employer, and The Travelers Insurance Co., insurance carrier, appealing a proposed review-reopening decision wherein claimant was found to have sustained a 5% permanent partial disability to the body as a whole and was thus awarded benefits under the Iowa Workmen's Compensation Act.

* * *

Claimant contends he sustained a permanent disability as a result of a work related injury on August 13, 1975. The record supports the proposition that the claimant has a permanent back condition, that being an unstable back. Because of this instability, the claimant is susceptible to aggravations and exacerbations of his condition. The August 1975 incident was an aggravation of claimant's back condition.

In *Ziegler v. U. S. Gypsum Co.,* 252 Iowa 613, 106 N.W.2d 591 (1961), the supreme court stated that where claimant's employment results 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.

The aggravation caused by the August 1975 incident did not produce any permanent condition which was greater than the condition claimant had before the incident. After this brief period of aggravation, claimant's back returned to the same state it was in prior to the injury. Thus claimant did not sustain any permanent disability as a result of the injury on August 13, 1975.

WHEREFORE, claimant's request for additional benefits should be and is hereby denied.

THEREFORE, it is ordered:

That the relief requested in claimant's petition for review-reopening is hereby denied.

* * *

Signed and filed this 3 day of November, 1978.

ROBERT C. LANDESS
Industrial Commissioner

Appealed to District Court: 12-1-78.

RICHARD A. CAGLEY,

Claimant,

vs.

BIELENBERG MASONRY CONTRACTING, INC.,

Employer,

and

WESTERN CASUALTY & SURETY CO.,

Insurance Carrier,
Defendants.

Order

NOW on this day the matter of defendants' appeal to the commissioner comes on for determination.

On September 12, 1979 claimant filed an original notice and petition. A special sppearance was filed by defendant employer and its insurance carrier on October 2, 1979. Claimant filed a resistance to the special appearance. On October 15, 1979 a deputy industrial commissioner overruled defendants' special appearance. This ruling is appealed.

The general rule regarding appeals which has been propounded by the Iowa Supreme Court on many occasions is found in *Crowe v. DeSoto Consolidated School District,* 246 Iowa 38, 66 N.W.2d 859 (1954). After pointing out that an appeal is proper only after a final judgment has been granted, the court then held that "[a] final judgment or decision is one that finally adjudicates the rights of the parties, and it must put it beyond the power of the court which made it to place the parties in their original positions." In a recent decision, *Citizens State Bank of Corydon v. Central Savings Association,* 267 N.W.2d 33 (1978), the court considered the matter of an appeal of a special appearance. The opinion suggested "[g]reat harm would result to litigants under a system which tolerated indiscriminate appeals from each and every adverse ruling." Reasoning that regulation of interlocutory appeals contributes to the orderly litigation and to the peace of mind of the parties in that they "have at least the comfort of knowing they will not be put to the expense, or threat of the expense, of repeated, permissive appeals," the court dismissed the appeal.

Iowa Rule of Civil Procedure 66, which provides for the special appearance and contains the provision that "[i]f the special appearance is erroneously overruled, defendant may plead to the merits or proceed to trial without waiving such error," can be seen as a safeguard for a party whose appeal is dismissed. Because Industrial Commissioner's Rule 500-4.35 states that "rules of civil procedure shall govern the contested case proceedings before the industrial commissioner unless the provisions are in conflict with these rules and chapters 85, 85A, 86, 87 and 17A, or obviously

inapplicable to the industrial commissioner," the protection of that rule is extended to the defendants in the case sub judice.

* * *

Signed and filed this 3 day of December, 1979.

ROBERT C. LANDESS
Industrial Commissioner

Appealed to District Court: 12-31-79.

OLIVER M. CAMP,

Claimant,

vs.

WILSON FOODS CORPORATION,

Employer,
Self-Insured,
Defendants.

Review-Reopening Decision

This is a proceeding in Review-Reopening brought by the claimant, Oliver M. Camp, against his employer, the Wilson Foods Corporation, self-insured, to recover additional compensation under the Iowa Workers' Compensation Law by virtue of an industrial injury which occurred in March, 1975. This matter came on for hearing before the undersigned Deputy Industrial Commissioner at the Iowa County Courthouse in Marengo, Iowa on July 6, 1977. Several post-hearing delays were permitted and the period of time for the submission of further evidence became unnecessarily protracted. The case was ultimately closed on May 24, 1978.

* * *

Claimant received an injury arising out of and in the course of his employment at Wilson Food Corporation. In March 1975 he hit his right elbow on a corner of a bench where his duties were to shave jowls and necks. He noted pain in his neck and down the right arm. He saw David C. Naden, M.D., an orthopedic surgeon, who thought the claimant had entrapment of the ulnar nerve. Because claimant is diabetic, Dr. Naden wished to treat his case carefully. An EMG was taken which indicated evidence of ulnar nerve entrapment.

The claimant was hospitalized on April 21, 1975 and surgery was performed. The claimant had repeatedly struck his right elbow on his work table. The right ulnar nerve was transferred from the back of the claimant's right elbow to the front of the elbow area. He continued to see Dr. Naden after surgery and was released from the hospital on April 24, 1975 and released to return to work on May 26, 1975. He returned to work on that date.

In February 1976, the claimant saw Dr. Naden and was complaining of discomfort in the right shoulder area which Dr. Naden thought was rotator cuff tendonitis. Dr. Naden injected the shoulder. The claimant worked until April 5, 1976 when he stopped because of difficulties noted with loss of strength in his right hand. He saw Dr. Naden on April 7, 1976 and had a thorough examination which Dr. Naden thought evidenced cervical arthritis with radicular type of pain into the claimant's shoulder and right arm. He again saw Dr. Naden on April 21, 1976. At that time Dr. Naden thought there was a possibility that the claimant "had a cervical disk with nerve root compression" so he referred the claimant to Kazem Fathie, M.D., a neurosurgeon, who examined the claimant on May 13, 1976. The report submitted (claimant's exhibit H) is largely unreadable, but reveals that the claimant had soft tissue trauma and bilateral floating cataracts. Dr. Fathie gave the claimant instructions on physical therapy. In July 1976, he saw Dr. Naden and Dr. Naden gave the claimant a work release. In November of 1976 the claimant was also seen by Dr. Naden who rated the claimant's permanent physical impairment at 10 to 15 percent of the body.

The claimant returned to work in August 1976 and on January 3, 1977. On each occasion he worked about two hours and then lost the use of his right arm. Other than these two short periods of employment, the claimant has not worked since April 5, 1976.

The claimant saw W. J. Robb, M.D., an orthopedic surgeon, at Dr. Naden's request in August, 1976. Examination by Dr. Robb led to the diagnosis of recovered ulnar nerve neuropathy of the right forearm and hand and cervical strain. Dr. Robb prescribed physical therapy consisting of microwave and intermittant cervical traction. Dr. Robb examined the claimant on August 31, 1976 and noted that the traction relieved some of the symptoms which recurred upon cessation of traction. The claimant would exhibit pain at the base of the neck into the right shoulder and over the suprascapula and the suprascapular nerve to the deltoid area but not down the arm. Dr. Robb thought the claimant might have a "soft" cervical disc.

Dr. Robb admitted the claimant to the hospital on October 18, 1976 and a Minerva plaster jacket was applied. Dr. Robb thought the claimant had chronic cervical strain. A moderate exercise program was prescribed in November, 1976 and the claimant was released to return to work on January 1, 1977. On the first day of work the claimant reported numbness and tingling down the arm, loss of grip strength and pain. He returned to Dr. Robb who diagnosed the claimant's condition as probable cervical disc disease and considered the claimant "totally disabled as far as his previous job was concerned at Wilson's."

On March 23, 1977 the claimant was seen by John P. Albright, M.D., an orthopedic surgeon with the University of Iowa. Dr. Albright subspecializes in cervical spine and neck problems. Dr. Albright opines that the claimant has no permanent partial functional impairment. Dr. Albright's opinion was that the claimant had chronic cervical strain syndrome. In answer to a question with respect to causation the Doctor said that the claimant's shoulder pain possibly was caused by the right ulnar nerve problem and that the cervical problems were caused by postural problems, but he could not give an opinion as to the original cause of the pain. Dr. Albright noted that the claimant had evidence in the cervical spine which may be related to

repetitive motions.

Dr. Naden saw the claimant several times after the hearing of this matter, but a fair reading of the evidence would indicate that his opinion is that the claimant's work aggravated the claimant's condition.

At the time of the hearing the claimant's activities were limited and he had trouble performing household duties.

The issue for determination is whether the claimant is entitled to compensation in addition to that which has already been paid. Determination of this issue will hinge upon the nature and extent of the claimant's disability, if any, and the causation of the disability, if any. Determination of these matters will depend on medical evidence.

The claimant has the burden of proving by a preponderance of the evidence that the injury of March, 1975 is the cause of the 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. Based on the foregoing principles it is found that the claimant has prevailed in this claim by the requisite preponderance of the evidence. Dr. Naden and Dr. Robb have followed this case since the condition began to manifest itself. The claimant has had problems which can be traced to his employment. See *Langford v. Kellar Excavating and Grading Co.,* 191 N.W.2d 667 (Iowa, 1971)

The claimant has a pre-existing condition, diabetes. The claimant has had this condition for some thirty years and was apparently able to control the disease. Evidence of this can be seen in the ability of the claimant to work at heavy labor for the majority of his working life.

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. * * * *

Defendant's cross-examination of Dr. Naden revealed that the cervical problems, mainly of an arthritic condition started when the claimant was hospitalized. Dr. Naden does not know what started the cervical problems, but stated that these problems were not caused by the work. He also stated that the claimant had an impairment to the right upper extremity from 3 to 5% as a result of the ulnar nerve surgery. Dr. Naden feels that the cervical spondylitis condition was aggravated by the claimant's work. (Naden depo. exhibit #3) Dr. Albright, on the other hand, states that there is no permanency, but did agree that the claimant had chronic cervical strain syndrome. Dr. Naden's opinion with regard to causation seems to have more credibility than Dr. Albright's This is because Dr. Naden is a treating physician and has followed this case since it started. It is therefore found that the claimant's ulnar nerve problems were caused by his employment and that the cervical problems were substantially aggravated by the claimant's employment. This extends the claimant's disability beyond the arm.

Since the claimant has 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 (1963). It is the reduction of earning capacity which must be determined. *Barton v. Nevada Poultry,* 253 Iowa 285, 110 N.W.2d 660 (1961).

Claimant, presently age 46, has been employed by defendant as a laborer since 1950. He was 19 at the time of his hire. He has supposedly been a good employee. He has diabetes, which he controlled until the time of his injury. He has not worked in over two years and will, in all likelihood be unable to return to his former employment. He had inoperative diabetic cataracts on both eyes, and tries to control his diabetes by means of insulin. His physical problems, coupled with his limited eighth grade education lead to the finding that the claimant is disabled, for industrial purposes to the extent of 40%.

The next problem which must be addressed is the amount of healing period compensation to which the claimant is entitled. The claimant was off work from April 21, 1975 through May 26, 1975, a period of 5 weeks. He was off work again from April 6, 1976 through the present, save two short days. The implementation of rule 500-8.3 therefore comes into effect:

> 500-8.3(85) Healing period. A healing period exists only in connection with an injury causing permanent partial disability. It is that period of time after a compensable injury until the employee has returned to work or recuperated from the injury. Recuperation occurs when it is medically indicated that either no further improvement is anticipated from the injury or that the employee is capable of returning to employment substantially similar to that in which the employee was engaged at the time of the injury, whichever occurs first.

The rule is intended to implement §85.34 of the Code.

The medical evidence in this case indicates that the claimant's condition had stabilized as of December 31, 1976, when Dr. Robb released the claimant. This, therefore, entitles the claimant to the following periods of

healing period compensation:

April 21, 1975 through May 26, 1975	5 weeks
April 6, 1976 through December 31, 1976	38 4/7 weeks
Total	43 4/7 weeks.

The claimant apparently still owes Dr. Naden $55 for services and this award will therefore order payment of this amount.

* * *

Signed and filed this 11th day of August, 1978.

JOSEPH M. BAUER
Deputy Industrial Commissioner

Appealed to Commissioner: Affirmed.

WILL O. CARR,
Claimant,

vs.

JOHN DEERE WATERLOO TRACTOR WORKS,

Employer,
Self-Insured,
Defendant.

Claimant, Will O. Carr, appeals a proposed review-reopening and arbitration decision wherein claimant's petition for review-reopening or, in the alternative, claimant's petition for arbitration was dismissed.

* * *

The issue on appeal is whether payment made under an income plan can be construed as a payment of compensation under Iowa Code §86.13, and if so, whether defendant's failure to file a memorandum of agreement within thirty days after payment of weekly compensation began tolled the statute of limitations under Iowa Code §85.26.

There is no evidence in the record to support the finding either that the employer intended the payments to be on account of workmen's compensation liability or that the employee believed them to be so intended. *Smith v. Walnut Grove Products,* 32nd Biennial Report Iowa Industrial Commissioner, page 70. Thus the payments made to claimant cannot be construed as a payment of compensation under Iowa Code §86.13. The Workmen's Compensation Act does not contemplate the filing of a memorandum of agreement in the event an employee is paid for reasons other than a workmen's compensation liability. Huston v. *Ford Motor Company,* 30th Biennial Report Iowa Industrial Commissioner, page 33. Thus the failure on the part of the employer to file a memorandum of agreement does not toll the statute of limitations, for there is no evidence that the employer intended the payments to be made because of a workmen's compensation liability and the employer is under no duty to file a memorandum negating such liability.

It is found that the statute of limitations has not been tolled and has run. Iowa Code §85.26.

* * *

Signed and filed this 27 day of September, 1978.

ROBERT C. LANDESS
Industrial Commissioner

WALTER EUGENE CARTER,
Claimant,

vs.

WILSON FOODS CORPORATION,

Employer,
Self-Insured,
Defendant.

Appeal Decision

Defendant has appealed from a proposed arbitration decision wherein claimant was found to be 15% industrially disabled and was awarded permanent partial disability compensation along with healing period benetits.

* * *

The issues on appeal are (1) Whether claimant received an injury which arose out of and in the course of his employment, and if so, the nature and extent of disability that resulted; and (2) If claimant sustained a compensable permanent disability, what is the amount of healing period benefits claimant is entitled to.

Claimant, as part of his work duties for defendant employer, shaved heads of hogs, which required squatting, bending and twisting of his body. Claimant began suffering pain and loss of movement in his back and left leg in January of 1977. From January through June of 1977, claimant received pain medication as an outpatient and intermittently missed approximately one-fourth of his scheduled work time. In April, 1977 x-rays were taken which revealed degenerative arthritic changes with spurs at the L4-5. In June 1977 he ceased work entirely because of the extent of his pain.

On July 13, 1977 claimant was admitted to the Veterans Administration Hospital with a diagnosis of herniated nucleus pulposus. A myelogram was performed which revealed some pressure on the L4-5 interspace. Surgery was performed consisting of a division of the left piriformis muscle to relieve pressure on the sciatic nerve. Claimant was discharged on July 22, 1977 with his pain much relieved.

On September 6, 1977 claimant was readmitted to the hospital and treated conservatively with bedrest and traction. It was recommended that claimant not return to work for six months.

On September 24, 1977 claimant was admitted to Mercy Hospital for a diagnostic evaluation by Dr. Wirtz, who concluded that claimant had low back pain from herniated disk material at the L4-5 on the left side. Dr. Wirtz also concluded that claimant had radicular symptomatology involving the left fourth lumbar nerve root.

In March, 1978 Dr. Thornton reported that claimant still

had pain in his back and down his left leg. In April, 1978 Dr. Thornton recommended that claimant not return to work for at least three months.

On July 27, 1978, A. P. Monson, M.D., from the V.A. Hospital, wrote that claimant could return to work if the duties did not require squatting, lifting or extra heavy efforts. On August 3, 1978, Dale M. Grunewald, M.D., did not think claimant could return to work because of his back injury.

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. *Bodish v. Fischer, Inc.*, 257 Iowa 516, 133 N. W. 2d 867 (1965); *Lindahl v. L. O. Boggs Co.*, 236 Iowa 296, 18 N. W. 2d 867 (1945). A possibility is insufficient to establish causal connection; a probability is necessary. *Burt v. John Deere Waterloo Tractor Works*, 247 Iowa 691, 73 N.W. 2d 732 (1956). The incident or activity need not be the sole proximate cause if the health impairment is directly traceable to it. *Langford v. Kellar Excavating & Grading, Inc.*, 191 N. W. 2d 667 (Iowa 1971).

The Iowa Supreme Court has defined "personal injury" to be any health impairment which results from employment. The supreme court in *Almquist v. Shenandoah Nurseries, Inc.*, 218 Iowa 724, 732, 254 N. W. 35, ___ (1934), 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 processes 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."**Of course, such personal injury must be the result of the employment "and flow from it as the inducing proximate cause. "***

In *Black v. Creston Auto Co.*, 225 Iowa 671, 678, 281 N. W. 189, ___ (1938), the supreme court noted that a gradual health impairment can be just as much as injury as an impairment caused by a sudden and violent means. Evidence of some special incident or unusual occurrence is not required in order that an employee receive a personal injury in his work. *Ford v. Goode*, 240 Iowa 1219, 1222, 38 N. W. 2d 158, ___ (1949). An employer's liability under the Workers' Compensation Act is not reduced for the mere fact that claimant sustained no apparent "wound or bruise or other hurt of a traumatic character. " *Lindahl v. L. O. Boggs Co.*, 236 Iowa at 312, *supra*.

While a claimant is not entitled to compensation for the results of a preexisting injury or disease, the mere existence at the time of a subsequent injury is not a defense. If the claimant had a preexisting condition or disability that is aggravated, accelerated, worsened or "lighted up" so it results in a disability found to exist, he is entitled to compensation to the extent of the injury. *Nicks v. Davenport Produce Co.*, 254 Iowa 130, 115 N. W. 2d 812 (1962); *Yeager v. Firestone Tire & Rubber Co.*, 253 Iowa 369, 112 N. W. 2d 299 (1961).

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 (1960).

The deputy, in his proposed arbitration decision, relied on V. A. Hospital records and Dr. Thornton's opinion in finding that claimant sustained his burden of proof. In a report dated April 11, 1978, Dr. Thornton wrote that claimant's condition is probably aggravated by his work. In a remarkably similar report dated September 27, 1977, T. Mizuguchi, M. D., from the V.A. Hospital, also indicated that claimant's condition is probably aggravated by his work. Based on this evidence and the record as a whole it is found that claimant sustained his burden of proof that he suffered a permanent health impairment which arose out of and in the course of his employment.

Defendant has challenged the deputy's finding on healing period benefits. In April, 1978 Dr. Thornton indicated that claimant should not return to work for at least three months. On July 27, 1978, Dr. Monson indicated that claimant could return to light duty work. Dr. Grunewald, however, did not think claimant was able to return to work on August 3, 1978. The deputy found that claimant attained maximum medical recuperation on August 3, 1978. This finding is supported by the record because the reliance on Dr. Grunewald's release is in line with the recommendations of other doctors. Therefore, it is found that claimant's healing period extended from June 17, 1977 through August 3, 1978.

Since claimant received a permanent partial disability to his body as a whole, he is entitled to have his disability rated industrially. Functional disability is an element to be considered in determining industrial disability which is the reduction of earning capacity; but consideration must also be given to the injured employee's age, education, qualifications, experience and inability to engage in employment for which he is fitted. *Olson v. Goodyear Service Stores*, 255 Iowa 1112, 125 N. W. 2d 251 (1963); *Barton v. Nevada Poultry*, 253 Iowa 285, 110 N. W. 2d 660 (1961).

Dr. Thornton indicated that claimant had a permanent disability of 20 percent which is in part due to arthritis and in part due to the injury. Dr. Grunewald indicated that claimant had a permanent disability of 10 percent. Claimant, who is 56 years old, has a high school education and a work history of heavy labor in the meat packing industry. Because of his health impairment claimant will be unable to return to the type of occupation which he has worked in for his entire life. Based on these factors, the deputy's finding of 15 percent industrial disability is hereby adopted.

* * *

Signed and filed this 28 day of January, 1980.

ROBERT C. LANDESS
Industrial Commissioner

Appealed to District Court: Affirmed.

RICHARD D. CARVER,

Claimant,

vs.

BAY-CON CORPORATION,

Employer,

and

UNITED STATES FIDELITY & GUARANTY CO.,

Insurance Carrier,
Defendants.

Appeal Decision

This is a proceeding brought by defendants appea
proposed review-reopening and arbitration decision wh
claimant was awarded healing period benefits and c
medical expenses. This case, when it was before the d
industrial commissioner, was a merged arbitration
review-reopening proceeding in which the appealing de
ant was involved in the review-reopening portion o
case and a second employer defendant, Iowa Constru
Company, Inc., and its insurance Employers Mutual
panies were involved in the arbitration portion. The d
found that Bay-Con Corporation was liable for the
award. Thus only Bay-Con and its insurance carrie
appealing.

* * *

Defendants have challenged the applicability of *De*
v. *Energy Manufacturing Company*, 192 N.W.2d 777
1971), to the present proceeding, but defendants' po
on *DeShaw* as set out in its brief on appeal cann
accepted.

When a claimant sustains an injury, later sustains an
injury, and subsequently seeks to reopen an award bas
the first injury, he must prove one of two things: (1
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was proximately caused by the first injury, or (2) th
second injury and ensuing disability was proxim
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because of his more complete knowledge of clai
medical history, testified that claimant suffered fr
herniated intervertebral disk which was caused by the
11, 1976 injury. Dr. Minard further testified that the
17, 1977 incident merely aggravated claimant's cond
Claimant's symptoms had persisted between June 11
and March 17, 1977, and thus based on this fact an
testimony of Dr. Minard, it is found that any pr
claimant suffered on March 17, 1977 was mere
exacerbation of symptoms and not an independent i
Therefore, the theory of *DeShaw v. Energy Manufac*
Company does not apply to these findings. See
Langford v. Kellar Excavating & Grading, Inc., 191 N
667 (Iowa 1971).

Defendants also urge the "last injurious exposure
This rule does not apply in Iowa except in occupa

RICHARD D. CARVER,

Claimant,

vs.

BAY-CON CORPORATION,

Employer,

and

UNITED STATES FIDELITY & GUARANTY CO.,

Insurance Carrier,
Defendants.

Appeal Decision

This is a proceeding brought by defendants appealing a proposed review-reopening and arbitration decision wherein claimant was awarded healing period benefits and certain medical expenses. This case, when it was before the deputy industrial commissioner, was a merged arbitration and review-reopening proceeding in which the appealing defendant was involved in the review-reopening portion of this case and a second employer defendant, Iowa Construction Company, Inc., and its insurance Employers Mutual Companies were involved in the arbitration portion. The deputy found that Bay-Con Corporation was liable for the entire award. Thus only Bay-Con and its insurance carrier are appealing.

* * *

Defendants have challenged the applicability of *DeShaw v. Energy Manufacturing Company,* 192 N.W.2d 777 (Iowa 1971), to the present proceeding, but defendants' position on *DeShaw* as set out in its brief on appeal cannot be accepted.

When a claimant sustains an injury, later sustains another injury, and subsequently seeks to reopen an award based on the first injury, he must prove one of two things: (1) that the disability for which he seeks additional compensation was proximately caused by the first injury, or (2) that the second injury and ensuing disability was proximately caused by the first injury.

Dr. Minard, whose testimony is given greater weight because of his more complete knowledge of claimant's medical history, testified that claimant suffered from a herniated intervertebral disk which was caused by the June 11, 1976 injury. Dr. Minard further testified that the March 17, 1977 incident merely aggravated claimant's condition. Claimant's symptoms had persisted between June 11, 1976 and March 17, 1977, and thus based on this fact and the testimony of Dr. Minard, it is found that any problem claimant suffered on March 17, 1977 was merely an exacerbation of symptoms and not an independent injury. Therefore, the theory of *DeShaw v. Energy Manufacturing Company* does not apply to these findings. See also *Langford v. Kellar Excavating & Grading, Inc.,* 191 N.W.2d 667 (Iowa 1971).

Defendants also urge the "last injurious exposure rule." This rule does not apply in Iowa except in occupational disease cases.

WHEREFORE, the proposed arbitration and review-reopening decision is hereby affirmed.

It is found that claimant's disability was proximately caused by the June 11, 1976 injury.

It is further found that claimant is entitled to healing period compensation from March 17, 1977 to April 13, 1978. In addition, the healing period should continue from April 13, 1978 until such time in the future that claimant has returned to work or competent medical evidence indicates that recuperation from the injury on June 11, 1976 has been accomplished, whichever comes first.

* * *

THEREFORE, it is ordered:

That Bay-Con pay claimant fifty-six (56) weeks of healing period compensation at the rate of one hundred sixty dollars ($160) per week.

That Bay-Con pay claimant healing period benefits from April 13, 1978 to some date in the future as contemplated in Iowa Code §85.34(1).

* * *

Signed and filed this 29 day of August, 1978.

ROBERT C. LANDESS
Industrial Commissioner

Appealed to District Court; settled.

JERRY L. CHAPMAN,

Claimant,

vs.

FIRESTONE TIRE & RUBBER COMPANY,

Employer,

and

THE TRAVELERS INSURANCE COMPANY,

Insurance Carrier,
Defendants.

Arbitration Decision

INTRODUCTION

This is a proceeding brought by claimant seeking benefits as a result of an injury in the first week of September 1977 against Firestone Tire and Rubber Company, the employer, and Travelers Insurance Company, insurance carrier.

* * *

FACTS

Claimant is 30, married, and has worked for the defendant-employer for seven years. Claimant had been working on wire machine number five for approximately

three years, when in the first week of September 1977 the machine became noisy. Approximately a week previously, claimant flipped his head back when entering a building at work which caused pain in the back of his neck. Claimant testified that the noisy machine made the pain worse until after about a week he shut down the machine and was put on another job. On September 26, 1977 claimant saw Charles S. Fail, M.D. On November 15, 1977 claimant saw Rustico V. Santos, M.D. After the machine was fixed, claimant testified he still had headaches. Claimant called Dr. Santos to have himself put into the hospital because of his headaches and a cold. Claimant was in the hospital from November 24 until December 8, 1977. While at the hospital the claimant was also seen by John T. Bakody, M.D.

As a result of bidding for another job, claimant was transferred to "heavy duty bead service". Claimant testified that he first thought the headaches were caused by an eye problem and went to see Michael J. Versackas, M.D. Claimant also testified that at the time of his injury he was holding down another job with Adel TV and Appliance.

ISSUE

The issues presented by the parties at the time of hearing are: (1) whether claimant's injury arose out of and in the course of his employment; (2) whether there is a causal relationship between claimant's injury and the disability on which he now bases his claim; and (3) the extent of healing period or temporary total disability.

APPLICABLE LAW

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. *McDowell v. Town of Clarksville,* 241 N.W.2d 904 (Iowa 1976). *Musselman v. Central Telephone Company,* 261 Iowa 532, 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 Tractor Works,* 247 Iowa 691, 73 N.W.2d 732, 737 (1956).

The claimant also has the burden of proving by a preponderance of the evidence that the injury in the first week of September 1977 is the cause of his disability on which he now bases his claim. *Bodish v. Fischer, Inc.,* 257 Iowa 516, 133 N.W.2 867 (1965). *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, supra.* 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).

ANALYSIS

Based on the foregoing principles, it is found that claimant has failed to establish his claim. Although claimant now contends that his headaches were caused by the noisy machine, he previously thought they were caused by poor eyesight. Dr. Santos, in his report dated July 25, 1978, stated: "No objective evidence was found to conclude that such headaches were caused by the breakdown of the machine". Although Dr. Santos goes on to say: "It was historically evident that Mr. Chapman's headaches were aggravated by his return to usual work", he revealed that this was based on claimant's statements and no medical evidence. Dr. Bakody's report of July 25, 1978 would indicate that there may be a causal relationship between an injury claimant received to his back some time in 1977 and claimant's headaches. Furthermore, on claimant's admittance to the hospital, it was noted that he had significant anxiety as well as depression, which may, or may not, have been related to claimant's double employment and the cause of his headaches. Claimant also testified that he had a previous history of headaches. On this set of facts claimant has failed to show that any injury arose out of his employment or that any disability was causally connected to an injury in September 1977.

* * *

Signed and filed this 30th day of March, 1979.

DAVID E. LINDQUIST
Deputy Industrial Commissioner

No Appeal.

KENNETH CHAPMAN,

Claimant,

vs.

UMTHUN TRUCKING,

Employer,

and

GREAT WEST CASUALTY COMPANY,

Insurance Carrier,
Defendants.

Arbitration Decision

This is a proceeding in arbitration brought by Kenneth Chapman, the claimant, against his employer. Umthun Trucking, and the insurance carrier, Great Western Casualty Company, to recover benefits under the Iowa Workers' Compensation Act on account of an injury he allegedly sustained while working for defendant employer.

* * *

The issues to be determined are whether claimant sustained an injury in the course of and arising out of his employment, and, if so, the nature and extent of any disability resulting from such injury.

Claimant, age 45, who has bilateral keratoconus, a condition which has required him to wear contact lenses since 1973, worked for defendant employer in various

capacities from September 25, 1967 through September 3, 1977. Claimant testified uncertainly that for some period beginning in 1969 and perhaps into 1975 he was exposed to calcium oxide. During that time he was driving an air bulk trailer and he recalled an incident in which a hose on the trailer broke and the calcium oxide got behind his lens. He took out the lens, washed it, cleansed his eye, and consulted Dr. Gazaway when he got home. In an attempt to get out of the dust claimant transferred to defendant employer's lumber yard. In spite of a promotion to the lumber yard office claimant found his eyes were still being irritated by dust when he would make trips out to the yard to check a load. As defendant employer had no work to offer in a dust-free environment, claimant's employment was terminated. Claimant conceded he received full pay from defendant employer through September 17, 1977 and then received unemployment benefits until November 4, 1977 when he went to work for a meat packing plant as a sanitation supervisor.

Keith Riley, who holds a management position with defendant employer, testified that claimant was a well motivated worker. According to Riley, claimant had no record of excess time loss from 1974 through 1977 other than vacation time. He was unaware of any absenses by claimant due to an eye condition.

Steve Nicklaus, a co-worker and presently operations manager for defendant employer, had done several jobs for defendant employer. He asserted that there was generally no reason for drivers of the trailers to be exposed to chemicals. Nicklaus did not recall claimant complaining of burning his eyes with calcium oxide but did remember claimant mentioning that dust from some products transported on air trailers bothered his eyes. He recounted numerous times when the defendant employer agreeably responded to claimant's requests for changes in his employment whether it was to allow claimant to adhere to a proper schedule for wearing his contacts, to attempt to remove the claimant from dust-ridden environments, to assist the claimant in making more income, or generally to provide the claimant with more comfortable working conditions. Such concern on the part of defendant employer is noteworthy. Nicklaus explained that the reason claimant was finally let go by the defendant employer was that the loading department in the lumber division, of which claimant was the manager, was being discontinued and no other position was available that would accommodate the requirements of claimant's eye condition.

Claimant has seen John A. Gazaway, optometrist, since April 20, 1968. Gazaway described keratoconus in a September 22, 1976 letter as "a disease in which the apex of the cornea thins and the internal pressure of the eye, in its normal state forces the cornea to protrude or vault outward in the shape of a cone." In Dr. Gazaway's opinion the cornea in a keratoconus sufferer "is not as resistant to abuse as a healthy cornea." He reasoned:

> . . . the nature of the "hard" contact lens, which allows any foreign body in the environment to irritate the cornea by entrapment behind the lens, makes a strong case for daily living in a very clean environment -- as much as possible free from dust, chemicals and other impurities in the air. This is most true in environments where impetus is given to foreign bodies by wind or disturbing forces which would contaminate the working or living area.

In a letter of December 19, 1978 the doctor wrote regarding aggravation that "keratoconus is not in itself aggravated by environment but the therapy, which most probably is to be continued in the foreseeable future is aggravated."

Otis D. Wolfe, M.D., of the Wolfe Eye Clinic, saw claimant on April 23, 1973 and on January 26, 1976. He was unaware of claimant's exposure to calcium oxide. On the issues of causal relatedness and aggravation, Dr. Wolfe wrote that the keratoconus was "in no way related to his [claimant's] work, nor is there any reason to believe that his work or his exposure to foreign materials will in any way aggravate his keratoconus. It certainly does aggravate the tolerance of his contact lenses."

Robert Stickler Brown, M.D., board certified ophthalomologist, saw claimant on March 1, 1977 and again on November 20, 1978. In a letter dated March 1, 1977, Brown states:

> I saw Mr. Chapman today and he was given a complete eye exam. As you recall his history, he was "burned with calcium oxide in the left eye" two years ago while at work. He feels that since that time his vision has steadily gotten worse and his contacts have become more uncomfortable, more so in the left eye than the right. He has worn contact lenses for three years for keratoconus in both eyes which has been fit by his local optometrist [sic].
>
> * * *
>
> His left contact lens was fitting way too flat and I feel that this is responsible for his discomfort and decreased visual acuity in that eye at this time.
>
> * * *
>
> I could find no sequelae of calcium oxide injury to either eye and this in no way is influencing the keratoconus or the fit of his present contact lens. He does need a refit with a new contact lens for the left eye to relieve the discomfort and decreased vision he is having in that eye which is unrelated to the previous injury.

Dr. Brown's testimony describing keratoconus is enlightening.

> Keratoconus is a condition we believe to be inherited- at least, genetically predetermined. The exact genetic inheritance is not totally resolved. One theory is, it's a recessive trait, and the other leading theory is that it's two separate dominant genes, and that both must be present for the disease to be manifested. But all seem to agree that it's a genetically determined disease.
>
> The disease usually develops between the ages of 10 and 20 to 25 years of age, although cases arising in later adulthood have been reported, and it's not a rarity for that to occur. It is slightly more prevalent in females than males. It's usually always bilateral, but it

can be developed more prominently in one eye than the other.

The condition is usually progressive and leads to an increase in astigmatism, and this astigmatism in the more advanced stages becomes very difficult to correct optically with spectacles. Therefore, patients usually are fit with hard contact lenses to see clearly. For optical reasons that I don't think we need to get into, that corrects the astigmatism where spectacles cannot. And some patients will progress to the point that they can't wear hard contact lenses comfortably and can't see well with them, and they will require corneal transplants.

That covers the whole gamut of the disease, from the very mild to the most severe.

Dr. Brown indicated that the examinations revealed no evidence of trauma. The doctor could not relate claimant's environmental condition to the keratoconus. He responded, "[a]bsolutely not" to the question as to whether or not the keratoconus was aggravated by claimant's work environment.

The claimant has the burden of proving by a preponderance of the evidence that the injury was the cause of his disability on which he now bases his claim. *Bodish v. Fischer, Inc.,* 257 Iowa 516, 133 N.W.2d 867 (1965). *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).

A claimant is not entitled to recover for the results of preexisting injury or disease, but only for an aggravation thereof which resulted in the disability found to exist. *Olson v. Goodyear Service Stores,* 255 Iowa 1112, 125 N.W.2d 251 (1963). In *Ziegler v. U.S. Gypsum Co.,* 252 Iowa 613, 620, 106 N.W.2d 591 (1961), the Iowa Supreme Court said:

> It is, of course, well settled that when an employee is hired, the employer takes him subject to any active or dormant health impairments incurred prior to his employment. If his condition is more than slightly aggravated the resultant condition is considered a personal injury within the Iowa law.

In *Yeager v. Firestone Tire & Rubber Co.,* 253 Iowa 369, 375, 112 N.W.2d 299 (1961), the court quotes with approval from C.J.S.:

> Causal connection is established when it is shown that an employee has received a compensable injury which materially aggravates or accelerates a preexisting latent disease which becomes a direct and immediate cause of his disability or death.

Claimant does not allege, nor does the record indicate that his keratoconus is work-related. Claimant's argument is that his "keratoconus treatment condition was aggravated by and made worse by the conditions of his employment resulting in an environmental disability in that his work with Umthun Trucking Company aggravated his eye condition, making it unable for him to work [sic]." He claims a 40 percent industrial disability because his income has decreased from the $23,000 per year he claims he would have been making as a truck driver for the defendant employer if he had remained in that position to the $13,250 per year he is making as a sanitation supervisor. (Defendants' answer to interrogatory 14 indicates claimant made $14,437.92 during the last year he worked with the defendant employer.)

Defendants point out that claimant's exposure to calcium oxide, dust and bits of wood did not materially aggravate claimant's condition which was congenital in nature.

The record is clear that prior to wearing contact lenses, claimant had no trouble working in dusty environments. He had done general farming and driven semi-trucks prior to working for defendant employer. He had no difficulty driving an air bulk trailer from 1967 until 1973 when he began wearing the contacts which were necessitated by the keratoconus condition. He is presently employed in surroundings that do not create problems with his wearing of contacts.

The record is devoid of any evidence that would support a finding that claimant's pre-existing condition was aggravated in such a way as to result in any permanent partial disability. The medical reports and testimony do not mention any permanent impairment as a result of claimant's work. The record is devoid of any evidence that would support a finding that claimant's condition was aggravated in such a way as to result in any temporary disability. Claimant lost no time from work as a result of his eyes being aggravated by the working conditions. He testified that when his eyes felt uncomfortable he would remove his lenses, cleanse them, and then insert them.

Claimant has proven only that a dusty or chemical ridden environment "irritated" his eyes as is often the case for the vast majority of contact lense wearers.

WHEREFORE, IT IS FOUND that claimant did not sustain his burden of proving that his work environment is the cause of the so-called disability on which he now bases his claim.

THEREFORE, the present claim is hereby denied.

Signed and filed this 23rd day of July, 1979.

LEE M. JACKWIG
Deputy Industrial Commissioner

Appealed to Commissioner: Affirmed.

HOLLIE C. CHERRY,

Claimant,

vs.

WILSON FOODS CORPORATION,

Employer,
Self-Insured,
Defendant.

Appeal Decision

This is an appeal of a ruling filed December 21, 1979 in which the defendants were denied credit for overpayments of healing period against permanent partial disability compensation.

The ruling was consistent with a prior decision of the agency in the case of *McCombs v. Mercy Hospital,* filed January 31, 1979 in which it was stated:

> The law does not specifically provide for credit for overpayment of healing period benefits against permanent partial disability benefits. Since the legislature specifically provided for such a credit when a permanent total disability is involved, it must be assumed that such a credit was not intended for permanent partial disability. Thus, the defendants are not entitled to a credit for any overpayment of healing period benefits.

Defendant would have us now reverse the ruling in *McCombs.* While defendant's argument is persausive so, too, is the argument for consistency in the agency interpretation of the statutes we are charged to administer. If the legislature chooses to change the language or the courts determine the interpretation is incorrect, so be it. Until such time, however, the prior interpretation will continue to be applied by the agency.

THEREFORE, the ruling of December 21, 1979 is adopted as the final decision of the agency.

Signed and filed this 25th day of February, 1980.

ROBERT C. LANDESS
Industrial Commissioner

Appealed to District Court: Pending. 3/10/80

LOUISE C. COBLE,

Claimant,

vs.

METROMEDIA, INC.,

Employer,

and

COMMERCIAL UNION ASSURANCE COMPANIES,

Insurance Carrier,
Defendants.

Ruling

BE IT REMEMBERED that on November 13, 1978 claimant herein filed an employee's request for a medical examination by a Dr. John R. Scheibe, M.D., pursuant to Code section 85.39. On February 26, 1979 defendants herein filed a resistance alleging that said request was premature insofar as "employer's physician has not yet made an evaluation of permanent disability although an examination for the same has been scheduled".

Review of the file reveals that pursuant to a memorandum of agreement filed on March 27, 1978, defendants paid the claimant 18 weeks and 4½ days of temporary total benefits. According to the employer's report of benefits paid filed on August 9, 1978, such benefits ceased in August 1978. No permanent partial disability benefits were paid. Pursuant to Commissioner's Rule 3.1(3), medical information in the form of three reports from Dr. Jack W. Brindley, M.D., were filed in support of the payments made.

The relevant portion of Code section 85.39 reads:

> 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 . . ."

On its face, Code section 85.39 does indeed specify that a permanent disability evaluation by a physician retained by the employer is a prerequisite to the employee requested examination. Accordingly, without further analysis, the employer's resistance to the claimant's examination being taken before the employer's physician has evaluated the claimant appears to be supported by the statutory language quoted above.

However, a question that frequently arises in these section 85.39 fact situations is whether the employer has in effect, if not in fact, adopted the claimant's physician thereby entitling the claimant to pursue another evaluation. The apparent import of the above-quoted statutory language is to allow the claimant to dispute an evaluation which the employer has obtained and which the employee feels is too low. Thus, insofar as an opinion of no permanency amounts to "an evaluation of permanent disability" and if the defendants herein adopted a physician chosen by the claimant in such a way that said physician could be viewed as one retained by the employer, the claimant would already be entitled to an independent examination by a physician of his own choosing to dispute the evaluation of the physician adopted by the employer.

The status of the pleadings and of the filings in this case does not allow the undersigned to find conclusively that the employer has already retained (adopted) any of the physicians who have examined the claimant regarding the injury in issue. In the original notice and petition filed January 17, 1979 claimant alleges that she has seen Dr. G. P. Gerleman, D.C., Dr. Donald D. Berg, M.D., and Dr. Jack W. Brindley, M.D., (paragraph 20) and that the medical expenses have been "paid by carrier" (paragraph 21). There

is some indication in correspondence between defendants and this office that Dr. Brindley, M.D., was considered to be the claimant's treating physician and that further examination by said doctor was "agreeable" to defendants. Whether the defendants have adopted Dr. Brindley for purposes of Code section 85.39 or have agreed to his involvement in this case pursuant to Code Section 85.27 is not clear at this stage of the proceeding. Finally, the name of the physician retained by the employer for purposes of §85.39 and referred to in the resistance is unknown. If such physician is one who has already examined the claimant, such fact may be determinative of the issue.

WHEREFORE, the parties are urged to reevaluate their position in light of the above discussion and to attempt to resolve the matter of which examination may precede and which should follow. In the event the parties cannot arrive at an agreement regarding said matter, they shall present their position supported by relevant evidence to the undersigned for determination.

Signed and filed this 26th day of March, 1979.

LEE M. JACKWIG
Deputy Industrial Commissioner

No Appeal.

SANDRA KAY COLWELL,

Claimant,

vs.

ARMOUR-DIAL, INC.,

Employer,
Self-Insured.

Review-Reopening Decision

INTRODUCTION

This proceeding was initiated by the claimant filing a petition in arbitration on December 19, 1977.

* * *

ISSUE

Is claimant entitled to recover a permanent partial disability compensation based on 25 percent of the foot which equals 37.5 weeks or entitled to compensation for four amputated toes at 15 weeks each, for a total of 60 weeks.

FACTS

On May 7, 1977 claimant injured her right foot while working for defendant employer. She was taken to the emergency room at Sacred Heart Hospital following the injury at which time Dr. McGinnis repaired the foot by an amputation through the middle one-third of the fifth metatarsal, amputation through the distal one-third of the fourth metatarsal, amputation through the proximal one-third of the phalanx of the third toe, amputation of the distal phalanx of the second toe, while other lacerations were sutured. On September 13, 1977 Dr. McGinnis had to perform an amputation at the proximal phalanx of the right second toe. Because of the proximal amputation of the right foot, claimant required services of Dr. Schivley, podiatrist, who made a prosthesis to fit her foot in a shoe. Dr. McGinnis indicates that claimant has a 25 percent functional impairment to the right foot.

APPLICABLE LAW

Section 85.34, 1975 Code of Iowa, provides that a claimant will receive weekly compensation during 15 weeks for the loss of one of the toes other than the great toe and the loss of more than one phalange shall equal the loss of the entire toe. This section also provides that a claimant will receive weekly compensation during 150 weeks for the loss of the foot.

The Supreme Court of Iowa has indicated that the Workmen's Compensation Law, being passed for the workers' benefit and being a remedial statute is to be liberally construed in favor of the employee. *Snook v. Herrmann,* 161, N.W.2d 185 (Iowa 1968); *Hoenig v. Mason & Hanger, Inc.,* 162 N.W.2d 188 (Iowa 1968).

ANALYSIS

Claimant's injury is to the foot as a whole because the amputations took portions of the metatarsals so the doctor's opinion as to functional disability of the foot is relevant to determining claimant's compensation. The facts are also undisputed that claimant has in fact lost four toes as a result of this injury. Construing the law in favor of the claimant, she is entitled to compensation during fifteen weeks for each lost toe or sixty weeks compensation which is greater than a functional loss of 25 percent of her foot or 37.5 weeks compensation.

* * *

Signed and filed this 30th day of October, 1978.

DAVID E. LINQUIST
Deputy Industrial Commissioner

Appealed to Commissioner: Affirmed 12/29/78

RALPH RUSSELL COOPER,

Claimant,

vs.

MORSE CHAIN DIVISION OF BORG WARNER CORPORATION,

Employer,

and

AETNA CASUALTY AND SURETY COMPANY,

Insurance Carrier,
Defendants.

Arbitration Decision

This is a proceeding in arbitration brought by Ralph Russell Cooper, the claimant, against his employer, Morse Chain Division of Borg Warner Corporation, and the insurance carrier, Aetna Casualty and Surety Company, to recover additional benefits under the Iowa Workers' Compensation Act on account of injuries he sustained on April 7, 1977 and September 16, 1977.

* * *

The issues to be determined are whether claimant sustained an injury in the course of and arising out of his employment with defendant-employer, and if so, the nature and extent of the disability, if any, resulting from the injury. Certain medical expenses and the rate of compensation are also in issue.

Claimant, presently 57 years old and a machinist for 35 years, testified that on April 7, 1977 while lifting a basket of sleeves, he experiended a sharp pain on the outside of the right knee. He told his foreman, Ralph Hardy, about it that day but did not go home early. Since resting over the three-day Good Friday weekend did not improve his knee, claimant asked to see Dr. Billy James Williamson, the company doctor, when he returned to work the following Monday.

According to the claimant, Dr. Williamson treated him with physical therapy and then referred him to Keokuk Area Hospital where Dr. J. W. Gwaltney examined him and ruled out gout being the cause of his problem. Claimant returned to Dr. Williamson who released him to return to work the second week in May. (Claimant indicated he had been off work three full weeks since the date of the injury. He returned to work on May 9, 1977.) He continued to receive therapy after he returned to work.

Claimant recalled that his knee swelled again on September 2, 1977. Claimant reported that Dr. Williamson put him on light bench duty with no lifting. Then while at work on September 16, 1977, claimant tripped over a basket. In the process of doing that, claimant testified that he put all his weight on the right leg and experienced immediate pain in the right knee. He reported the incident the same day to Dick Staple, his foreman, and went to see Dr. Williamson. He continued to work light duty.

Claimant testified that Dr. Williamson sent him to Dr. Gwaltney again. Dr. Williamson also referred the claimant to Dr. Lucius C. Hollister who examined the right leg and recommended surgery. Claimant related that sometime in December of 1977 and again in April of 1978 he underwent surgery on the right knee. At the time of the hearing, the claimant was still under Dr. Hollister's care.

The claimant demonstrated difficulty he was having walking and squatting. He testified that he has trouble climbing stairs, walking more than one-fourth mile, and standing for any substantial period of time. He has limited lifting ability. He does prescribed knee exercises two to three times a day and takes pain medication.

He saw Dr. Burton Stone at his attorney's request. Dr. Stone recommended whirlpool and physical therapy.

Claimant testified that his present status with defendant-employer was unknown. He did not think he had been terminated. However, he explained that he had not worked since December 12, 1977 when defendant-employer informed him that the company had no more light duty work available.

Claimant acknowledged that he had a heart attack on December 20, 1978 for which he was hospitalized through January 6, 1979 and treated by Dr. Kempf. He still takes medicine occasionally upon "need". He stated he has no instructions from Dr. Kempf regarding return to work. He added that he had a heart problem three years ago for which he was treated by the company doctor. He missed no work as a result of that condition.

On cross-examination claimant testified that the April 7, 1977 injury occurred while he was working and the September 16, 1977 injury occurred while he was on his break. The claimant further stated that no doctor had released him to return to work either before or since the heart attack. He indicated he told one doctor he could not stand eight hours. Claimant felt he had been unable to return to work since December of 1978 because of both the heart and the knee conditions.

Claimant further testified on cross-examination that he refused to undergo traction suggested by one doctor because he feared reinjuring his knee. He testified that he did his exercises until he had his heart attack. He presently walks about one-fourth mile per day whereas he walked three-fourths of a mile or 45 minutes per day prior to the heart attack.

On redirect examination claimant indicated that if the company doctor and Dr. Kempf advised him he could return to work and if the company had appropriate work for him, he would be willing to attempt working again.

In a letter dated October 26, 1977, Billy James Williamson, M.D., reports:

> I first saw Ralph Cooper in my office on April 11, 1977. He stated that on April 7, 1977 he had helped load some baskets of sleeves at work and that evening noted pain in the right knee. On examination he was tender over the lateral part of the knee and could not completely flex or extend the knee. My diagnosis was a sprain of the right knee. X-ray on April 12, 1977 showed some fluid in the suprapatellar brusa. An appointment was made with Dr. Gwaltney, an orthopedist, for April 21, 1977. He was placed on crutches and received physiotherapy almost daily. He returned to work on May 2, 1977. On May 9, 1977 examination at my office disclosed no tenderness or swelling and he stated that he felt fine.
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> On August 3, 1977 he returned to my office complaining of pain in the muscles above the right knee for six days. He related this to no known reinjury. He was found to be tender above the patella. Butazolidin alka was prescribed and physiotherapy. He did not return the next day as instructed.
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> He again returned on September 2, 1977 to my office complaining of his right knee hurting and not being able to straighten it out. He stated it started 1 week before but could not relate it to any new injury. He was found to be tender over the outside of the knee. Physiotherapy was reinstituted and he was given a sit-down job at the plant. However on September 16,

> 1977 he reported having caught his left pants leg on a stem while walking in the plant and caused him to twist his right knee. He complained of pain on both sides of the knee. He was tender on both sides of the knee. Physiotherapy was continued and he saw Dr. Gwaltney again on September 27, 1977.

Dr. Williamson estimated that claimant would be temporarily totally disabled for three months if he had surgery. He expected surgery would result in claimant's full recovery.

In a letter dated January 4, 1977, James A. Gwaltney, Jr., M.D., F.A.C.S., relates that claimant was referred to him by Dr. Williamson. He "found no significant findings" on April 21, 1977, but on September 22, 1977 he "found that the patient had findings which might be consistent with a tear of the medial meniscus." Dr. Gwaltney's clinical notes do not contain a complete history regarding either date of injury.

Lucius C. Hollister, Jr., M.D., F.A.C.S., an orthopedic surgeon, testified on behalf of the claimant. He first saw the claimant from January 24, 1975 to February 6, 1976 regarding a tear of the rotator cuff of the right shoulder. According to defendants' exhibit 1, he next saw the claimant on September 30, 1977. The claimant gave a history of a work injury the day before Good Friday and a subsequent work reinjury entailing being thrown down on the right knee. He prescribed a muscle relaxant for the claimant.

Upon claimant's visit the following week, Dr. Hollister reviewed x-rays that had been taken September 21, 1977 at the Graham Hospital in Keokuk. He testified that the x-rays were negative for any bony abnormalities which ruled out a fracture injury or arthritic condition. Such finding did not rule out a soft tissue abnormality. Dr. Hollister diagnosed "an internal derangement of the knee, most probably a bucket-handled injury of the medial meniscus." However, surgery revealed that "it was not a bucket-handled injury. It was what we described as a tab tear, which is a less extensive tear of the semi-lunar cartilage."

The arthrotomy and medial meniscectomy during claimant's December 14, 1977 to December 24, 1977 hospitalization was described as follows:

> I have a copy of my operative report of December 15th, 1977. The knee joint was open and the lining of the knee joint was found to be chronically thickened and showed an increased number of blood vessels which is an indication of chronic inflammation. I described a tab like tear of the anterior horn which had caused a reaction of thickening of the lining of the joint with a fold of the lining of the joint on the medial femoral condyle. After I removed the medial meniscus what portion of the lateral meniscus could be visualized appeared to be normal. His ligaments were normal and the articular surface of the kneecap appeared to be normal; and the knee joint was closed up.

Dr. Hollister further testified that in February of 1978 claimant complained of excessive tenderness in the back of the knee joint. The excision of the Baker's cyst of the right popliteal space during claimant's April 10, 1978 to April 21, 1978 hospitalization was described as follows:

> Well, the knee joint is basically a hinge joint lined with what we call the synovium which produced joint fluid. A Baker's cyst is a projection of the lining of the joint through the combination of ligaments which we call a capsule projecting toward the back of the body. At the same time, there can be a flap of tissue which acts as a valve and an increased amount of fluid in the joint can escape into this projection; but the flap of tissue will prevent it from going back where it arose originally in the joint so that the fluid in the Baker's cyst will build up pressure and cause pain with a secondary muscle spasm.

Although Dr. Hollister thought the Baker's cyst may have been present a long time prior to the incidents in issue, he testified that "the irritation of the joint by the torn cartilage produced an increased amount of fluid in the joint which eventually made the Baker's cyst enlarged and become symtomatic (sic)."

Upon claimant's first office visit on May 5, 1977 following the second surgery. Dr. Hollister noted claimant "lacked about five degrees of getting his knee completely straight" and the right knee was larger than the left. Dr. Hollister last saw the claimant on March 26, 1979 and noted continued limitation of motion and enlargement of the right knee. He elaborated upon the limitations of such a knee condition as it relates to claimant's employability:

> A. Well, he has difficulty squatting. He has difficulty at times putting his shoes or socks on. He has difficulty walking on uneven surfaces. If he's on his leg excessively the knee tends to swell more.
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> Q. How, when you say excessively, how long would he be able to be on his knee before he would have such condition occur?
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> A. I would say possibly three hours.
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> Q. Now, Doctor, when you last saw him would you recommend that he return back to his employment at his company?
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> A. No.
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> Q. And what is your reason for that?
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> A. It's my recollection that he worked at a lathe and this requires prolonged standing, turning to obtain material to put on the lathe; and I don't believe he's physically ready to do it.
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> Q. Might he do some lighter kind of work if they could find some for him?
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> A. I believe he could, possibly sentry at a gate.
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> Q. Something where he didn't have to stand at a gate for a period of time or use his leg much?
>
> A. Right.

In response to a question asking him to assume that the claimant twisted his knee on both April 7, 1977 and September 1977, Dr. Hollister responded that he believed claimant sustained a tear of his cartilage on one of the two occasions.

In answer to a question regarding whether there is a need for further improvement, Dr. Hollister related his suspicion that some adhesions in the joint may exist. He has no other possible explanation for the unusual limitation of motion in this case. He desires the opinion of another orthopedic surgeon and contemplates another arthrography which "is a technique where a radiopaque dye is injected into the joint and x-rays are taken," or an arthopscope which is a "technique where a tube is introduced into a joint with a lens so that the inside of the joint can be visualized." Dr. Hollister recommends this further evaluation before physical therapy is pursued seriously.

Dr. Hollister is of the opinion that the claimant sustained some permanent impairment but he feels further treatment and evaluation is necessary before he estimates the amount of disability.

On cross-examination, Dr. Hollister conceded he did not treat the claimant between April of 1977 and September of 1977. His notes did not indicate that the claimant himself called for an appointment. (However, on redirect examination Dr. Hollister implied that Dr. Williamson was presumed to be the referring doctor from the time of the shoulder matter to the present.) Dr. Hollister also agreed that the only source of information regarding the work injuries -- the severity of each and course of treatment pursuant to each -- was the medical history given to him by the claimant. Dr. Hollister acknowledged that he saw claimant on four other occasions between the date of injury and the first surgery. Although he had not directed the claimant to refrain from working, he felt progressive pain, as described by the claimant, resulted in claimant being no longer able to work. He did not know whether claimant being taken off light duty contributed to claimant's complaints. Dr. Hollister added that the type of work the claimant does is not in and of itself a cause of a Baker's cyst condition.

Dr. Hollister further testified that he first became aware of claimant's December, 1978 heart attack during a January 29, 1979 office visit. He recalled that during a March 26, 1979 office visit, the claimant advised him that Dr. Kempf told the claimant he could return to work April 1, 1979. Dr. Hollister's medical opinion was that the heart attack "most probably" slowed claimant's progress down with respect to the knee condition because claimant was not getting much exercise and because medication taken for the heart attack may have had an effect on the flow of blood in the knee area. Dr. Hollister noted that the claimant complained of the Baker's cyst returning as of March 26, 1979; however, he found no evidence of a cyst upon examination and speculated that scar tissue may have formed in the area and "could be related to treatment for the heart attack possibly if he had been on anti-congulants."

Although Dr. Stone would not release claimant to return to full work duties at this time, he would have released the claimant for light duty work as of March 16, 1979.

Burton Stone, M.D., who is Board certified in Physical Medicine and Rehabilitation, testified on behalf of the claimant. He saw the claimant once on February 26, 1979 at the request of claimant's attorney. He obtained a history of the work injuries from both the claimant and the reports of claimant's other doctors. In deposition exhibit 1, Dr. Stone describes the two injuries:

> In effect, this gentleman states his right knee problem began on April 7, 1977 when he and another man were lifting a "200 pound hamper". Apparently he turned with the hamper and twisted his right knee and immediately complained of pain.****
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> On September 16, 1977 apparently while walking in the plant his left pant leg caught on "the cubber piece" of a rake which is manufactured at the plant which, according to Mr. Cooper, was sticking out some place it was not supposed to be and he tripped throwing his weight on his right leg. He describes a stabbing pain in the right knee and apparently reported this immediately.

Examination revealed almost normal extension, severe restricted motion in flexion, swelling above the kneecap and no evidence of instability. X-rays revealed mild demineralization which Dr. Stone attributed to lack of activity. His recommendation was "to mobilize the knee through as full a range of motion as possible" and "to regain the strength lost in the quadriceps muscle, the thigh muscles on that side . . . ." He would suggest a program including whirlpool, active and passive stretching range of motion and isometric exercises for the quadriceps if an orthopedic surgeon determined that no other further surgical intervention should be pursued at this time. He was hopeful that a six month program would return the claimant to his previous activities. Presently, Dr. Stone would restrict the claimant from being on his feet a long time, heavy lifting, stooping, twisting, crawling, and climbing.

Regarding the causation issue, Dr. Stone testified:

> A. Yes, I would feel that the initial insult on April the 17th--
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> Q. I think it's April 7.
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> A. 7th would have served as a sort of primer. I don't think that his meniscus tear occurred on April 7th, but I think that it created some problems that primed the knee and on September 16th that this probably was the cause of his problem of his meniscal tear.
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> * * *
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> Q. How, what, if any, relationship is there between the injury or the tear in the knee that commenced your April 7th or September 16th of '77 with that condition of the Baker's cyst (sic)?
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> A. Baker's cyst can follow a traumatic incident like this.
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> Q. Can you tell us what reason for that is?
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> A. It's leakage of fluid into the posterior elements.

As of April 4, 1979, the date of his deposition, Dr. Stone had no opinion regarding any permanent impairment claimant may have sustained to his knee. Dr. Stone was hopeful that any impairment would be minimal if claimant followed the therapy program he outlined.

Dr. Stone did not feel that the claimant's heart condition would interfere with the rehabilitation program he recommended. He again exphasized that an orthopedic surgeon would have to approve such a program. In justifying why one of claimant's other doctors may have recommended avoiding physical therapy, Dr. Stone stated:

> Well, there were several instances where it was mentioned that there was a fair amount of swelling and fluid that might have precluded this. It's possible -- and this would just be an educated guess -- that the initial problem that occurred in April, which sounded to me like it was probably a lateral ligamentous strain with some acute synovitis that sort of was chronically going on and had, you know, never completely healed because he continued to complain about it may have been the reason that this thing has dragged out a little bit more.
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> * * *
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> Q. I'm talking about back in the context when you were reading the reports from the other physicians where you noticed that his complaints were swelling, tenderness, pain, which you indicated in your opinion -- as an educated guess -- would be the opinion that physical therapy wasn't pursued and my question simply, I hope, would be what could have been done early on to alleviate that pain and swelling so that physical therapy could have taken place?
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> A. Well, I gather that he was put on crutches and kept off it and given proper rest, and he did have episodes, I think, where he seemed to be getting along quite well, so I think he, you know -- that the treatment was pretty adequate.

Dr. Stone was unaware of what claimant's job entailed. He did feel claimant could do light duty work which was described by defendants' counsel as "sitting at a grinder and finishing."

On redirect examination, Dr. Stone agreed that Dr. Hollister's suggestion of further examination by means of an arthrogram would be helpful. If adhesions suspected by Dr. Hollister were so found, Dr. Stone felt such "adhesions could be a cause of slowing down." However, he did not think that therapy would have to be delayed necessarily for further medical treatment because "[I]f it were just ashesions, I think these would have to be gradaully stretched."

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).

In the course of employment means that the claimant must prove his injury occurred at a place where he reasonably may be performing his duties. *McClure v. Union, Et Al, Counties,* 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).

The claimant has the burden of proving by a preponderance of the evidence that the injuries of April 7, 1977 and September 16, 1977 are the cause of his disability on which he now bases his claim. *Bodish v. Fischer, Inc.,* 257 Iowa 516, 133 N.W.2d 867 (1965). *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).

From the cross-examination of the claimant, defendants appear to be contending that the injury on September 16, 1977 did not occur in the course of employment because the claimant was on break when he tripped and twisted his knee. Clearly, the evidence shows that the claimant was on the defendant-employer's premises. According to Iowa law, an injury which occurs on the defendant-employer's premises is compensable unless otherwise precluded. *Crowe v. DeSoto Consolidated School District,* 246 Iowa 402, 68 N.W.2d 68 (1955).

From the cross-examination of the claimant and of Drs. Hollister and Stone, the defendants seem to be arguing that since the claimant was already on light duty work when the second injury occurred, now that the medical experts have indicated he can return to light duty work, healing period should be deemed completed. Consideration has been given to the application to this case of that portion of Industrial Commissioner Rule 500-8.3 which states, "[r]ecuperation occurs when it is medically indicated . . . that the employee is capable of returning to employment substantially similar to that in which the employee was engaged *at the time of the injury* . . . ." (Emphasis added.)

In the opinion of the undersigned, the September 16, 1977 light duty work and injury is not determinative of the healing period issue. Dr. Stone's testimony regarding the April 7, 1977 injury being the "primer" for the meniscus tear which he thinks probably occurred on September 16, 1977 injury was a lateral ligamentous strain with some acute synovitis which was chronic in nature and may be responsible for the prolonged recuperation indicates that but for the first injury, the second would not necessarily have resulted in the present unresolved disabling condition. Additionally, it is noted that claimant complained of left knee pain to Dr. Hollister on both August 3, 1977 and September 2, 1977. On the latter occasion, claimant was put on light duty work.

Furthermore, it cannot rightfully be found that claimant has reached maximum recovery because he is capable of return to light duty work (which the company may or may not have available for him) rather than that claimant has not reached maximum recovery because he has not returned to the same or substantially similar employment he was engaged in on April 7, 1977. The evidence supports a finding that claimant's second injury and resultant disability were proximately caused by the first injury. *See DeShaw v. Energy Manufacturing Co.,* 192 N.W.2d 777 (Iowa 1971). *Compare Richard John Waters v. Backman Sheet Metal Works and Bituminous Casulaty Corp.,* 33rd Biennial Report of the Industrial Commissioner, page 60.

An additional matter clouding the healing period issue is claimant's heart attack which occurred on December 20,

1978. No claim has been made by the claimant that the heart attack was work-related. The claimant's testimony and the medical evidence support a finding that the claimant was not able to return to light or full-duty work from the date of the heart attack through and including March 31, 1979 because of the heart condition as much as because of the knee ailment. Additionally, it is pointed out that Dr. Hollister indicated that the improvement of claimant's knee condition was hindered to some extent by the heart attack and by any subsequent medication that claimant may have taken for it.

WHEREFORE, IT IS HEREBY FOUND THAT claimant sustained injuries arising out of and in the course of employment on April 7, 1977 and on September 16, 1977. Whereas the medical evidence suggests a likelihood of some minimum permanent impairment, and whereas the medical evidence reveals that claimant has not reached maximum recovery and is not capable of return to work substantially similar to that in which he was engaged on April 7, 1977, and whereas the claimant has not returned to work, the claimant is deemed entitled at this time to a running award of healing period benefits.

It is further found that the healing period benefits should be suspended from December 20, 1978 through March 31, 1979, the period of time during which claimant was industrially disabled for reasons unrelated to the injuries in issue yet affecting the recuperation from the disability ensuing from said injuries.

* * *

Signed and filed this 28th day of September, 1979.

LEE M. JACKWIG
Deputy Industrial Commissioner

No Appeal.

DONALD COWELL,

Claimant,

vs.

ALL-AMERICAN, INC.,

Employer,
Self-Insured,
Defendant.

Appeal Decision

This is a proceeding brought by defendant appealing a proposed review-reopening decision wherein claimant was awarded one hundred weeks permanent partial disability benefits and mileage expenses under the Iowa Workers' Compensation Law.

* * *

Claimant started work for defendant as a dock foreman in April 1975. On February 23, 1977 at about seven p.m. claimant was climbing out of a trailer. Claimant stated his foot slipped and he fell to the ground, landing on the "left side of his back, flat." Claimant further testified that he worked and saw R. J. Foley, M.D., the next day and that he remained off work for two or three months after the incident. Claimant was hospitalized for low back pain in July 1977 and later developed pain which led to exploratory surgery related to an ulcer. This ulcer was removed in September.

Claimant said that he returned to work about October 1, 1977, at which time he was still having problems with his lower back and leg.

Jimmie McKinney, defendant's terminal manager since approximately October 15, 1977, reported that as of June 15, 1976 claimant had a good job performance evaluation. When claimant returned to work following his injury, McKinney found it necessary to speak with claimant about his failure to attend a supervisor's meeting. It was McKinney's opinion that claimant was not producing, was failing to communicate with other foremen, and was not maintaining a proper attitude toward management goals. Therefore, claimant was given a choice of resigning or being fired. Although claimant's file contained multiple references to the February injury, McKinney said claimant had not told him of any physical problems until he was leaving the company.

Prior to the incident on February 23, 1977, claimant had been treated for a number of conditions, including a lumbosacral strain on the left side in September of 1973, a herniated disc in January of 1974, back strain in May of 1975. Claimant was off work from February 3, 1977 through February 14, 1977 with marked lumbar spasm.

Dr. Foley hospitalized claimant on March 17, 1977 with an admitting diagnosis of "L-5, S-1, disc herniating involving the S-1 nerve root on the left." Lumbar spine x-rays were interpreted as normal and conservative treatment was provided. The doctor readmitted claimant to the hospital on July 15, 1977, at which time claimant was experiencing "low back pain with radiation to the left leg." The final diagnoses following this admission were a "herniated intervertebral disc L-5, S-1" and a "perforated duodenal ulcer."

Peter Dwight Wirtz, M.D., board certified orthopedist, first saw claimant on January 14, 1974 on referral from a Dr. Schlaser. Claimant reported low back pain and pain in the left buttock which radiated into his foot. He noted the pain comes on while claimant is at work and is relieved by a curtailment of activities. X-ray showed a narrowing between L-5 and S-1. The doctor's diagnosis was a herniated nucleus pulposus and he prescribed conservative treatment with a weight restriction of twenty-five pounds. As of March 27, 1974, claimant had a five percent impairment of the body as a whole. Dr. Wirtz next saw claimant on March 17, 1977 and diagnosed his condition as "an L5-S1 disk herniation involving the first sacral nerve root on the left, and . . . re-irritation of the nerve root." In comparing the 1974 and 1977 examinations, Dr. Wirtz said the patient had more restriction of motion and more irritation in 1974. Dr. Wirtz authorized a return to work on April 25, 1977. On March 18, 1978 the doctor saw claimant on consultation from Dr. Foley and found no greater disability than in 1974.

M. H. Dubansky, M.D., saw claimant in consultation during the July 1977 hospitalization. At that time he suggested traction, physical therapy and gentle back exercises. On December 28, 1978 Dr. Dubansky saw claimant again. In a letter to claimant's attorney, the doctor felt that claimant, who had "about 15 percent physical impairment," had "residual of a herniated disc at L-5, S-1" and "that there is probably a causal relationship between his present condition and the injury that he sustained by history at work."

The claimant must prove by a preponderance of the evidence that the injury is the cause of the disability on which the claim is based. *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). Claimant need not prove that an employment injury be the sole proximate cause of the 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). 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).

Establishing causal connection is essentially within the domain of expert testimony. *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.*

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 likelihood of causal connection, this will suffice to raise the question of fact of connection for the trier of fact and, if the testimony is accepted, it 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.

As this is a review-reopening proceeding, there is no question of an injury arising out of and in the course of claimant's employment. There is also no question as to whether or not claimant was disabled for a period of time. The issue is whether or not there is any residual permanent disability as a result of the February 23, 1977 incident.

Dr. Foley's office notes indicate claimant was improving until the February fall on his *right* side. Dr. Wirtz began treating claimant in 1974 and as of March 27, 1974 gave claimant a five percent impairment of the body as a whole. Dr. Wirtz's rating remained the same after the 1977 incident. Dr. Dubansky rates claimant's physical impairment at fifteen percent. There is nothing in the record to indicate that Dr. Dubansky was aware of claimant's symptoms before the fall. It should be noted that Drs. Wirtz and Dubansky are rating the same man; however, only one, Dr. Wirtz, can testify to change in claimant's condition as he has treated claimant both times. Although the medical evidence tends to indicate that claimant's condition is no worse now than it was before, claimant testified that he did not feel as well after the injury as he did before. While there is nothing other than claimant's own allegations to suggest a greater degree of permanent disability than before, there is no testimony that claimant does not suffer as he claims.

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 also 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 (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).

Fifty-one year old married claimant is a high school graduate who was serving in the army when a heart condition was discovered which entitled him to disability and, according to claimant, prevented his doing physical labor. Claimant, who has had some training in band instrument repair, had work experience in sales and for other trucking firms. After termination on January 8, 1978 by defendant, claimant, who has a weight restriction of 25-30 pounds, testified he tried for six months to find employment in the trucking industry. Using VA benefits the claimant went to Area XI Community College to study electronics.

He said his work as a dock foreman, which paid $18,000 per year at the time of his injury, demanded "[n]o physical effort except if it was a door to be opened." He believed the doors on the truck would be more than he could lift. He complained of trouble bending. Claimant attested he submitted a letter resume to various employers in an attempt to find work in the trucking industry.

A letter from Mike Patrick, Admission Counselor at Des Moines Area Community College, suggested potential earnings of $651 per month gross salary in electronics. Mr. Patrick also writes that "[j]obs are readily available in this field and placement will be no problem."

WHEREFORE, it is found:

That claimant sustained an injury on February 23, 1977.

That claimant's disability is causally related to that injury.

That claimant is entitled to five percent (5%) permanent partial disability as a result of that injury.

* * *

Signed and filed this 6th day of September, 1979.

ROBERT C. LANDESS
Industrial Commissioner

Appealed to District Court: Pending.

JIMMIE D. COX,

Claimant,

vs.

J. E. SIEBEN CONSTRUCTION,

Employer,

and

LIBERTY MUTUAL,

Insurance Carrier,
Defendants.

Review-Reopening Decision

INTRODUCTION & ISSUE

Jimmie D. Cox, claimant, filed a petition in review-reopening against J. E. Sieben Construction, employer, and Liberty Mutual, insurance carrier, for the recovery of further benefits as a result of an injury on November 1, 1977.

* * *

FACTS

Defendant Liberty Mutual has been making weekly benefit payments to claimant since he first became eligible. Approximately one year ago Thomas F. Daley, Jr., who represented the defendants, and John R. Ward, who represents the claimant, discussed what should be done to determine whether this case could be settled or tried. On May 16, 1979, Mr. Ward wrote a letter to Mr. Daley in which it was stated:

> We discussed this matter by telephone on April 25. I believe the conclusion we reached in that conversation was that you would talk to your company to see if they were willing to cover the cost of a hospital confinement in Memphis during which time a program of intensified conservative treatment could be conducted. It was felt that such a program might result in the medical opinions that would allow us to either settle the case or proceed to hearing.

Also received into evidence was a note by Mr. Ward which indicated that on June 26, 1979 Mr. Daley authorized a two-week hospital confinement. On August 13, 1979 Mr. Ward wrote Mr. Daley a letter in which he stated:

> Enclosed are copies of items received from Dr. Miller in Memphis. You will note that he has seen Mr. Cox recently and plans on admitting him to the hospital.
>
> I had earlier talked by telephone with Dr. Miller. I advised him of your carrier's extension of authority to confine the patient for extended therapy and evaluation. I told him that the patient seemed reluctant to have surgery. The doctor thought that a more limited confinement with a myelogram would be more productive in determining the extent of the problem and/or disability.
>
> The doctor's note indicates that the patient has been back into [sic] see him and that the myelogram is contemplated. According to a phone message received from Mr. Cox, he is scheduled to go into the hospital on August 19.
>
> It looks as though the expense of the hospital confinement will be somewhat less than we had contemplated. Perhaps we will know a little more when it has been completed. I trust that this meets with your carrier's approval. Let me know if it does not.

Defendants contend that they authorized a hospital confinement with the knowledge that a myelogram would be taken but did not authorize a hemilaminectomy.

APPLICABLE LAW

The last paragraph of Section 85.27, Code of Iowa, states:

> For purposes of this section, the employer is obliged to furnish reasonable services and supplies to treat an injured employee, and has the right to choose the care. The treatment must be offered promptly and be reasonably suited to treat the injury without undue inconvenience to the employee. If the employee has reason to be dissatisfied with the care offered, he should communicate the basis of such dissatisfaction to the employer, in writing if requested, following which the employer and the employee may agree to alternate care reasonably suited to treat the injury. If the employer and employee cannot agree on such alternate care, the commissioner may, upon application and reasonable proofs of the necessity therefor, allow and order other care. In an emergency, the employee may choose his care at the employer's expense, provided the employer or his agent cannot be reached immediately.

ANALYSIS

It is assumed that claimant's laminectomy is causally connected to his injury on November 1, 1977 since neither party raised it as an issue to be decided at the time of the prehearing or hearing.

At the time of hearing both counsel for the claimant and

counsel for defendants made professional statements indicating that defendants had authorized claimant to be seen by Joseph H. Miller, M.D., and W. C. Grant, M.D., for the purposes of confined hospitalization and a myelogram.

In his letter of August 13, 1979, Mr. Ward informed Mr. Daley that the doctors contemplated a myelogram would be taken. The hospitalization and surgical procedure of a myelogram is treatment as contemplated by Section 85.27, Code of Iowa, and goes far beyond an evaluation as contemplated by Section 85.39.

The statute clearly gives the employer the right to choose the care. With that authority exists a corresponding responsibility to monitor the course of the treatment. A claimant is not responsible for a communication gap between the employer and the employer-chosen doctor.

It would appear to be defendants' argument that because there is no written evidence of an unlimited authorization, the subsequent hemilaminectomy was unauthorized. However, it appears from the record that defendants authorized treatment of the claimant, they never gave claimant notice of withdrawing that authorization or offer claimant alternative medical care.

* * *

Signed and filed this 18th day of June, 1980.

DAVID E. LINQUIST
Deputy Industrial Commissioner

No Appeal.

RODNEY LYNN COX,

Claimant,

vs.

GREAT PLAINS BEEF COMPANY,

Employer,

and

IDEAL MUTUAL INSURANCE COMPANY

Insurance Carrier,
Defendants.

Arbitration Decision

INTRODUCTION

This is a proceeding in arbitration brought by Rodney Lynn Cox, claimant, against Great Plains Beef Company, employer, and Ideal Mutual Insurance Company, insurance carrier, for benefits as a result of an injury on September 7, 1978.

* * *

FACTS

On September 7, 1978 claimant was working on the head table templing heads when he alleges he received an injury which arose out of and in the course of his employment with defendant. Claimant testified he went to work at approximately 5:30 A.M. although he did not start working until 6:30 A.M. Claimant testified that he threw meat at a fellow employee by the name of Steven Franck at approximately 8:30 A.M. Claimant testified that he horsed around with Steven Franck and other employees every once in awhile but always when the foreman was not around. Claimant stated it was common to throw meat and untie apron strings. Claimant indicated that the line had shut down and he was sitting on box rollers minding his own business when he felt something on his apron strings. He reached back with his right hand cutting his thumb on a knife that Steven Franck was using to cut claimant's apron strings. Claimant stated he realized Steve was getting back at him for throwing meat at Steven earlier. Claimant went to the nurse's office and then to the hospital where he was operated on the following day by a Dr. Miller. Claimant stated he was in the hospital four days and was allowed to return to work five weeks later.

Steven Franck, in his deposition, testified that claimant had thrown the meat at him only a couple of minutes before the injury occurred. Steven Franck also stated that the management knew of the problem of horseplay. Steven Franck's testimony is supported by the testimony of Anita Tedesco who testified she saw claimant throw meat at Steven Franck five minutes before the injury.

ISSUE

The issue presented by the parties as shown by the prehearing order is whether or not claimant received an injury arising out of and in the course of his employment.

APPLICABLE LAW

The 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 Company,* 261 Iowa 352, 154 N.W.2d 128 (1967); *McDowell v. Town of Clarksville,* 241 N.W.2d 904 (Iowa 1976).

Historically, in Iowa, the issue of horseplay has been treated as an "arising out of" issue. *Whitmore v. Dexter Mfg. Co.,* 204 Iowa 180 214 N.W. 700 (1927). In *Ford v. Barcus,* 155 N.W.2d 507 (Iowa 1968), the court stated: "Horseplay which an employee voluntarily instigates and aggressively participates in does not arise out of and in the course of his employment and therefore is not compensable."

ANALYSIS

Based on the foregoing principles and the evidence presented, it is determined that claimant has failed to meet his burden of proof in proving his injury arose out of his employment. Claimant's testimony as well as that of Steven Franck and Anita Tedesco indicate claimant instigated the horseplay by throwing meat. Claimant's testimony regarding the time lapse between when he threw the meat and the knife injury is rejected in that the testimony of Steven Franck, and more importantly Anita Tedesco, contradicted it. Therefore, the throwing of the meat was so close in time as to make it an act of horseplay. Claimant also testified he realized this was retaliation for his act against Steven.

Claimant, by failing to show he did not aggressively participate in the horseplay, or that there were two separate incidents of horseplay, failed to meet his burden of proving by a preponderance of the evidence that his injury arose out of his employment.

* * *

Signed and filed this 26th day of October, 1979.

DAVID E. LINDQUIST
Deputy Industrial Commissioner

No Appeal

ROBERT C. CROUSHORE,

Claimant'

vs.

JOHN DEERE DES MOINES WORKS,

Employer,
Self-Insured,
Defendant.

Ruling and Order

BE IT REMEMBERED that on February 25, 1980 defendant herein filed a motion to dismiss claimant's petition for review-reopening which was filed on February 8, 1980. Said motion alleges that no memorandum of agreement has been filed regarding the January 7 or 8, 1978 injury date specified on claimant's petition and accordingly argues that claimant's cause of action lies in arbitration.

On March 7, 1980 claimant herein filed a resistance to defendant's motion to dismiss and a motion for leave to amend petition. Both the resistance and the motion address a statute of limitations defense implied but not yet raised by the defendant.

Based on the face of the petition, defendant's motion to dismiss raises a valid argument regarding the caption. However, Iowa Rule 88 of Civil Procedure provides:

> 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. Leave to amend, including leave to amend to conform to the proof, shall be freely given when justice so requires.

Allowing amendment of a pleading is the general rule; denying amendment of a pleading is the exception. *Galbraith v. George,* 217 N.W.2d 598 (Iowa 1974).

Additionally, claimant asks that his motion, if granted, be considered his amendment. As indicated above, the motion is argumentative and could be construed as a resistance to a motion to dismiss based on a statute of limitation defense or as a reply to an answer raising a statute of limitation defense.

WHEREFORE, it is hereby found that defendant's motion to dismiss should be overruled in light of claimant's request to amend his petition. It is further found that claimant's motion for leave to amend should be granted insofar as it is a request to amend. Said motion shall not be construed as the actual amendment.

* * *

Signed and filed this 4th day of April, 1980.

LEE M. JACKWIG
Deputy Industrial Commissioner

No Appeal

JOHN F. CULLEN,

Claimant,

vs.

ERICKSON TRANSPORT

Employer,

and

TRUCK INSURANCE EXCHANGE,
FARMERS INSURANCE GROUP,

Insurance Carrier,
Defendants.

Ruling on Motion for Summary Judgment

This matter came on for hearing at Black Hawk County Courthouse in Waterloo, Iowa, before the undersigned on November 19, 1979, on the sole issue of the defendants' motion for summary judgment. The case was considered fully submitted at the conclusion of the hearing. The motion for summary judgment is based upon the statute of limitations, Section 85. 26 Code of Iowa, successor to Section 86. 34 (1973 Code).

* * *

The undersigned deputy industrial commissioner having reviewed the above record, considered the argument of the counsel and being duly apprised of the motion grants the same for the following reasons:

1. The claimant injured his low back on February 16, 1974, while in the process of trying to dislodge a spare tire from between a tire rack and the front axle of a trailer. When pulling the tire, he felt a burning sensation in his legs and injured his back. The insurance carrier filed a memorandum of agreement compensating the claimant at the temporary disability rate of $91.00 per week. The form 5 (signed by the employee) evidences temporary disability paid to the claimant of twenty-four and two-sevenths (24 2/7) weeks. The date of the last weekly benefits paid was August 19, 1974.

2. The claimant filed his original notice and petition for review-reopening on May 7, 1979, alleging disability from November 1977, through the present. Defendants' answer filed on May 22, 1979, asserts an affirmative defense of the three-year statute of limitations as provided under Section 86. 34, (1973 Code). The defendants subsequently filed on May 31, 1979, their motion for summary judgment supported by affidavit therein asserting that more than three years had elapsed since the date of last payment of weekly benefits made to the claimant and therefore the claimant's petition for review-reopening of his industrial injury is now barred by the statute of limitations.

3. The claimant filed his amendment to petition on July 17, 1979, alleging in part that he suffered additional surgical, medical and transportation expenses for which the employer is responsible under Section 85. 27. Defendants' answer to the amended petition, filed on July 16, 1979, denies generally the allegations of the amended petition.

4. Section 86. 34 provides:

> Any award for payments or agreement for settlement made under this chapter where the amount has not been commuted, may be reviewed by the industrial commissioner or a deputy commissioner at the request of the employer or of the employee at any time within three years from the date of the last payment of compensation made under such award or agreement, and if on such review the commissioner finds the condition of the employee warrants such action, he may end, diminish, or increase the compensation so awarded or agreed upon . . .

WHEREFORE, it is found that a review of the Industrial Commissioner's file establishes that the benefits provided to the claimant were not commuted. It is further found that the claim for workers' compensation benefits are barred by the three-year statute of limitations wherein the claimant was required to file his petition for review-reopening on or before August 19, 1977. The claimant having filed his petition on May 7, 1979, is now barred from recovery of any compensation payments.

It is further found that the claimant's application for determination of medical benefits under Section 85. 27, Code of Iowa, may be considered by the commissioner after the parties have had an opportunity to present evidence on this limited issue.

THEREFORE, it is ordered that defendants' motion for summary judgment be sustained in part and denied in part and claimant's petition for Section 85. 27 benefits remain open for appropriate proceedings.

Signed and filed this 19th day of December, 1979.

THOMAS R. MOELLER
Deputy Industrial Commissioner

No Appeal

ROGER DANKERT,

Claimant,

vs.

MIRCO LIMITED, d/b/a/ MIDWEST INSULATION & ROOFING COMPANY,

Employer,

and

STATE FARM FIRE AND CASUALTY company,

Insurance Carrier,
Defendants.

Arbitration Decision

INTRODUCTION

This is a proceeding in arbitration by Roger Dankert, claimant against Mirco Limited, d/b/a Midwest Insulation and Roofing Company, defendant, and State Farm Fire and Casualty Company, insurance carrier, for benefits as a result of an injury on October 1, 1977.

* * *

ISSUE

The only issue indicated by the parties at the time of pre-hearing and hearing was whether or not claimant's injury arose out of and in the course of his employment.

FACTS

On July 4, 1976 Don McMullen and his wife began business as the defendant. Mr. McMullen is the president and principal stock holder of defendant. Claimant started working for defendant on January of 1977 as a salesman. Defendant had sponsored a Christmas party for the employees in December of 1976 and in July of 1977 an anniversary picnic. Larry Husemann testified in August or September, 1977, Mr. McMullen started discussing having a picnic for the employees and their families the following October. Rex Whitmore and Larry Husemann both testified that Mr. McMullen stated he felt that the picnic would build the morale of the employees, would allow the employees to get to know each other better and would be a point of winding down from the busy summer. Rex Whitmore and Larry Husemann also testified that Mr. McMullen stated he expected certain employees to be at the picnic and indicated that he felt all dedicated employees would be there.

Mr. McMullen arranged for property at Lake Eleanor where the picnic was to take place. Sherri Jungers testified Mr. McMullen requested that she take care of the other arrangements. Jungers, Whitmore and Husemann all testified Mr. McMullen announced that the company would take care of the hamburger, hot dogs, buns, beer and pop. The employees were to bring covered dishes. Mr. McMullen's secretary put a notice regarding the picnic on the bulletin board and slips regarding it in with the employee's pay checks. The hamburger, hot dogs, beer and pop was paid for by checks in the name of the company on their so-called "pop fund". Rex Whitmore testified he was

reimbursed by the defendant for purchasing charcoal.

Claimant testified he informed his supervisor that he did not think he could go to the picnic. Claimant's supervisor and another employee discussed the matter with the claimant and indicated that they thought he better be there. This testimony was verified by both the testimony of claimant's supervisor, Larry Husemann and Rex Whitmore.

At one o'clock on October 1, 1977 the picnic started. Claimant and his two sons arrived at approximately two o'clock. Claimant brought with him a covered dish and noticed upon his arrival that people were already drinking the beer and pop. Claimant testified that he started playing catch with his two sons and then was asked by some of the other employees to join a football game that was already in progress. Claimant testified that a few seconds after he started playing he was tackled and injured.

Claimant was taken to the hospital and it was determined that he had broken his left ankle.

APPLICABLE LAW

Claimant has the burden of proving that by a preponderance of the evidence that his injury arose out of and in the course of his employment. *McDowell v. Town of Clarksville,* 241 N.W.2d 904 (Iowa 1976); *Musselman v. Central Telephone Co.,* 261 Iowa 352, 154 N.W.2d 128 (1967). "Arising out of" employment refers to the causal origin of the injury while "in the course of" employment refers to the time, place and circumstances. *McClure v. Union County,* 188 N.W.2d 283 (Iowa 1971). For an employee to be "in the course of his employment" he must be at a place where it is reasonable that he would be in the performance of his duties or engaged in something incidental thereto. *Golay v. Keister Lumber Co.,* 175 N.W.2d 385 (Iowa 1970). A major question is whether or not the employee was furthering the employer's business. *Danico v. Davenport Chamber of Commerce,* 232 Iowa 318, 5 N.W.2d, 609 (1942).

Professor Arthur Larson in 1A *Workmen's Compensation* Section 22.00 (1978 edition) 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 recreation period as a regular incident of the employment; or
2. The employer, by expressly or impliedly requiring participation, or making the activity part of the services of an employee, brings the activity within the orbit of the employment; or
3. The employer derives substantial direct benefit from the activity beyond the intangible value of improvement of employee health and morale that is common to all kinds of recreation and social life.

ANALYSIS

Based on the foregoing principles it is determined that claimant has met his burden in proving that his injury arose out of and in the course of his employment. It is quite evident that this case does not fall within the first rule as set down by Professor Larson in that the picnic was not held on defendant's premises. Although it would appear from the evidence presented that Mr. McMullen felt he would be able to tell his dedicated employees by seeing who appeared at the picnic and it would be a winding down from the summer as well as a morale booster it would not appear to be a great enough benefit to the defendant as to fall within Professor Larson's third rule. The testimony from claimant as well as claimant's supervisor, Larry Husemann and Rex Whitmore was that he was "expected" to be at the picnic. Although Mr. McMullen testified that he did not require his employees to attend the picnic, his employees in reaction to his statements felt that if they did not attend the picnic they would suffer some adverse consequence. This decision rests largely on the testimony of Larry Husemann and Rex Whitmore and their impeccable demeanor on the witness stand.

* * *

Signed and filed this 20th day of July, 1979.

DAVID E. LINDQUIST
Deputy Industrial Commissioner

Appealed to Commissioner; Affirmed. 1/31/80

JOHN DAVIS,

Claimant,

vs.

McATEE TIRE CO.,

Employer,

and

UNITED STATES FIDELITY AND GUARANTY COMPANY,

Insurance Carrier,
Defendants.

Partial Commutation Decision

INTRODUCTION

This matter came on for hearing before the undersigned in Council Bluffs, Iowa on November 11, 1979 and was submitted for order on this limited issue at the conclusion of the hearing.

The claimant sustained an injury which arose out of and in the course of his employment on February 23, 1978. The claim was admitted by the defendants and a prior application for partial commutation, based upon a disability rating of 20 percent of the body as a whole, was entered by order on December 14, 1978. The present application for partial commutation was filed on September 14, 1979 based upon an agreement for settlement reached by the parties of a disability of 50 percent of the body as a whole.

The issue is whether the application for partial commutation should be granted.

APPLICABLE LAW

Section 85.45, Code of Iowa, Commutation, provides, in part:

> Future payment of compensation may be commuted to a present worth lump sum payment on the following conditions:
>
> 1. When the period during which compensation is payable can be definitely determined.
>
> 2. When it shall be shown to the satisfaction of the industrial commissioner that such commutation will be for the best interest of the person or persons entitled to the compensation, or that periodical payments as compared with a lump sum payment will entail undue expense, hardship, or inconvenience upon the employer liable therefor.
>
> (See also Diamond v. Parsons Co., 256 Iowa 915, 129 N.W.2d 608, 1964)

The deputy industrial commissioner, having heard the testimony of the claimant and having examined claimant's exhibits 1-6, finds that the period during which compensation is payable in this case is deemed determinable and that it is in the best interest of the claimant that the application for partial commutation be approved.

It is specifically found that the degree and extent of disability resulting from the initial injury and agreed to by the parties is 50 percent, thereby entitling the claimant to be compensated for a period of 250 weeks at the rate of $148.40 per week.

It is further specifically found pursuant to §85.48, Code of Iowa, 1979, that commutation is in the best interest of the claimant for the following reasons:

1. That the claimant has had extensive training and experience in the field of pest control and that the probability of success in the business venture is good.

2. That the claimant has business contacts and prospective clients in the Iowa community of Jefferson.

3. That the claimant has already secured substantial business contingent upon approval of the application for partial commutation which will permit him to purchase the necessary business equipment and a residence from which the business will be operated.

4. That the claimant has no competition within a thirty (30) mile radius of Jefferson, Iowa and should be able to build a successful business.

5. That the claimant is capable of performing most of the work of pest control and has made arrangements to employ a qualified person for the manual work that the claimant is unable to perform.

It is further found that the claimant's contract with his attorney for an agreed fee of twenty-five percent (25%) of the increased compensation benefits over the twenty percent (20%) previously agreed upon by the parties is fair and reasonable and that said fee should be paid out of the proceeds from this partial commutation.

The commutation would be computed as follows:

	full weeks	factor
Factored value of remainder of	191	174.7816
Minus factored value of new remainder	43	42.1243
Value of commutation	148	132.6573

* * *

Signed and filed this 26th day of November, 1979.

THOMAS R. MOELLER
Deputy Industrial Commissioner

No Appeal.

RICHARD PATRICK DAWSON,

Claimant,

vs.

**DONALD R. CLARK, individually,
JULIAN T. CLARK, individually,
DONALD R. CLARK and JULIAN T. CLARK
d/b/a CLARK BROTHERS CONSTRUCTION
COMPANY,**

Employer.

Order

On June 15, 1978 claimant filed a petition for review purporting to give notice "that additional testimony and other evidence will be submitted by the Claimant at the review hearing and the particular plan of the controverted claim to which such additional evidence will apply concerns the extent of disability, both temporary and permanent, and medical expense." An application for rehearing filed June 22, 1978, was granted.

The order on rehearing as stipulated by the parties stated:

> IT IS THEREFORE ORDERED that the Arbitration Decision hereinbefore filed be modified to include the finding that the parties did not intend to make res judicata matters occurring since the cessation of the temporary disability time paid by the Defendants, and it is so ordered that upon review, evidence of disability, both temporary and permanent, and medical expense may be introduced.

Industrial Commissioner's Rule 500-4.27 gives parties the right to appeal to the commissioner from decisions, orders or rulings made by the deputy commissioners. Rule 500-4.28 provides the commissioner with discretion as to the scope of the appeal.

On reviewing the record, it appears that the matters in the original arbitration decision from which the claimant was aggrieved were rectified in the order on rehearing. It further appears that the aspects of this case on which claimant seeks to present additional evidence are all new matter and would be more appropriately handled in a hearing before a deputy than a review before the commissioner.

THEREFORE, it is ordered:

That this matter be remanded to a deputy industrial commissioner to take evidence on the extent of claimant's disability and on medical expenses.

Signed and filed this 13th day of December, 1978.

ROBERT C. LANDESS
Industrial Commissioner

No Appeal.

LE ROY DE YOUNG,

Claimant,

vs.

WILSON FOODS CORPORATION,

Employer,
Self-Insured,
Defendant.

Appeal Decision

This is a proceeding brought by defendant seeking review of a proposed decision in review-reopening wherein claimant was awarded 275 weeks of permanent partial disability.

* * *

Defendant's petition for review alleges three specific errors on the part of the deputy industrial commissioner:

1. That the Deputy Industrial Commissioner erred in finding that the present disability of the Claimant was due to the injury on September 18, 1975.

2. The Deputy Industrial Commissioner erred in establishing the industrial disability of the Claimant at 45 percent for the reasons above stated because of the causal connection not having been properly established to the September 18, 1975 injury, but also because the Deputy Industrial Commissioner failed to take into consideration the contribution of the prior injuries to Mr. DeYoung's back as it affected his present condition and discounted all of those injuries and medical history of them as having no affect [sic] on his present condition and the rating in [sic] which he gave for industrial disability, even though the medical testimony indicated that these were the only evidence of permanent disability.

3. The Deputy Industrial Commissioner erred in establishing the industrial disability of the Claimant at 45 percent as a result of the September 18, 1975 injury because he took into consideration a heart condition of the claimant which was non-work related in arriving at the determination of the Claimant's industrial disability.

As the deputy commissioner properly found, the 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). 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). More recently in *Becker v. D & E Distributing Co.,* 247 N.W.2d 727 (Iowa 1976) the Iowa Supreme Court at 730 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." Claimant's surgery occurred after his September fall, and therefore, the fall may be viewed as a precipitating cause. Any prior injuries to claimant's back do not appear to have contributed to his industrial disability.

There is scant medical evidence in the record relating to claimant's heart attack. Claimant testified that he had a heart attack in March of 1972 and later returned to work. He was hospitalized for control of arrhythmia in December 1975 and again he was able to return to work. Defendant has presented no evidence to indicate the claimant was under restrictions because of his heart trouble or that the heart attack he suffered was disabling.

On reviewing the record, it is found that the deputy's proposed findings of facts and conclusions of law are proper.

WHEREFORE, it is found:

That the proposed decision of the deputy industrial commissioner is adopted as the final decision of this agency.

THEREFORE, it is ordered:

That defendant pay to claimant two hundred seventy-five (275) weeks of permanent partial disability at the rate of one hundred forty seven dollars ($147) per week.

* * *

Signed and filed this 29th day of December, 1978.

ROBERT C. LANDESS
Industrial Commissioner

No Appeal.

BERNITA DEAVER,

Claimant,

vs.

CITY OF DES MOINES, IOWA

Employer,
Self-Insured,
Defendant.

Appeal Decision

Claimant has appealed from proposed review-reopening and arbitration decisions wherein claimant was denied benefits.

* * *

The review-reopening and arbitration proceedings involve two separate injuries but have been consolidated at the hearing level and on appeal.

The issue presented in the review-reopening proceeding is whether the claimant suffered any permanent partial

disability as a result of an injury incurred on January 18, 1974. Claimant slipped and fell on some ice and injured her shoulder on January 18, 1974. Claimant received 3 4/7 weeks of temporary disability for this injury. On June 6, 1978, John E. Cisna, D.O. wrote in a letter to claimant's counsel that he thought claimant had made a complete recovery from recurrent bursitis and would not have any permanent disability for this problem. Claimant testified that her right arm still aches in cold weather and catches when she reaches.

The deputy found that claimant failed to sustain her burden of proof on the issue of permanent partial disability. In addition to the letter from Dr. Cisna mentioned above, the deputy relied on a November 22, 1977 letter from Dr. Cisna which indicated that the intermittent discomfort claimant was experiencing in her shoulder was due to osteoarthritis. The deputy found that claimant failed to show that the January 18, 1974 injury caused the condition of osteoarthritis. The deputy was also concerned about unspecified injuries claimant received from an accident in February 1970.

It is found that the deputy properly held that claimant failed to sustain her burden of proof that the injury she incurred on January 18, 1974 caused any permanent partial disability.

The issues presented in the arbitration proceeding are whether defendant received the requisite notice of symptoms of a heart condition as required by Iowa Code Section 85.23 and whether the symptoms of a heart condition arose out of claimant's employment.

Claimant was working as a parking meter checker for the city of Des Moines on March 4, 1977. On that day claimant was using a Cushman vehicle on her meter route and was required to leave her vehicle each time she wrote a ticket.

Claimant submitted weather records for the first three months of 1977. According to the official federal weather records published by the National Oceanic and Atmospheric Administration the minimum temperature for March 4, 1977 was 30 degrees fahrenheit and the average temperature was 33 degrees fahrenheit. This official record indicates that the average temperature on March 4 was 4 degrees fahrenheit above normal. The weather record also indicates that March 4, 1977 was an overcast day with an average wind speed of 16.4 miles per hour from the northwest. The precipitation table in the weather record shows that there was some precipitation between 5 and 11 a.m. on the morning of March 4. The weather record documents that March 4, 1977 was a blustery day but certainly nothing unusual for that time of the year.

During the morning of March 4, 1977 claimant was involved in a confrontation with a young man. The young man ripped up and threw on the ground a ticket which claimant had issued. The young man also called claimant "everything but a lady." Claimant did not know for sure what time in the morning the incident occurred. Claimant thought that, even though it upset her, such action was the young man's privilege, if he wanted to go to court. Claimant stated that "nobody likes to be called foul names, but this is something you had to put up with, this language, in your work." Claimant testified that she had problems with this young man before and with other citizens in that area in the past, "but you had to overlook that."

Claimant was not sure when she started to feel bad but by lunch time she was having pain in her left arm and periodic pain in her chest. Claimant stated that she mentioned she was not feeling well to Betty Triggs, a co-employee, and Dorothy Merkely, her supervisor. Claimant worked in the afternoon and went home about 4:30 p.m.

Claimant testified that the pain in her chest and left arm continued to worsen and by 7:30 p.m. she was having severe chest pains. Claimant rested in bed for the weekend. Then on Monday, March 7, 1977, claimant called R.C. McLaughlin, D.O. who could not get her admitted to the hospital until Thursday, March 10, 1977. Claimant also called Dorothy Merkely, her supervisor, and told her about the situation and that the pain had started at work.

On March 10, 1977 claimant was admitted to Des Moines General Hospital with a diagnosis of coronary insufficiency. Charles Hurwitz, D.O. thought claimant had arteriosclerotic heart disease with coronary insufficiency.

On March 30, 1977 claimant was transferred to Mercy Hospital. Robert Kreamer, D.O. agreed with Dr. Hurwitz's diagnosis and reported that electrocardiogram and vectorcardiogram results showed a possible anteroseptal infarction. Dr. Kreamer's impressions at that time were: (1) Anteroseptal myocardial infarction, time undetermined; (2) coronary artery disease; and (3) possible functional hypoglycemia. Dr. Kreamer recommended that claimant undergo a cardiac catheterization with coronary angiography. On March 30, 1977 claimant underwent an angiogram. No surgical coronary artery disease was found and Dr. Kreamer's final diagnosis was chest pain of unknown etiology.

After claimant was released from the hospital, Dr. Hurwitz continued to treat claimant for variant angina pectoris. Claimant was taking Quinamm, Benadryl and nitroglycerin when needed. Claimant was later put on Isordil. Dr. Hurwitz stated that pain followed by relief from nitroglycerin is classic for angina. Dr. Hurwitz seriously doubted whether claimant could return to the same type of employment. Dr. McLaughlin, claimant's regular physician, agreed with that conclusion.

At the request of the City of Des Moines, claimant saw Dr. From on November 16, 1977. Dr. From ran several tests, including an electrocardiogram, reviewed prior test results and concluded in a November 21, 1977 report that he could not definitely state whether claimant had myocardial damage. Dr. From thought that unless a new stress test proved to be highly abnormal, he did not expect a great deal of disability. Dr. From based his conclusions on normal results of a coronary angiography and thought that further evaluation was necessary.

On February 1, 1978 Dr. From ran a treadmill study on claimant and reported that the study was sub-optimal because claimant did not achieve the target heart rate. Dr. From did not place much emphasis on this test and did not change his thoughts on disability from the first examination.

Dr. From testified that the pain claimant described was not typical of angina pectoris and that relief obtained from

nitroglycerine is not specific to a heart attack. Dr. From thought the stresses of claimant's job as described by claimant's counsel in a hypothetical question were probably connected with the pain claimant was experiencing in her chest and left arm. Dr. From further thought that since there were no objective findings, claimant did not sustain an injury of a permanent nature.

The first issue to be addressed is that of notice as required by Iowa Code Section 85.23. The statute mandates that the employer have actual knowledge or receive notice within ninety days (90) of the occurrence of the injury. Iowa Code Section 85.24 states that for notice to be sufficient it must "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." Although the precise form of notice is not material Professor Larson has indicated the nature of requisite notice as follows:

> It is not enough, however, that the employer, through his representatives, be aware that claimant . . . 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,* Section 78.31 (1976).

Claimant called her supervisor, Dorothy Merkley, before March 10, 1977 and told Merkley about her situation. Claimant told Merkley that the pain had started at work. Dorothy Merkley testified that she visited claimant while she was in the hospital. These contacts with claimant's supervisor satisfy the knowledge or notice requirements of the statute.

The second issue is whether claimant's heart injury arose out of her employment. As indicated in the arbitration decision there is no issue as to whether the symptoms of the heart condition occurred in the course of claimant's employment.

For an injury to arise out of the claimant's employment, however, there must be a causal relationship between employment and the injury. *Volk v. International Harvester Co.,* 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 Iowa Supreme Court wrote in *Musselman v. Central Telephone Co.,* 261 Iowa 352, 359-360, 154 N.W.2d 128, , (1967):

> [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.

See also *Ziegler v. United States Gympsum Co.,* 252 Iowa 613, 106 N.W.2d 591 (1961).

The question of direct causal connection is essentially within the domain of expert testimony. *Bradshaw v. Iowa Methodist Hospital,* 251 Iowa 375, 101 N.W.2d 167 (1960). However, expert testimony must be considered in light of all other circumstances presented in the record. *Burt v. John Deere Waterloo Tractor Works,* 247 Iowa 691, 73 N.W.2d 732 (1956); *Pace v. Appanoose County,* 184 Iowa 498, 168 N.W. 916 (1918).

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 or "lighted up" so that it results in a disability found to exist, he is entitled to compensation to the extent of the injury. *Nicks v. Davenport Produce Co.,* 254 Iowa 130, 115 N.W.2d 812 (1962). *Yeager v. Firestone Tire and Rubber Co.,* 253 Iowa 369, 112 N.W.2d 299 (1961).

The deputy held that claimant failed to meet her burden in proving by a preponderance of the evidence that the injury arose out of her employment. Claimant contends on appeal that this holding is in error and that claimant did sustain an injury arising out of her employment on March 4, 1977 resulting in temporary total disability through August 16, 1978.

Claimant contends that both mental and physical pressures of her job along with the harsh weather aggravated claimant's condition to the point of causing her to be temporarily totally disabled. Claimant first cites a report from Dr. Kreamer dated March 2, 1978. Dr. Kreamer wrote in that report: "I have not been able to find any cardiovascular disease on Mrs. Deaver. I can't say whether there is a causal connection between Mrs. Deaver's work on March 4, 1977, and the bad weather, emotional stress and fatigue and the conditioned suffered." Claimant contends that the deputy misinterpreted this statement. However, the deputy uses the language from the March 2, 1978 report almost verbatim and properly interpreted the report. The deputy did not state that Dr. Kreamer failed to indicate a causal connection between claimant's work and the bad weather, but rather stated that Dr. Kreamer could not say whether there was a causal connection. However, this dispute over interpretation of the March 2, 1978 report of Dr. Kreamer is not crucial, because either interpretation fails to establish a direct causal connection between claimant's condition and her employment.

The claimant then cities a report from Dr. Hurwitz dated August 3, 1977. The deputy did not mention this report specifically in the arbitration decision. Claimant in her brief quotes the following part of the August 3 report:

> There are several questions which go unanswered. Specifically could her job and its ensuing pressures both physical and mental and her exposure to the harsh weather conditions of last winter, be a cause of heart trouble that arose in March, 1977 and its residuals. This truly is a difficult question to answer

> however, in a patient with coronary insufficiency or angina pectoris these conditions most assuredly would aggravate the patient's symptomatology.

Claimant contends that this statement establishes a causal connection between claimant's aggravated condition and her employment. However, it is difficult to determine from the report whether Dr. Hurwitz was specifically referring to claimant. Dr. Hurwitz uses the word "patient" in a general and hypothetical sense. Also further on in the report Dr. Hurwitz relates that claimant told him that the pain she was experiencing "was not brought on by emotion or exertion." It is impossible to tell from the August 3 report, or from any other report of Dr. Hurwitz in the record, what physical and mental pressures Dr. Hurwitz was considering in rendering his opinion. Also there is no showing as to whether Dr. Hurwitz was making a judgment on the weather conditions from his general recollection or from official weather records and whether these included both on the job and off the job weather conditions. Further the doctor refers to "symptomatology" and not "disability." Therefore, the August 3, 1977 report of Dr. Hurwitz must be given little weight as it pertains to establishing causal connection.

Claimant next contends that causal connection was established by Dr. From in his testimony. Claimant questions the deputy's reliance on a Dr. From report dated November 21, 1977. Claimant contends that more weight should be given to Dr. From's deposition which was taken on August 16, 1978. A portion of page four of the November 21, 1977 report states:

> At this point, I do not believe it is possible to state that Mrs. Deaver definitely had a myocardial infarction in March 1977. A Vectorcardiogram at Des Moines General Hospital was said to show some anteroseptal infarction, but either that Vectorcardiogram should be examined or perferably [sic] another Vectorcardiogram obtained at Mercy Hospital to determine if such findings can be duplicated. In addition, she is said to have had a positive stress test, and this should be brought up to date as it would be possible that she could have a positive stress test in spite of normal coronary angiography. In addition, I would most strongly urge an echocradiogram be obtained to rule out the basis of any mitral valve prolapse which could account for chest pain.
>
> I do not believe, on the basis of present evidence, that we can definitely state Mrs. Deaver has had myocradial damage. If she did have damage, I could obtain no history from her of anything unusual in her job which might suggest a cause [sic] and effect relationship between the job and her pain. Unless a stress test is highly abnormal, I do not believe we could expect a great deal of disability on the basis of present evidence from any possible previous heart damage.
>
> The problem here is that coronary angiography has been performed and is normal. In fact, the attending cardiologist changed his diagnosis to that of chest pain of unknown etiology following the coronary angiography. Left ventricular function appeared good. However, Mrs. Deaver still complains of disabling pain and has been found to be disabled by her attending physician, Dr. Hurwitz. I believe that a further physiological evaluation is needed in this case, and have a feeling that there is little actual organic disability in this case although there may be a great deal of symptomatology.

In a later report dated February 9, 1978, Dr. From noted that he had claimant go through a treadmill study and as mentioned earlier the tests were considered sub-optimal. Dr. From did not change his opinion on the amount of disability and made no mention of causal connection.

In his deposition, Dr. From testified further about the cause and effect relation between claimant's symptom of a heart condition and her employment. At the taking of the deposition, claimant's attorney propounded a hypothetical question in which the conclusion and the response by Dr. From were recorded as follows:

> Q. . . . Now, with this history, all of which may not have been provided to you, would you have an opinion as to whether or not the stress -- and by this I include the physical work on March 4 and the days before, coupled with the extreme cold and the argument with the motorist against whom she did not retaliate or argue back -- does this bear some causal connection in causing her to have this pain in her chest and down her left arm?
>
> A. Yes, I would think that that is probably connected.

On redirect examination by defendant's attorney, Dr. From responded similarly to the following question:

> Q. In light of the additional information that Mr. Dahl has asked you to assume about Mrs. Deaver's activities, before she had this episode of pain, is there anything in that additional history, which taken together with your study of the reports, your examination of her, and your knowledge about her, would that enable you to state that she suffered an injury in the course of her work with the City?
>
> A. I couldn't -- if one says that pain is an injury, then she might have sustained something because she did have pain, which I would be certain, from my examination of Mrs. Deaver -- and not only by that, but by the facts brought out by Mr. Dahl -- that this would be her reaction to that particular train of events in the environment she was in . . .

Finally on recross examination by claimant's attorney, Dr. From again thought there was a causal connection.

> Q. So, assuming that the facts I gave you about the weather and the harassment are true, there would be a causal connection between those events and her chest pain, although you are not sure of the mechanism or ideology [sic] of the chest pain? Have I stated it right?
>
> A. Absolutely right.

Dr. From's change in opinion in his deposition seems to be based on additional history given by claimant's attorney in the hypothetical question rather than on any objective medical findings. In his November 21, 1977 report Dr. From made no mention of any incident which claimant might have encountered on the morning of March 4, 1977. Also no mention was made of the weather conditions on March 4 in Des Moines. Dr. From was made aware of the ticket ripping incident and the weather conditions on March 4, 1977 in the hypothetical question. Also included in the hypothetical question were alleged facts or incidents for which there is no substantiation. For instance it was stated that claimant had to climb up on trucks in order to give tickets to truck drivers. However, there is no showing that claimant actually had to climb up on a truck on March 4, 1977. Also claimant's attorney stressed the severity of the weather but as mentioned above the weather on March 4, 1977 was not unusual for that time of year. Further it should be noted that Dr. From is referring to the occurrence of an episode of pain and not to a permanent disabling condition. Therefore, lesser weight must be given to Dr. From's opinion based on the hypothetical question posed in his deposition. Since no causal connection is adequately established by the reports or testimony of Dr. From, the degree of disability or the nature of claimant's condition, whether anginia pectoris, coronary insufficiency or some other type of heart impairment, is no longer relevant.

Claimant has smoked about a pack of cigarettes a day off and on since 1955 and had been smoking for several months preceding March 4, 1977. Claimant's family has a history of heart problems. Two sisters had several myocardial infarctions, two brothers died from myocardial infarctions, a third brother had two myocardial infarctions and her parents had a history of myocardial infarctions and congestive heart failure.

Claimant testified that in the fall of 1976 she was off work for a couple of months. Things had built up to the point where a lot of problems were getting to her and she needed some rest. She felt completely exhausted. In latter August or early September of 1976 Dr. Laughlin had recommended that she stay home for a whole month under his care. She returned to work on October 1. Over all of the years she worked as a parking meter checker she was always very tired after working especially in the wintertime when she would go home "chilled to the bone", get warmed up and fall asleep "before the evening was half over". In 1975 she was having troubles with irregularity of heartbeat. In January, February of 1977 she did not recall any difficulty with her heart other than coming home tired and "once in a while I would have light pains in the left arm, which I figured might have been caused from something else, but at the time I didn't realize there was anything wrong at all."

Although claimant has never been released for parking meter checker she did return to light duty work on July 10, 1978. The work entails answering the phone and doing paper work, but claimant is receiving lower wages and often does not work a full day.

In applying the facts of this case to the rule set forth in *Musselman, supra,* it is found that the deputy properly held that claimant failed to sustain her burden of proof that the injury of March 4, 1977 arose out of her employment. Although claimant experienced some symptoms of a heart injury at work there has been no showing of a direct causal connection between claimant's heart condition and an exertion in her employment.

* * *

Signed and filed this 6th day of September 1979.

ROBERT C. LANDESS
Industrial Commissioner

Appealed to District Court: Pending

JENNIE L. DICKEY,

Claimant,

vs.

IIT CONTINENTAL BAKING COMPANY,

Employer,

and

LIBERTY MUTUAL INSURANCE CO.,

Insurance Carrier,
Defendants.

Review-Reopening Decision

This is a proceeding in Review-Reopening brought by Jennie L. Dickey, the claimant, against ITT Continental Baking Company, the defendant employer and Liberty Mutual Insurance Company, the insurance carrier, to recover additional benefits under the Iowa Workers' Compensation Act by virtue of an admitted industrial injury which occurred on August 26, 1976.

* * *

The issue requiring determination is the nature and extent of the claimant's disability.

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

Claimant, age 54 years of age and married, began her employment duties for the defendant-employer in 1960. On August 26, 1976, while performing her assigned duties as a wrapper operator, fell at her work station by slipping on bread crumbs. That day claimant became a patient of Raymond W. Dasso, M.D., a member of the American Board of Orthopedic Surgery, complaining of back and head aches. Dr. Dasso admitted the claimant to the hospital the same day and recalled his findings (deposition, page 7, line 19) as "spasm and tenderness of the posterior paravertebral muscles in the thoracic and lumbar area."

Claimant has not resumed any form of gainful employment since the date of the industrial injury and remains under the care of Dr. Dasso. On the basis of a report of C. L. Peterson, D.O. (claimant's exhibit 1), claimant was paid temporary total disability until September 6, 1977, for a

period of fifty-three weeks and five days. Dr. Peterson expressed the medical opinion that claimant had sufficiently recovered so as to be able to return to work. On September 17, 1977 the claimant was discharged by the defendant- employer for failing to report for her normal duties.

The claimant has the burden of proving by a preponderance of the evidence that the injury of August 26, 1976 is the cause of her disability on which she now bases her claim, *Bodish v. Fischer, Inc.*, 257 Iowa 516, 133 N.W.2d 867 (1965). *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).

In applying the foregoing legal principles to the case at hand, the claimant is found to have sustained her burden of proof.

On October 16, 1978 the defendants' caused the claimant to be examined by Frank I. Russo, M.D., who reported, in part, as follows (defendants' exhibit A):

> FINAL DISCHARGE DIAGNOSIS: 1) Chronic lumbosacral and cervical strain with deconditioning of the low back and neck musculature. 2) Conversion reaction intensifying symptomatology of Number 1).
>
> RECOMMENDATIONS: At the present time it was the feeling of the staff that this woman would benefit from a supervised reconditioning program as she is not very well motivated to carry out this program on her own. We will be setting up such a program and I will be monitoring her as an outpatient. We also explained to her, although she has a rather poor appreciation of her rather severe conversion reaction, she will be coming in for some relaxation training as well as counseling in an attempt to decrease some of her symptomatology and also to taper her off her pain medications. I see no reason from a physical standpoint why, without some proper reconditioning, this woman would not be able to carry out some useful and meaningful employment 4-6 weeks down the road. However, from a psychological standpoint, I think it is going to be very difficult to get this woman back in the job market, and I am particularly unoptimistic about her being able to return to employment from her previous employers because I feel there will be a sufficient amount of emotional stress and pressure placed on her that she will undoubtedly produce symptomatology on the basis of conversion reaction even if we have basically solved her physical problems.

Dr. Dasso, the original attending physician provided by the defendants, testified that the claimant remains unable to work and that she is under his care on a bi-monthly basis. Dr. Dasso's medical opinion, as the most qualified physician involved in this matter, is given the greater weight in this decision.

* * *

WHEREFORE, after having seen and heard the witnesses and after taking all of the creditable evidence contained in this record into account, the following findings of fact are made, to wit:

(1) That the claimant sustained an admitted industrial injury on August 26, 1976.

(2) That by reason of the aforesaid injury the claimant has been and remains unable to perform acts of gainful employment.

(3) That the claimant remains under the care of Raymond W. Dasso, M.D. and that the reason for such continuing medical care is causally connected to the injury under consideration.

(4) That claimant's functional impairment is of a permanent nature.

THEREFORE, it is ordered that the defendants pay the claimant a healing period commencing on September 7, 1977 (being the last day of previous temporary total disability payments) and continuing until the terms and conditions of Section 85.34(2) have been met at the agreed rate of weekly entitlement of one hundred forty-five dollars and 15/100 ($145.15).

* * *

Signed and filed this 10th day of October, 1979.

HELMUT MUELLER
Deputy Industrial Commissioner

Appealed to Commissioner: Affirmed.

CLIFFORD L. DILLINGER,

Claimant,

vs.

CITY OF SIOUX CITY,

Employer,
Defendant.

Appeal Decision

This is an appeal proceeding brought by claimant appealing a proposed ruling dismissing claimant's original notice and petition.

* * *

The issue on appeal is the applicability of section 85. 26, Code of Iowa 1975, or Code of Iowa 1977.

Claimant initially injured his back in March 1973 and he was treated at the Veterans Hospital in Sioux Falls, South Dakota. Claimant returned to his job as a water meter reader for defendant in June 1973.

Claimant testified that on October 8, 1975 he fell when a ladder upon which he was standing broke as he was attempting to read a meter. Claimant landed on his head and shoulders. Claimant testified his back hurt after this fall and he reported the injury to defendant. Claimant continued to work but testified that his back "seemed like it kept getting a little worse." Claimant terminated his employment with defendant in April 1977 because his back

was not getting better and he could no longer do his job.

Claimant sought out a job with minimum lifting requirements.

Claimant first sought medical attention for his back complaints on November 11, 1977, more than two years after the fall.

On November 11, 1977 claimant was examined by John Dougherty, M.D., an orthopedic surgeon, and on or about December 3, 1977 claimant underwent a bilateral hemilaminectomy at L4-L5 and a spinal fusion from L4 to the sacrum.

Claimant did not file his original notice and petition for arbitration until April 3, 1978.

Hearing was held on claimant's petition and the deputy industrial commissioner found that claimant's claim was barred by section 85. 26, Code of Iowa 1975, because it had not been filed within two years of the date of injury causing disability.

Dr. Manning treated claimant at the Veterans Hospital in Sioux Falls, South Dakota, for the 1973 back injury.

Dr. Manning noted in his report:

> . . . Mr. Dillinger entered our hospital with typical findings of a degenerative, herniated nucleus pulposus -- a ruptured intervertebral disc . . .
>
> He had degenerative intervertebral disc disease. It would be usual to have a series of problems with back and leg pain, brought on by re-injury, until the degenerated structure could be removed.

No surgery was performed by Dr. Manning as claimant desired to be discharged and visit a hospital closer to his home.

Dr. Dougherty testified that in his opinion the fall of 1975 aggravated the preexisting condition.

Section 85. 26, Code of Iowa 1975, provides in part:

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

Section 85. 26 was amended effective July 1, 1977 and read:

> 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.

This is an arbitration proceeding and is an "original proceeding," not a continuation of an old one, as in the case of a review-reopening.

The Iowa Supreme Court, in the case of Jennings v. Mason City Sewer Pipe Co., 187 Iowa 967 (1919), noted:

> It appears that since the time of this injury, the statute has been amended at this point. The appellant urges upon us that the statute . . . should be construed by us in accordance with the later amendment, on the theory that the amendment discloses the legislative construction of the original statute. The position is not tenable. We must construe the statute as it was and the amendment as it is.

Section 85. 26, Code of Iowa 1975, in effect at the time of claimant's injury on October 8, 1975, is controlling under the Jennings case.

Claimant did not commence his arbitration proceeding within two years of the date of injury and as a result his case is barred.

Counsel for claimant has cited the case of Jacques v. Farmers Lumber & Supply Co., 47 N.W.2d 236 (Iowa 1951), as controlling. The Jacques case, however, was a case which interpreted the notice provisions of section 85. 23 of the Code and not the limitation provisions of section 85. 26 with which we are here concerned. Although the language of sections 85. 23 and 85. 26 are now similar in their usage of the phrase "occurrence of the injury," they were not similar under the law at the time applicable to this case. Jacques also dealt with the discovery of a latent injury (i.e., pulmonary tuberculosis). There was no accident or special incident to create the injury.

In the case presently under consideration, the injury was not latent. The claimant testified and the medical reports of Dr. Manning indicate the claimant had a preexisting back condition. Claimant on October 8, 1975 fell from a broken ladder and was injured. On that date claimant reported the injury to his employer. Claimant's back continued to worsen and he eventually left his employment with defendant and sought other work where lifting would not be involved. Not until November of 1977 did claimant seek the assistance of Dr. Dougherty for his back complaints, and it was not until April 1978 that the action was filed. As the court found in Mousel v. Bituminous Material & Supply Co., 169 N.W.2d 763, 767,

> It must be held that until claimant consulted Dr. Lester he exercised virtually no care to discern the nature of his trouble. Certainly there is no room for a finding he exercised ordinary or reasonable care in this regard. A claimant should not be thus permitted to toll the running of the period of limitation for such an extended time.

WHEREFORE, it is found that the findings of fact and conclusions of law of the deputy are proper.

THEREFORE, the relief requested in claimant's petition for arbitration is denied.

* * *

Signed and filed this 18th day of January, 1980.

ROBERT C. LANDESS
Industrial Commissioner

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

ILA DILLINGHAM, Widow and Surviving Spouse of WILLARD DILLINGHAM, Deceased,

Claimant,

vs.

UNITED STATES GYPSUM COMPANY,

Employer,

and

TRAVELERS INSURANCE COMPANY,

Insurance Carrier,
Defendants.

Appeal Decision

Claimant, Ila Dillingham, has appealed from a proposed arbitration decision wherein it was found that claimant failed to sustain her burden of proof that the death of her spouse arose out of and in the course of his employment and the relief requested was denied.

* * *

The issue presented on appeal is whether there is a causal connection between decedent's employment and his death.

Decedent had worked for defendant employer for approximately thirty years. The last three years he was a mechanic involved with repairing and maintaining equipment in defendant-employer's plant. Decedent usually worked a normal day shift, but was on call in case problems arose at night.

In the week preceding his death, decedent worked a regular 7:00 a.m. to 3:30 p.m. shift on Monday. On Tuesday decedent worked his regular shift plus an additional two to three hours in the afternoon. Decedent was called to the plant at 2:59 a.m. Wednesday and worked until 5:08 a.m., and then he worked his regular shift. When decedent returned home from work Wednesday afternoon, he spoke a few angry words with his son about a damaged motorcycle. He then ate dinner and took a nap. When decedent awoke to the roaring of his son's motorcycle, he again spoke angrily to his son about the motorcycle. Later in the evening decedent bought a pizza and some beer as a peace offering to his son. After drinking several beers decedent went to bed. Decedent got up once during the night, but told claimant not to worry about him. In the morning he was found dead in the living room. He evidently died while preparing to go to work that morning. The probable cause of death was established as a myocardial infarction by J. J. Landhuis, M.D.

Besides the events immediately prior to decedent's death, there are other relevant facts which must be considered. First, claimant testified that decedent did not seem to be himself in the week preceding his death. Claimant stated that the decedent complained about his job and seemed unusually tense. She also stated that it was unusual for decedent to be angry with his son Billy. Second, Billy caused some concern for decedent. Decedent was worried about Billy's ability to find a job, and he was under the impression that Billy's girlfriend was pregnant. Also, Billy had wrecked his motorcycle and decedent thought the insurance company had not offered a proper adjustment. Third, decedent smoked a pack of cigarettes a day up until the day of his death. He also drank a quart of beer a day, he had given that up about two months prior to his death. Fourth, decedent's family had a history of deaths from heart attacks, although decedent had not had any known previous heart problems himself. Fifth, the work decedent had done in the week preceding his heart attack was nothing unusual for him and was not strenuous.

Dr. Kersten, a general surgeon and the decedent's family physician, stated the opinion that the stress of decedent's work probably "contributed to furthering . . . a heart attack on the date of his death." Kersten believed that there were many factors involved and the stresses of decdent's job was one. However, Kersten thought that decedent's worry over his son was the strongest factor.

Dr. Ravreby, a specialist in internal medicine, stated that there was no causal connection between decedent's employment and his death. Ravreby testified that there was not a sufficient nexus between work and death and he could not associate aggravational factors such as the work situation and the problems with Billy with any certainty. Ravreby concluded that the work stress in this case was no different than everyday stresses.

Dr. From, also a specialist in internal medicine, stated there was a direct relationship between the work decedent was doing prior to death and death. From testified that the decedent was most upset about his job even though there were other problems. He thought that the job was the source of decedent's emotional problems. There is insufficient evidence in the record to support such a conclusion.

The claimant has the burden of proving by a preponderance of the evidence that the death of decedent was caused by an incident or activity that arose out of and in the course of his employment. *Volk v. International Harvester Co.*, 252 Iowa 298, 106 N.W.2d 649 (1960). 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. *Musselman v. Central Telephone Co.,* 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 causal connection. *Burt v. John Deere Waterloo Tractor Works, supra.*

The incident or activity need not be the sole proximate cause if the injury or disease is directly traceable to it. *Langford v. Keller Excavating & Grading, Inc.,* 191 N.W.2d 667 (Iowa). However, the Iowa Supreme Court in *Almquist v. Shenandoah Nurseries, Inc.,* 218 Iowa 724, 732, 254 N.W. 35, (1934), 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 . . . 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.

If a preexisting condition did exist, then claimant must

show that an employment incident or activity materially aggravated or accelerated decedent's condition, resulting in death. *Yeager v. Firestone Tire & Rubber Co.*, 253 Iowa 369, 112 N.W.2d 812 (1961).

The deputy gave little weight to Dr. From's opinions because according to the deputy the evidence did not support From's emphasis on job stress. The deputy's conclusion is well founded for there appeared to be no unusual activity in decedent's work and there were many other factors which could have contributed to decedent's death. Such factors include decedent's smoking habit, his concern about Billy, and his family history of heart attacks.

The deputy also gave little weight to the opinions of Dr. Kersten. Even if Kersten's opinions were given greater weight, they would not sustain claimant's burden of proof. Kersten agreed that decedent's concern about Billy probably was a greater factor than his work. This fact, combined with Kersten's statement that work was just one of many factors involved, does not sustain claimant's burden of proof.

The deputy gave greatest weight to the testimony of Dr. Ravreby because his conclusions seemed more compatible with the evidence. This was a proper finding, for the evidence does not show that decedent's work activity involved or occasioned any unusual stress and thus cannot be accorded greater weight in precipitating or aggravating the myocardial infarction than the other risk factors involved. To accept claimant's position would extend compensation to every person who has been employed and ultimately dies as a result of a myocardial infarction. Claimant's position is equivalent to stating that merely because work for an employer was performed during one's lifetime that the work activity (as well as nonwork activity) contributed to a condition which eventually resulted in death and therefore is causally related to the employment.

In this case there was no evidence of a preexisting condition but only evidence of an acute episode which is not sufficiently established as causally related to decedent's employment.

WHEREFORE, it is found:

That claimant failed to sustain her burden of proof that decedent's death resulted from an injury arising out of and in the course of his employment.

* * *

Signed and filed this 31 day of January, 1979.

ROBERT C. LANDESS
Industrial Commissioner

No Appeal.

RICHARD A. DITTMAR, SR.

Claimant,

vs.

MODERN PIPING, INC.,

Employer,

and

IOWA NATIONAL MUTUAL INSURANCE COMPANY,

Insurance Carrier,
Defendants

Ruling

NOW on this 14 day of July, 1978, the matter of defendants' motion to dismiss comes on for determination.

A review of the file indicates an arbitration decision was filed March 8, 1978 in which claimant was denied benefits. On March 27, 1978, this office received a letter from claimant himself entitled "Notice of Appeal." Defendants' motion to dismiss the appeal was filed June 19, 1978.

Defendants assert, as a basis for their motion, that claimant failed to serve notice of the appeal on the opposing parties as provided for by Rule 500--4.27 and Rule 500--4.13. They also note claimant's failure to file a transcript of the proceedings as required by Rule 500-4.30.

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.

Defendants were not served with a copy of claimant's letter in which he sought to appeal the decision filed March 8, 1978. Copies of defendants' motion to dismiss, filed June 19, 1978, were sent to claimant and claimant's attorney. At this date, no response has been received from either party. It is also noted that a transcript of the arbitration proceeding was not filed with this office in compliance with Rule 500-4.30.

THEREFORE, defendants' motion to dismiss is sustained.

Signed and filed this 14 day of July, 1978.

ROBERT C. LANDESS
Industrial Commissioner

No Appeal.

VIRGINIA F. DUPLER,

Claimant,

vs.

DIXIE MOON, INC.,

Employer,

and

FIREMAN'S FUND INSURANCE COMPANY,

Insurance Carrier,
Defendants.

Arbitration Decision

This is one of three proceedings brought by the claimant, Virginia F. Dupler, against her employer, Dixie Moon, Inc., and three insurance carriers, namely, United States Fidelity and Guaranty Company, Aetna Casualty & Surety, and Fireman's Fund Insurance Company, to recover benefits under the Iowa Workers' Compensation Act for various alleged industrial injuries sustained on April 14, 1973, April 14, 1976 and December 7, 1976.

* * *

The primary issue requiring a ruling is the nature and extent of this claimant's injuries as they relate to her current ability to perform acts of gainful employment.

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

Claimant, age 50, a widow with one dependent child, sustained an industrial injury on April 14, 1973. This, then, ultimately resulted in a review-reopening decision written by Iowa Deputy Industrial Commissioner, Alan R. Gardner, and filed January 12, 1976, wherein it was found in part as follows:

> Therefore defendants are ordered to pay claimant one-hundred (100) weeks of permanent partial industrial disability at the rate of sixty-three dollars ($63) per week. Defendants are further ordered to pay claimant forty-eight and five-sevenths (48 5/7) weeks of healing period disability at the rate of sixty-eight dollars ($68) per week. Credit is to be given for the amounts previously paid.

The claimant returned to employment as a cashier in a small convenience store in Carter Lake, Iowa in May, 1975. On January 1, 1976, the claimant again accepted a position as waitress for the defendant-employer. (Trans. p.25, l.19). On April 13 or 14, the claimant slipped on the wet kitchen floor and struck her back on the handle of a mop bucket which was standing next to the meat locker. (Trans. p.28, l.7-17). Following this episode the claimant spent a week in Ohio, visiting her family and recuperating from the injury.

Beginning in early 1975 the claimant testified that she became a patient of Charles L. Pigneri, D.O., a family practitioner, with claimant's chief complaint being exogenous obesity. Claimant saw Dr. Pigneri on fifteen occasions beginning on February 21, 1975 and ending on May 12, 1976 and received treatment for her obesity and hypertension. (Pigneri depo. p.9, l.15). In short, the claimant did not seek medical attention following the fall of April 13, 1976, and at no time provided Dr. Pigneri with a history that connected her upper dorsal pain to the work-related fall. (Pigneri depo. p.9, l.22).

All of the issues concerning the fall of December 7, 1976 must now be dealt with. The record stands uncontroverted that the claimant fell heavily, resulting in a period of unconsciousness in the defendant-employer's kitchen on the date in question. First of all, on the issue of notice to the defendant-employer as required by §85.23, Code of Iowa, it is abundantly clear that the claimant's mishap was of such a magnitude that the bulk of the defendant-employers' managerial staff was aware of the episode. The defendant-employer's wife, the apparent manager, was present when Marvin Hiatt and Willie Blakeman assisted the claimant into a chair. The record fails to contain any credible evidence that supports the defendant-employer's contention of lack of notice.

It is therefore found as a finding of fact that the defendant-employer had constructive and actual knowledge of the work incident of December 7, 1976.

After returning home in the early morning of the date in question, the claimant sought medical assistance at the emergency room of Jennie Edmundson Hospital. (Claimant's Ex. 4a). While she was there, she again became a patient of Dr. Maurice P. Margules, and as such, gave the doctor the following history (Margules Depo. p. 18, l.9):

> Patient slipped on(Pause.) and fell hitting her head on the table. Patient said that she was unconscious but does not know for how long. Does have a raised area in the left occipital region.
>
> Patient complains of pain in the neck and back of her head, radiating down to her left. I don't know what it says. I can't read it. And then my notes says hematoma of the left suboccipital region due to accidental fall backwards on the 7th of December, 76, and at Zero-one-three-zero hours at the Stork Club in Council Bluffs. Return to the office Saturday at noon, I guess.

Claimant who had continued as a patient of Dr. Margules, who, after being unsuccessful in treating the claimant's complaints of increasing complaints of head, back and leg pains, readmitted her to the hospital on April 3, 1977 for the purpose of a lumbar and a cervical

pantopaque myelogram in order to compare the results with the initial injury of April 14, 1973. Dr. Margules' discharge diagnosis was "a sprain of the lumbar spine due to trauma and sprain of the cervical spine due to trauma, both as a result of the injury sustained on December 7, 1976". (Depo. p.23, 1.20)

On June 6, 1977, Dr. Margules instituted a program of physical therapy, but due to a lack of improvement and a reduction of the claimant's complaints of pain, the treatment was discontinued. On July 16, 1977 the doctor-patient relationship concerning treatment of the December 7, 1976 injury apparently ended, since Dr. Margules has not seen the claimant as of that date. Dr. Margules expressed the opinion that as of July 16, 1977, that the claimant's total functional impairment was twenty five percent (25%) of the body as a whole, taking into account both the April 14, 1976 injury and the most recent injury of December 7, 1976.

On March 23, 1977, claimant sought additional medical assistance from Harold H. Ladwig, M.D., a neurologist, whose initial clinical impression was as follows:

> A) The clinical impression, number one, lumbar strain. Number two, cervical strain. Number three, exogenous obesity. Number four, hypertension by history. (Ladwig depo. p. 11, 1.5).

Dr. Ladwig treated the claimant during the next six months, and came to the medical conclusion that, based upon the testing he had done, that the claimant was a cooperative patient. (Depo. p.19, 1.5).

In August of 1977, Dr. Ladwig's diagnosis remained constant, but he added "adhesive capsulitis" of both claimant's shoulder joints, together with a limitation of movement of the claimant's cervical spine. (Depo. p. 19, 1. 12). Dr. Ladwig defined adhesive capsulitis as:

> A reactive change of the structures about a joint in which there is a restriction of movement of the joint because of the formation of adhesions of the coverings of the joint.

The claimant's symptoms of neck and low back pain increased, requiring two additional periods of hospitalizations in August and September of 1977. Claimant remained under the care of Dr. Ladwig, who had instructed her to return for a regularly scheduled visit on May 3, 1978 for treatment of the work-connected injury, which had aggravated the preexisting conditions of cervical and lumbar sprain. (Def. Ex. No. 32). (Dr. Ladwig Depo., p.44, 1.13).

Dr. Ladwig's evidence is given the greater weight in this decision as he is the most qualified physician testifying in this dispute. He is firm in expressing his medical opinion that the current medical complaints concerning neck and lower lumbar pain are due to the fall of December 7, 1976. (Ladwig Depo. pp 38-40).

The medical evidence contained in this record, as it relates to the amount of the claimant's functional impairment, due to the December 7, 1976 episode is remarkably consistent. Edward M. Schima, M.D., in his report of November 28, 1977 (Def. Ex. 31), concluded that the claimant has a twenty percent (20%) impairment of the body as a whole. Dr. Ladwig agrees. (Depo. p.43, 1.5). None of the aforementioned physicians include in their collective medical opinions the claimant's problems of obesity, hypertension or hiatal hernia, but limit their findings to the preexisting conditions present at the time of the December 7, 1976 incident.

While a claimant is not entitled to compensation for the results of a preexisting injury or disease, the mere existence at the time of a subsequent injury is not a defense. If the claimant had a preexisting condition or disability that is aggravated, accelerated, worsened or "lighted up" so it results in a disability found to exist, he is entitled to compensation to the extent of the injury. *Yeager v. Firestone Tire & Rubber Company,* 253 Iowa 369, 112 N.W.2d 299. *Nicks v. Davenport Produce Co.,* 254 Iowa 130, 115 N.W.2d 812.

Functional disability is an element to be considered in determining industrial disability which is the reduction of earning capacity, but consideration must also be given to the injured employee's age, education, qualifications, experience and inability to engage in employment for which he is fitted. *Olson v. Goodyear Service Stores,* 255 Iowa 1112, 125 N.W.2d 251 (1963); *Barton v. Nevada Poultry,* 253 Iowa 285, 110 N.W.2d 660 (1961).

This 50-year old widow, an inarticulate life-long waitress, will have difficulty in finding any form of gainful fulltime employment in that she has many infirmitives which will restrict her limited ability. Not all of her medical problems are chargeable to her employer, and to the extent that her obesity, hypertension and hiatal hernia contribute to her inability to seek and hold employment, such factors are ignored in reaching this claimant's industrial disability.

The long-lasting lower lumbar and cervical strain, and the resultant inability to be able to walk properly and to carry items dictate that the claimant has sustained an industrial disability of forty percent (40%) of the body as a whole.

The troublesome question of the rate of weekly entitlement under §85.36(6) now requires a ruling. The claimant testified that she worked six days per week. Her normal day appears to have been an average of ten hours per day at one and 25/100 dollars ($1.25) per hour. The claimant also testified that she worked two additional weeks in June of 1976 in replacement of Vassie Summers, the cook. (Trans., p.328, 1.5) (P.123, 1.12). For her work as cook she received one hundred sixty one and 10/100 dollars ($161.10), based on gross wages of two hundred and 00/100 ($200.00) per week. While it is the general rule that in computing actual gross earnings as contemplated by §85.61(12), Code of Iowa, there should be included not only wages but anything of value received as consideration for the work, such as tips, room and board, the evidence in this case is of such a confusing nature that it is impossible to determine how much, if any, of the three hundred seventy nine dollars ($379.00) in tips received by the claimant during 1976 were received during the thirteen (13) week period immediately preceding the injury. No claim is made for the value of meals provided by the defendant-employer as part of this claimant's weekly remuneration.

The cook, Vassie Summers, corroborates the claimant's

version of the wage issue in her testimony. (Trans., p.325-328). The claimant worked two full double weeks in July and two full double weeks in August, two weeks in September, two weeks each in October and November. (Trans., p. 128-133) (Trans., p.331-332).

It is found that the claimant's gross weekly wages for the last three (3) weeks of September, 1977, were four hundred eighty-two and 50/100 dollars ($482.50); wages for the month of October, 1977, were six hundred thirteen and 75/100 dollars ($613.75); wages for the month of November, 1977, were three hundred thirteen and 13/100 dollars ($313.13); wages for the first week of December, 1977, were forty six and 25/100 dollars ($46.25); for a total gross wage for the thirteen (13) weeks immediately preceding the injury of one thousand four hundred fifty five and 63/100 dollars ($1455.63), or an average weekly wage of one hundred eleven and 97/100 dollars ($111.97).

* * *

Signed and filed this 14 day of March, 1979.

HELMUT MUELLER
Deputy Industrial Commissioner

No Appeal.

FRED EASTMAN, JR.,

Claimant,

vs.

WESTWAY TRADING CORP.,

Employer,

and

GREAT AMERICAN INSURANCE CO.,

Insurance Carrier,
Defendants.

Review-Reopening Decision

This matter was heard at the Woodbury County Courthouse on December 6, 1978 at which time the record was closed.

* * *

The issues for determination are the amount of the claimant's disability for industrial purposes and whether the claimant is entitled to further healing period compensation.

Claimant received an injury arising out of and in the course of his employment on July 6, 1976. Defendant-employer is a supplier of molasses and claimant's duties were to offload the product from transportation systems, store and process the product and distribute it to the customer. The claimant was employed as a truck driver and manager of defendant-employer's Sioux City outlet. The managerial activities were a small portion of his duties. The claimant's main duties were concerned with the distribution of the molasses. On the date of the injury claimant was driving his employer's truck on Highway 20 in Nebraska. The truck was equipped with a seat which adjusted to the ride. The seat would fill with air as the road became rougher. The stretch of highway upon which the claimant was driving was rough and the seat adjusted itself accordingly. The claimant hit a depression in the road on the approach to a bridge and when the vehicle came out of the depression, the claimant struck his head on the ceiling of the truck cab. The claimant testified that he felt his back "crunch" and continued to work through July 19, 1976 despite pain in the neck, shoulders, and arms. The claimant could not turn his head and had pain in the left arm.

The claimant first went to see an Aaron L. Katz, D.O., and manipulation proved fruitless. Dr. Katz referred the claimant to John J. Dougherty, M.D., an orthopedic surgeon, and the claimant was hospitalized at St. Vincent's Hospital in Sioux City on August 4, 1976. X-rays of the cervical spine appeared normal. Dr. Dougherty's impression at that time was cervical ligamentous and muscular sprain with possible early cervical spondylosis. He did not feel the claimant had symptoms of disc involvement. The claimant was released from the hospital on August 13, 1976.

The claimant continued to have marked restriction on neck motion so the claimant was sent by the defendant to Dr. William R. Hamsa, Jr., M.D., an Omaha orthopedist. Dr. Hamsa felt the claimant had suffered a cervical strain which was superimposed on a minimal degenerative disc disease and early arthritic changes in the posterior facets.

The claimant continued to see Dr. Dougherty who observed that the claimant was exhibiting the symptoms of ankylosis spondylitis.

The claimant was seen by Horst G. Blume, M.D., neurosurgeon, on February 21, 1977, who felt that the claimant had irritated the intervertebral joints of the cervical spine with irritation of the sinuvertebral nerves. Neo-Sonodynator treatments did not improve the claimant's condition. The claimant was hospitalized by Dr. Blume on April 11, 1977 and a myelogram was performed at all levels of the spine. A slight central defect was noted at C-5, C-6 and C-6, C-7. The claimant was released from the hospital, and no improvement of his condition was noted so he was rehospitalized on June 13, 1977 and a discogram was performed which Dr. Blume thought revealed a ruptured cervical disc at the C-5, C-6 level. An anterior discectomy and interbody fusion at the C-5, C-6 and C-6, C-7 was performed by Dr. Blume and the claimant was released from the hospital on June 24, 1977. The claimant continued to be treated by Drs. Blume and Dougherty and extreme rigidity of the cervical spine remained.

The claimant was seen by Maurice P. Margules, M.D., a neurosurgeon, from Council Bluffs on January 28, 1978. Examination showed evidence of extreme rigidity of the cervical spine with 5 degrees of lateral rotation, complete ankylosis in extension and 5 degrees in flexion. Dr. Margules felt the claimant had a post-traumatic arthritic syndrome.

Dr. Margules estimated the claimant to have a permanent disability of from 30 to 40 percent of the body as a whole. The claimant was examined by Chauncey E. Heffernan on February 28, 1978 who recommended that the claimant avoid all activities that involved use of the neck. Dr. Blume

on March 6, 1978 forecasted another year of recuperation. Dr. Dougherty feels the claimant has a 15 percent permanent partial impairment. Dr. Blume did not give an estimate of the claimant's functional impairment, although he did estimate the claimant's industrial disability, which estimate will be disregarded because it interferes with the prerogative of the deputy industrial commissioner.

The claimant has the burden of proving by a preponderance of the evidence that the injury of July 6, 1976 is the cause of the disability 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 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 is found that the claimant has established his claim. All evidence indicates that the claimant's present condition is related to the injury.

Since the claimant has 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 (1963). It is the reduction of earning capacity which must be determined. *Barton v. Nevada Poultry,* 253 Iowa 285, 110 N.W.2d 660 (1961).

Claimant, presently age 55, has been a busboy, a car jockey, a gas station owner, and primarily a truck driver. Because of his injury, he will never drive again. The potential of his reemployment is poor. His formal education is to the ninth grade. The claimant has obtained a GED in the recent months, and testimony elicited at the hearing revealed that the claimant may return to some type of employment through vocational rehabilitation. Claimant's physical condition shows severe restriction in the movement of the cervical spine. The claimant cannot be said to qualify for clerical work since a certain amount of cervical motion is also needed in this work. The claimant has minimal clerical skills as borne out by the testimony of the vocational rehabilitation expert and possibly may perform a job as a dispatcher. The severe limitation of motion from which the claimant suffers disqualifies him from many occupations. Considering the factors of industrial disability, it is found that the claimant is disabled, for industrial purposes, to the extent of 75 percent.

The next issue to be discussed is the healing period entitlement. Section 85.34(1), Code of Iowa, states:

> 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.

Rule 500-8.3 of the industrial commissioner states:

> Healing period. A healing period exists only in connection with an injury causing permanent partial disability. It is that period of time after a compensation injury until the employee has returned to work or recuperated from the injury. Recuperation occurs when it is medically indicated that either no further improvement is anticipated from the injury or that the employee is capable of returning to employment substantially similar to that in which the employee was engaged at the time of the injury, whichever occurs first.

Maximum medical recuperation in this case is found to have occurred on January 28, 1978. The letter from Dr. Margules indicates that the claimant's condition has stabilized significantly and the observations of the undersigned show little, if any, change from that date. Healing period compensation will be allowed from July 19, 1976 until January 28, 1978 (the date of examination by Dr. Margules), a period of 79 6/7 weeks. Defendants will receive credit for the excess healing period paid and apply such excess to the permanent partial disability compensation award.

WHEREFORE, claimant has established that he sustained an industrial injury on July 6, 1976 which resulted in a disability of seventy-five (75) percent for industrial purposes. The claimant has also showed that he is entitled to seventy-nine and six-sevenths (79 6/7) weeks of healing period compensation.

* * *

Signed and filed this 14th day of December 1978.

JOSEPH M. BAUER
Deputy Industrial Commissioner

No Appeal.

BENJAMIN W. EBY,

Claimant,

vs.

KEUFFEL & ESSER COMPANY,
KILBORN PHOTO PROD. PLANT

Employer,

and

CNA INSURANCE,

Insurance Carrier,
Defendants.

Review-Reopening Decision

INTRODUCTION

This is a proceeding in review-reopening by Benjamin W. Eby, claimant, against Keuffel & Esser Company, Kilborn Photo Prod. Plant, employer, and CNA Insurance, insurance carrier, for the recovery of benefits as a result of an injury on July 24, 1974.

* * *

FACTS

Claimant started working for defendant in April 1974 as a take down man and received an injury which arose out of and in the course of his employment on July 24, 1974 when his glove and hand got rolled up in a machine he was working with, flipping claimant over and rolling him up in the industrial film he was working with.

As a result of the injury, he was hospitalized and treated by L. C. Strathman, M.D. As stated by Dr. Strathman, claimant received the following injuries and treatment as a result of the incident:

> "This gentlemen sustained multiple injuries in an industrial accident on 7-24-74. To enumerate on these, he sustained a closed fracture of the humerus on the left, a fracture of the left radius, a fracture of the right femur, and soft tissue damage to his left knee. In the initial phase, treatment consisted of open reduction and rod fixation of the right femur and left humerus, closed reduction and plaster fixation for the left radius, and plaster immobilization of the left knee. In follow-up management, the rod has been removed from the right femur and, subsequently, he had surgery on the left knee, at which time, a medial meniscectomy was done and a pes transfer carried out."

Dr. Strathman in his report of May 28, 1976 stated that claimant had permanent disability of 15 percent of the right lower extremity and 25 percent of the left lower extremity. In Dr. Strathman's report of June 20, 1977 he indicated he gave claimant a 20 percent permanent partial disability rating for the body as a whole.

Donald D. Weir, M.D., who saw claimant for the purposes of making an evaluation has rated claimant's disability as follows: ". . . impairment of the right hip and femur 17

> ". . . impairment of the right hip and femur 17 percent of lower extremity; impairment of left knee 25 percent of lower extremity--total lower extremity impairment 42 percent or 17 percent of whole man. Impairment right shoulder 15 percent upper extremity or 9 percent whole. Total disability 26-30 percent impairment of whole man."

Claimant indicated at the time of hearing his injuries gave him problems with lifting and running.

ISSUES

The issues presented by the parties at the time of hearing were whether or not claimant's disability was causally connected to the injury he received on July 24, 1974, the extent of his disability if any; and whether or not claimant is entitled to 85.70 benefits.

APPLICABLE LAW

The claimant has the burden of proving by a preponderance of the evidence that the injury of July 24, 1974 is the cause of his disability on which he now bases his claim. *Bodish v. Fischer, Inc.,* 257 Iowa 516, 133 N.W.2d 867 (1965). *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).

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. *Nicks v. Davenport Produce Co.,* 254 Iowa 130, 115 N.W.2d 812 (1962). *Yeager v. Firestone Tire & Rubber Company,* 253 Iowa 369, 112 N.W. 2d 299 (1961).

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, 253 N.W.2d 899 (1935), 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]. In determining industrial disability, consideration may be given to the injured employee's age, education, qualifications, experience and his inability, because of the injury, to engage in employment for which he is fitted.* * * *

In Section 85.70 it is stated:

> 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. (emphasis added)

* * * *

ANALYSIS

Based on the foregoing principles, it is found that claimant has met his burden in proving his disability is causally connected to the injury he received on July 24, 1974. This is supported not only by the testimony of claimant but the testimony of Dr. Strathman and Dr. Weir. Claimant has been a rodeo performer for ten years and was clowning nearly every weekend before the accident. Claimant's doctors have indicated to him that he should give up the rodeo. The evidence also indicated that the claimant has sustained numerous injuries in performing at rodeo as well as at home.

In his report of May 26, 1976 Dr. Strathman revealed the disabilities that are causally connected to claimant's injury on July 24, 1974 when he states:

> At the present time this gentleman is back to his former job but does have residuals from his injuries. On the left arm, he shows full range of motion and essentially normal muscle recovery. He has no essential residual from either the humeral fracture of [sic] the radial fracture. On the right femur, there is a well-healed incision over the buttock. On the buttock, the incision measures just less than three inches; on the thigh, it measures seven inches in length. These are stable and non-tender. The muscle development has been recovered quite nicely. He shows full range of motion at the knee and has some limitation of rotation at the right hip. On the left knee, there is a scar extending six inches, which is healed and stable. There is a lesser scar over the lateral side of the knee from previous surgery. There is no effusion of the knee. There is some thickening and bogginess over the medical collateral, showing definite increased motion with valgus strain and limitation at 15 degrees of flexion. When relaxed and the knee is bended [sic] 90 degrees, there is obvious loss of the anterior cruciate with a prominent drawer sign. His knee is more stable actively with the transfer, but there is obvious gross instability persisting.

As indicated in the facts previously set forth, both Dr. Strathman and Dr. Weir state claimant has some permanent functional disability from this injury. It should be noted that functional disability is only one of the factors to be considered in determining industrial disability.

Claimant is 30 years old, married and has one child from a previous marriage. Claimant has graduated from high school, completed a one-year course in data processing at Kirkwood Community College and was, at the time of hearing, in the eighth week of a twelve week course in welding at that school. Prior to working for the defendant, claimant held jobs at Collins Radio, National Oats, Frake and Strothman and Osco Drug, all of which required heavy lifting. After recuperating from his injury, claimant returned to work for defendant in "emulsion" where he washed cans, mixed chemicals and operated a noodleing machine. This position with the defendant required less physical exercise, paid considerably better and was one of the better jobs in the plant. Claimant testified that he quit this job not because he couldn't do the work, but because the defendant couldn't keep him busy; so he was bored. In his report of August 6, 1976 Dr. Weir stated, "I discussed with the patient the advisability of considering a change in jobs, preferably to something that would not involve such extensive weight bearing activity with fairly heavy loads, etc." This statement does not coincide with claimant's testimony where he indicates that he could do the work for defendant but quit because he was bored.

It is also noted that from March 1978 until the hearing, claimant was working for College Community Schools in grounds work. This work at times required him to lift up to 80 pounds. Taking all of these factors into consideration, it is determined that the claimant has received a 35 percent industrial disability to the body as a whole as a result of the injury on July 24, 1974.

Claimant is seeking vocational rehabilitation but he has failed to prove that he could not return to gainful employment because of his disabilities. The position he had with the defendant after the injury paid more than he was making at the time of the injury. But as claimant states, he voluntarily quit that job because the defendant did not keep him busy. Therefore, the claimant is not entitled to Section 85.70 benefits. It should also be noted that defendant was not aware of this claim for Section 85.70 benefits prior to the hearing.

* * *

Signed and filed this 14th day of August, 1979.

DAVID E. LINQUIST
Deputy Industrial Commissioner

No Appeal.

BRIAN ECCLES,

Claimant,

vs.

CHICAGO & NORTH WESTERN TRANSPORTATION COMPANY,

Employer,
Defendant.

Appeal Decision

This is an appeal by claimant from a ruling filed October 26, 1978 sustaining defendant's motion to dismiss.

Claimant began work as a machinist with defendant Chicago & North Western Transportation Company on March 21, 1977. Claimant subsequently developed a dermatological condition which he contends resulted from the use of certain oils and chemicals in his work. He alleges that he

has been totally disabled since November 22, 1977.

Claimant filed his original notice and petition in review-reopening on September 21, 1978. Defendant filed its motion to dismiss on October 9, 1978 alleging that the employer is a common carrier by railroad engaged in interstate commerce and thus its liability to claimant is governed by the Federal Employer's Liability Act, 45 U.S.C.A. §51 et seq. The deputy industrial commissioner sustained the defendant's motion to dismiss. Claimant now appeals this ruling. Defendant filed its resistance to the appeal on November 21, 1978 and claimant responded on December 27, 1978. Both parties have filed appeal briefs in this proceeding.

Under Iowa Code §85.1(5), employees with respect to whom a rule of liability or method of compensation has been established by the Congress of the United States are not covered by Iowa Workers' Compensation Law. Instead, the federal law is controlling. Common carriers by railroad engaged in interstate commerce come within the Federal Employer's Liability Act (hereinafter FELA), 45 U.S.C.A. §51 et seq. Section 51 states:

> Every common carrier by railroad while engaging in commerce between any of the several States or Territories . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, . . . for such injury or death resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

The first issue in determining the applicability of the FELA to the case sub judice is whether or not the claimant was employed in interstate commerce at the time of his injury by a common carrier by railroad engaged in such interstate commerce.

Claimant concedes in his appeal brief on page three that claimant was engaged in interstate commerce under the interpretation provided by the U.S. Supreme Court. Claimant further acknowledges the fact that this employee-employer relationship comes within the coverage of the FELA. As stated in *Johnston v. Chicago & N.W.R. Co.,* 208 Iowa 202, 206, 225 N.W. 357, (1929), when the facts bring the case within the Federal Employer's Liability Act, the industrial commissioner is without jurisdiction to grant relief and the employee must resort to the federal act.

Claimant argues that the FELA does not apply where there is no evidence of negligence on the part of the employer. *New York Central Railroad Co. v. Winfield,* 244 U.S. 147 (1917), resolves this argument. In this case the Supreme Court states at page :

> True, the act does not require the carrier to respond for injuries occurring where it is not chargeable with negligence, but this is because Congress, in its discretion, acted upon the principle that compensation should be exacted from the carrier where, and only where, the injury results from negligence imputable to it. Every part of the act conforms to this principle, and no part points to any purpose to leave the states free to require compensation where the act withholds it.

The court notes that the act is comprehensive and applies as well to injuries where negligence is absent as it does to those where negligence is a factor. Thus, the presence or absence of negligence in a particular situation is not determinative of the act's applicability. The FELA applies to employees of common carriers by railroad engaged in interstate commerce whether or not negligence is evident.

Claimant also argues that the FELA does not include an occupational disease. The U.S. Supreme Court also has responded to this question in *Urie v. Thompson,* 337 U.S. 163 (1948). In that case, the court held that silicosis was an "injury" within the FELA and thus recovery was available when the disease resulted from the employer's negligence. Thus an occupational disease is included as an injury under FELA.

In this case, where claimant is alleging an occupational disease as a result of his employment, such fact by itself is not sufficient to bring it out from under the coverage of the FELA. The act's coverage remains comprehensive as to an injury or disease resulting from an individual's employment with a common carrier by railroad engaged in interstate commerce. Claimant has shown that he is employed by such a carrier and therefore the FELA applies. Therefore, the employee is one with respect to whom a rule of liability or method of compensation has been established by the Congress of the United States. The industrial commissioner is then without jurisdiction to act on the matter.

WHEREFORE, claimant is covered by the Federal Employer's Liability Act and is therefore without the jurisdiction of this tribunal.

THEREFORE, it is ordered:

That claimant's application for benefits under the Iowa Workers' Compensation Law should be and is hereby dismissed.

Signed and filed this 27 day of February, 1979.

ROBERT C. LANDESS
Industrial Commissioner

Appealed to District Court; Pending.

MICHAEL HOWARD EDEN,

Claimant,

vs.

ATLANTIC STEEL ERECTORS,

Employer

and

THE TRAVELERS INSURANCE COMPANY,

Insurance Carrier,
Defendants.

Review-Reopening Decision

INTRODUCTION

This is a proceeding in review-reopening by Michael Howard Eden, claimant, against Atlantic Steel Erectors, employer, and The Travelers Insurance Company, insurance carrier, for the recovery of further benefits as a result of an injury on or about June 29, 1978.

* * *

FACTS

On approximately June 29, 1978 claimant received an injury which arose out of and in the course of his employment. Claimant was helping lay out steel beams when another employee yelled for help. Claimant reached over, grabbed the steel beam and immediately had pain in the right side of his lower back. As indicated by the Form 5, claimant was off work from June 30, 1978 until July 16, 1978. Claimant returned to work on July 17, 1978. Claimant quit working for the defendant some time thereafter but the record is devoid of any date. Claimant has not worked for the defendant or any one else since that resignation.

Claimant was seen by Dwain E. Wilcox, M.D., who indicated claimant strained a muscle and placed claimant on Ecquagesic and gave him ultrasound treatment. Dr. Wilcox suggested that claimant have extensive physical therapy which claimant did not do. Dr. Wilcox, in his report of September 22, 1978, stated: "By phone on July 17 he was told that he was over it and was able to be released." Claimant testified that he was not satisfied with Dr. Wilcox's treatment and also stated: "Something that added to this was the attitude of the doctor, of Dr. Wilcox, when instead of granting the care that I requested, seemed to--well he just did not do what I was asking him to." (transcript, page 9, lines 18, 19, 20 and 21).

At the suggestion of his foreman and supervisor, claimant went to see Dale D. Schramm, chiropractor and was seen on August 30, September 1, 6, 12, 15, 18 and 21.

ISSUES

The issues presented by the parties at the time of hearing are whether there is a causal relationship between claimant's disability and work injury and the extent of claimant's temporary total disability.

APPLICABLE LAW

The claimant has the burden of proving by a preponderance of the evidence that the injury on or about June 29, 1978 is the cause of his disability upon which he now bases his claim. *Bodish v. Fischer, Inc.* 257 Iowa 516, 133 N.W.2d 867 (1965). *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).

ANALYSIS

Based upon the foregoing principles, it is found claimant has failed to establish his claim for benefits beyond those already paid. Although the evidence quite clearly indicated claimant was entitled to compensation from June 30, 1978 to July 16, 1978, the Form 5, filed by defendants, indicates that he has been paid for the same. And, although claimant contends that Dr. Schramm's report of September states that this type of injury requires three to four months of healing and his belief claimant should be able to return to work a month after his report, the evidence clearly indicated that claimant returned to work.

Had claimant been able to show that his loss of work subsequent to July 17, 1978 resulted from the injury, he would, of course, be entitled to weekly benefits. And, although Dr. Schramm's report would lead one to think claimant would have missed more work, the facts clearly showed that he had returned to work.

It should be noted that claimant was, by his own choice, not represented by counsel. It is difficult for the pro se party to deal with the complexities of proving a case of disability. Here, some medical evidence that, *even though* claimant had returned to work, he later was unable to work, would have been more convincing. And, as stated above, the record is unclear as to the date claimant left work subsequent to July 17, 1978.

Claimant testified that he quit work not only because of his pain but because he was "unhappy with the attitude that Atlantic Steel had shown". No evidence was received that would indicate Dr. Schramm or Dr. Wilcox were of the opinion that claimant was unable to work at the time he quit his position with defendant.

Here is a case, then, where claimant might have proved his entitlement to further benefits had the record shown more proof than it did. As it is, the lack of proof prevents recovery by claimant.

* * *

Signed and filed this 23rd day of April, 1979.

DAVID E. LINQUIST
Deputy Industrial Commissioner

No Appeal.

CHARLES DAVID EVANS,

Employee,

vs.

BROWN TRUCK LEASING

Employer,

and

TRUCK INSURANCE EXCHANGE,

Insurance Carrier,
Defendants.

Arbitration and Review-Reopening Decision

These matters came on for hearing at the offices of the

Iowa Industrial Commissioner in Des Moines, Iowa, on January 9, 1980. The record was closed on January 28, 1980.

* * *

The issues for determination are:

1. What is the nature and extent of claimant's disability, if any, because of an injury occurring on July 15, 1977.

2. Did claimant sustain an injury arising out of and in the course of his employment on October 2, 1978? If so, what is the nature and extent of disability, if any, which can attach thereto?

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

Claimant sustained an injury arising out of and in the course of his employment on July 15, 1977. He was a truck mechanic and after he finished an overhaul on an engine he dropped a cylinder head and hurt his back when he stooped to pick it up. He continued to work and first sought medical attention on the following Monday. He had been planning a vacation and the vacation was cancelled. Claimant sought treatment from R.K. Woods, D.O. His chief complaint was low back pain with radiation down his legs. Dr. Woods treated claimant conservatively with no improvement. He caused claimant to be admitted to Des Moines General Hospital on August 10, 1977. The claimant was seen by several physicians and testing indicated that claimant had a disc problem and claimant was given a myelogram which showed a ruptured intervertebral disc at the fifth lumbar interspace. Surgery was not performed and claimant was treated conservatively with traction, physiotherapy, muscle relaxants and heat. He was dismissed from the hospital on August 30, 1977. He was able to perform duties without restriction.

On October 2, 1978, claimant was still employed by defendant-employer as a mechanic. Claimant was taking bearings off some wheels when he felt pain similar to that which he had experienced a year earlier. He was seen by John Woods, D.O., on October 2, 1978. No marked neurological deficit was observed because claimant was able to heel and toe walk and the plantar and achilles reflexes were found to be normal and equal bilaterally. Because Dr. Woods found somatic dysfunction at the first and second lumbar levels on the left, he felt that the injury was caused by a different mechanism, although compensatory in nature. Osteopathic manipulation was given and claimant responded well. On October 4, 1978, claimant saw Dr. Woods again, complaining of pain. Claimant had continued to work. Claimant was given osteopathic manipulation and had some improvement until the following day when he hurt his back while pulling tires. Claimant was admitted to the hospital on October 9, 1978. Claimant had surgery whereupon extruded lumbar discs at the L-5, S-1 (central) and L-4, L5 (left) levels were removed and a foraminectomy at the L-5 and S-1 nerve root, on the left was performed. Claimant was released from the hospital on October 23, 1978. Claimant received compensation at the 1977 rate and finally returned to light work on September 4, 1979. During the severe winter of 1978-1979, claimant slipped on the ice a few times. Claimant was hospitalized from May 2, 1979 through May 9, 1979. A myelogram was performed which was not diagnostic of a ruptured disc at another level. Claimant went through vocational rehabilitation and the YMCA back program. The latter program resulted in claimant's not completing the course because of its strenuous nature.

Claimant was examined by Donald W. Blair, M.D., on December 12, 1979. He had seen Dr. Blair previously on September 6, 1979. The December 1979 examination showed tenderness at the lumbosacral level. Muscle spasm was absent. The right straight leg raising test went to 35° with low back and right posterior hip pain on the right. The left straight leg raising test went to 70° with low back discomfort only. There was some sensory diminution noted in the right leg. Dr. Blair anticipated occasional flareups of back and pain and that claimant had a 25 percent permanent partial impairment to the body as a whole.

J. E. Laughlin, D.O., testified by way of deposition in this case. He saw claimant after the 1977 injury and also the 1978 injury. He testified that the likely sequence of events dictated that claimant had a back sprain with the first injury, and that he ruptured the disc with the second injury. His assumption was that an 18 percent permanent partial disability could be directly attributed to the second injury. However, he later apportioned about 5 percent of the 18 percent to the first injury. The greater part of the impairment is due to nerve adhesions which caused limitation of motion. He also referred claimant for psychiatric care and evaluation. He felt this was necessary in order that claimant could deal with pain. Jean Glissman, M.D., the psychiatrist, examined claimant and gave an ambivalent diagnosis of "situational reaction of adulthood with anxiety."

Dr. Woods has also seen claimant since the inception of his present difficulties. His opinion of causation and apportionment differs from Dr. Laughlin's. The following exchange of Dr. Laughlin's testimony is enlightening:

> By Mr. Irish:
>
> Q. I'm going to hand you--or show you a letter that will be offered into evidence by the claimant himself, and the letter is dated August 13, 1979. It's addressed to Michael R. Hoffmann, and it is signed by Dr. Woods, and I'm going to read from that exhibit, beginning at the eighth line, where Dr. Woods says:
>
> "At that time he stated that he had slipped on July 17, 1977, following lifting some heavy objects at work. This resulted in low back pain with radiation down his legs at that time."
>
> And I'm going to read you the last paragraph of Dr. Woods' letter, where he says the following:
>
> "It is my professional opinion that patient's back problems are the result of the injury July 17, 1977. He compensated for a while with conservative treatment. Because of this continued heavy lifting and working, it was only a matter of time until this compensatory mechanism would be stretched and finally fail, resulting in total disability, until the primary discogenic pathology is corrected."
>
> Do you generally concur with that?
>
> A. What he's saying there, as I read it, is, he's saying

that basically he ruptured the disc at the first injury, and I'll say I don't know. I don't know which time he ruptured the disc. I felt he probably did it at the second time, but, as I read, I think what Dr. Woods is saying is that he feels he ruptured the disc at the first injury.

The problem between my feeling and what Dr. Woods has is, he speaks of discogenic--in fact, in his last paragraph he speaks of discogenic pathology; and what happens with a ruptured disc, and the reason it is a problem in knowing when it really happened, is that a disc becomes diseased, and it causes some back pain and causes some problems, but does not cause leg pain or nerve problem; and after the disc is diseased, at some point this disc will probably rupture and go in and hit the nerve, which then causes a nerve problem.

Q. Would it be fair to say that when there is radiation down the leg, this is evidence of the ruptured disc?

A. Not necessarily, because there are two types of pain. There is referred pain and radicular pain.

Now, if there is pressure on a nerve and the pain runs down the leg, a shock-like sharp pain, that's probably nerve pain; but a patient can have pain in a leg that they cannot--it is not well described. They know a leg hurts, but they cannot exactly tell where it hurts. That type of pain is a referred pain.

I would say that you need to know what kind of pain it was to know whether it was referred pain from discogenic disease or radicular pain from actual pressure on a nerve.

Now, let me go read ahead, because I wasn't quite done.

The problem is, in this patient I have no question in my own mind that he had discogenic disease after his first injury. Whether he had ruptured the disc after the first injury is what I don't really know.

I had said earlier I thought that he probably actually ruptured the disc at the second injury, but I also qualified it by saying I just don't know of any way you can definitely know for sure.

To be compensable, a claimant's injury must arise out of and in the course of his employment. *Musselman v. Central Telephone Co.,* 261 Iowa 352, 154 N.W.2d 128. *Almquist v. Shenandoah Nurseries, Inc.,* 218 Iowa 724, 254 N.W.2d 35. Based on the foregoing principles it is found that claimant has established that he received an injury arising out of and in the course of his employment with defendant-employer on October 2, 1978. The problem is whether this injury can be traced to the original injury. The evidence as a whole would lead to the conclusion that the two injuries are severable because two incidents were involved, claimant sought no further treatment for nearly a year prior to the second injury and that the symptoms of the first injury had subsided sufficiently for claimant to successfully return to work. This is, in no way, meant to indicate that defendants either were unreasonable or acting in bad faith when the decision was made to reinstate the payment of temporary total disability compensation at the 1977 rate. With the vision of hindsight, matters may be clarified.

Functional disability is an element to be considered in determining industrial disability which is the reduction of earning capacity, but consideration must also be given to the injured employee's age, education, qualifications, experience and inability to engage in employment for which he is fitted. *Olson v. Goodyear Service Stores,* 255 Iowa 1112, 125 N.W.2d 251 (1963). *Barton v. Nevada Poultry,* 253 Iowa 285, 110 N.W.2d 660 (1961).

Claimant, age 44, completed the 8th grade and received a GED during his vocational rehabilitation efforts following the October 1978 injury. He is a former Marine, a manual laborer, a printer's apprentice, a Pepsi route driver and truck mechanic. He has now returned to work, and his financial remuneration has increased. Undoubtedly, his disability for industrial purposes would be much higher but for the fact that his employer has been willing to employ him and make the necessary accomodations for him to perform his duties. Based on the principles of industrial disability, it is found that claimant's disability, for industrial purposes, is 25 percent of the body as a whole.

The problem now is how to apportion the disability between the two injuries. The positive myelogram following the July 1977 injury would indicate that major damage was done at that time. However, claimant was able to return to his duties. The testimony of Dr. Laughlin apportioning roughly a third to a quarter of the disability to the first injury is most reasonable. It will therefore be found that 5 percent permanent partial disability will be attached to the July 1977 injury and the remaining 20 percent will be attached to the October 1978 injury.

The record indicates that claimant was paid 7 6/7 weeks of compensation for the July 15, 1977 injury. The award will be made for healing period for this amount. The record also indicates that claimant was disabled from working because of the injury of October 2, 1978 from October 5, 1978 to September 3, 1979, a period of 47 5/7 weeks.

The parties stipulated that the rate of compensation for the 1978 injury was $208.89. Credit for the temporary total disability paid pursuant to the July 1977 injury will be given to defendants.

Claimant has not been paid for mileage. It would appear that $17.25 outstanding should be paid. Likewise, the $9.00 in hourly wages lost for the December 10, 1977 visit to Dr. Blair should be paid. See Section 85.39, Code of Iowa. There is a $30.00 charge of Dr. Laughlin which is also not paid. This should be paid.

* * *

Signed and filed this 13th day of February, 1980.

JOSEPH M. BAUER
Deputy Industrial Commissioner

No Appeal.

VERNON L. EVERETT,

Claimant,

vs.

J. I. CASE COMPANY,

Employer,
Self-Insured,
Defendant.

Appeal Decision

Claimant, Vernon L. Everett, has appealed from a proposed review-reopening rehearing decision wherein he was found to have an industrial disability of thirty-three and one-third percent of the body as a whole as a result of an injury sustained in April 1975.

In the first review-reopening proceeding the deputy held that claimant did not sustain his burden of proof. Claimant filed for a rehearing on March 21, 1978. A rehearing was granted on March 23, 1978 with the deputy holding in that rehearing that claimant sustained his burden of proof, based on a March 28, 1978 report from Dennis Miller, M.D., and finding that claimant had an industrial disability of thirty-three and one-third percent of the body as a whole. In making his decision the deputy considered the claimant's age, education and work experience. The deputy also considered the marked degenerative condition in claimant's back and claimant's alleged lack of motivation to seek rehabilitation and new employment.

The issue presented on appeal is whether or not the finding of the deputy industrial commissioner as to industrial disability is appropriate.

Claimant contends that there is not sufficient evidence in the record to support the deputy's conclusion regarding claimant's lack of motivation. Claimant further contends that he is now one hundred percent disabled because of the April 1975 injury.

Although this commissioner did not view this claimant, the record as a whole does not support the finding of lack of motivation to the degree emphasized by the deputy. The deputy placed weight on a report from Steven Jarrett, M.D., dated September 30, 1977. The report stated in part:

> I talked with Mr. Everett at length about the problems he is having due to scar tissue and the tightness of his low back. I do feel that if he were well motivated that the Industrial Injury Clinic Program, with a week's admission and a multidisciplinary approach would get him back on the track to reduce his pain and to make him once again an employable person. Being realistic however, the fact this gentleman is sixty-one and that going through the program and working at home, and then probably needing some retraining and new type of job from what he was doing, it is probably impractical at his age. Mr. Everett is also aware of this, and indicates the fact that he would only have another year or two of work.

There is nothing more than a passing reference in this passage to claimant's motivation. It is difficult to determine from this passage whether claimant did not go through the rehabilitation program because of his lack of motivation or because of Dr. Jarrett's view on the impracticality of the program for claimant. Thus the deputy's emphasis on this report is not well founded.

A statement made by claimant's treating physician, Dr. Miller, in a report dated June 1, 1977 is found more persuasive. Dr. Miller wrote: "I personally think that Mr. Everett is well motivated and would be very happy to be gainfully employed if the proper situation were available." Dr. Miller had observed claimant throughout his recuperation period and thus was better able to judge claimant's motivation.

It should be noted that claimant has offered some ideas of his own on what kind of employment he might be able to handle. Claimant mentioned that he would like to buy a house and fix it up. He also mentioned that he might buy a tavern and work as a bartender. Both of these activities would permit claimant to work at his own speed. Claimant tried to get an appointment with Social Security to discuss their rehabilitation program, but was turned down when he described his condition. Regular employers appear reluctant to hire claimant because he is no longer physically able to work a regular shift. Dr. Miller recommended that claimant only work a half day at a time. The alternatives that claimant has proposed seem to fit quite well into his limitations.

Claimant argues that since he apparently will not be gainfully employed again and his condition is related to the industrial injury, he is one hundred percent industrially disabled. The record, however, does not support a finding of permanent total disability. Although he did not state to what extent, Dr. Miller, in his March 28, 1978 report, stated that claimant's current condition is directly related to his April 1975 injury. Dr. Miller's conclusion in his March 28, 1978 report must be weighed against his diagnosis in his June 1, 1977 report. This was the last report from Dr. Miller before the original review-reopening decision was filed. In this report Dr. Miller stated: "Mr. Everett's present diagnosis is 1) status postoperative lumbar laminectomy and excision of herniated disc at L4-5, right, 2) marked degenerative arthritis and degenerative disc disease lumbosacral spine." Dr. Miller was concerned about the degenerative condition in claimant's back. This concern about the degenerative condition in claimant's back is found throughout the medical evidence presented in the record. In a report dated July 21, 1975, Leo J. Miltner, M.D., noted that claimant was suffering from degenerative disc disease which probably existed before the industrial injury. Thus, the deputy's consideration of the degeneration problem is well founded, for it contributes substantially to claimant's current condition.

It is found that claimant has an industrial disability of 50% of the body as a whole. This finding is based on a rejection of the deputy's emphasis on claimant's motivation and on an acceptance of the deputy's consideration of the degenerative back problem.

WHEREFORE, it is found:

That claimant has an industrial disability of fifty percent (50%) of the body as a whole.

* * *

Signed and filed this 3rd day of November, 1978.

ROBERT C. LANDESS
Industrial Commissioner

No Appeal.

HAZEL FARNUM,

Claimant,

vs.

HOERNER-WALDORF,

Employer,

and

AETNA CASUALTY & SURETY COMPANY,

Insurance Carrier,
Defendants.

Appeal Decision

Defendant employer, Hoerner-Waldorf, and its insurance carrier, Aetna Casualty & Surety Company, have appealed from a proposed review-reopening decision wherein claimant was awarded periods of temporary total disability and finally a running award.

* * *

The issue presented on appeal is whether claimant is entitled to temporary total disability for the periods awarded.

In the previous arbitration decision it was found that claimant had sustained a personal injury arising out of and in the course of her employment with defendant employer on or about April 15, 1975. It was further found that claimant sustained an industrial disability of 10%. Claimant was also awarded some healing period and temporary total benefits.

The finding of 10% permanent partial disability was based in part on the medical evidence presented by John T. Bakody, M.D., and Dr. Gustafson, M.D. Dr. Bakody noted that claimant had a permanent functional impairment of the low back and she was physically unable to do continued heavy lifting. Dr. Bakody agreed with claimant that she could perform the job of "inserter." An inserter has the task of placing a paper bag over a plastic bag liner which is considered light duty work in that it is less demanding physically than most tasks at defendant employer's plant.

Dr. Gustafson noted that claimant had a narrowing of the interspace between L5 and S1. Gustafson put a weight lifting restriction of 15 to 20 pounds on claimant. Claimant's age, education, and work experience were also considered in arriving at the 10% industrial disability rating. These findings were affirmed by the Polk County District Court.

The history of the present proceeding begins on July 12, 1976 when claimant returned to work for defendant employer as an inserter. However, when claimant reported to work on July 13 she was told to load bags on tables. This job required a lot of bending and lifting. Claimant continued at this job for about two and one-half hours. Claimant's back and legs then began to become numb and to cause her some pain. Claimant notified her supervisor that she could not do that type of work. Claimant was then told to quit if she could not do the job. Claimant worked the remainder of the day. On July 14 claimant could not get out of bed because of stiffness. Claimant went to see Dr. Gustafson that day. Although Gustafson did not give claimant a physical examination nor x-rays, he did tell claimant she was to do just light duty work. Claimant saw Gustafson again on July 21. Claimant was eventually x-rayed on July 28. These x-rays showed a narrowing of the L5-S1, but nothing else.

On July 26, 1976 claimant saw Dr. Blair, who suggested that an electromyograph and possibly a myelogram be run. At this point Dr. Blair could not diagnose a herniated disc and told claimant that she was to do only light duty work for at least three months.

Claimant was notified that she was to return to work on August 2, 1976. Claimant, however, went to see R. G. Hatchitt, D.O., on August 2 because her back and legs continued to bother her. Hatchitt released claimant for light duty work on August 3.

Claimant returned to work on August 3 and was assigned to a "bottomer." This was heavier work than inserting. After there was no more bottoming work, claimant had to scrub floors. Claimant testified that she had problems scrubbing the floor. For the next couple of weeks claimant worked various hours only on inserting work when it was available.

On September 2, 1976 claimant was told to unload a table of bags. When claimant refused because of her health problems, she was fired. From September 2, 1976 through October 16, 1976 claimaint did not work and there is no evidence in the record that she saw a doctor. On October 16 claimant was involved in a car accident in which her neck was injured. Claimant was treated by William L. Reinwasser, D.O., for the neck problem. Claimant's neck and back problems appear to be unrelated.

On November 8, 1976 Dr. Blair conducted a myelogram on claimant. The narrowing of the L5-S1 space appeared again as in previous x-rays, but no other objective findings were made. Blair noted that although there was some right sciatica and mild lumbosacral tenderness, there was no evidence of a herniated disc. Blair told claimant she could return to light duty work.

Claimant was in the hospital from December 1 through December 9 for neck problems. Claimant apparently had a flare-up in her back in January 1977 when she slipped on some ice. On March 3, 1977 Dr. Reinwasser released claimant for work in connection with the neck problem. Claimant was unemployed as of the time of the hearing.

Claimant has the burden of proving by a preponderance of the evidence that the exacerbation of July 13, 1976 is the cause of her claimed disability. *Lindahl v. L. O. Boggs Co.*, 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). Claimant is entitled to compensation if she had a preexisting condition or disability which was aggravated, accelerated, worsened or "lighted up" by an injury which arose out of and in the course of her employment. *Musselman v. Central Telephone Co.,* 261 Iowa 352, 154 N.W.2d 128 (1967). Iowa Code section 85. 33 states in part: "The employer shall pay to the employee for injury producing temporary disability . . . weekly compensation benefit payments for the period of his disability . . . ." Temporary disability as contemplated by section 85. 33 is total in nature and for claimant to be entitled to such compensation she must be unable to return to any type of work.

There are three different periods of time in which temporary disability was awarded to claimant by the deputy. The first period is from July 14, 1976 through August 2, 1976. Both Drs. Blair and Gustafson agree that claimant has a narrowing of the L5-S1 space and that this is the only objective sign of a back problem. This was the same problem that was present in the previous arbitration proceeding. However, it appears that claimant did have a flareup or exacerbation of a preexisting injury in this first period of time. Claimant was suffering from numbness and pain during this period which was related to her activities at work on July 13. Since there is a short amount of time involved in this period and claimant was seeking medical treatment, it can be reasonably concluded that her flare-up rendered her unable to work during this period. Although the evidence is not overwhelming and primarily circumstantial, claimant did sustain her burden of proving temporary total disability for this period.

The second period is from September 2, 1976 through October 16, 1976. On September 2, 1976 claimant was dismissed from her employment for refusing to lift some bags, and not because of any temporary flare-up of her condition. Her refusal was based on her physical restrictions and fear of another flare-up. Claimant has already been compensated for her permanent partial disability which arose out of the April 1975 injury. According to Dr. Blair, claimant's current condition is related to the 1975 injury. Thus claimant is only entitled to additional compensation for a flare-up of this condition. As there is no evidence that claimant's unemployment during this period was due to a flare-up, claimant is not entitled to temporary compensation for this period. Claimant's disability from October 16, 1976 through March 3, 1977 was due to an automobile accident which is unrelated to any industrial disability.

The third period entails a running award of temporary total disability commencing on March 3, 1977. All the doctors involved in this proceeding agree that claimant is able to return to light duty work. Dr. Blair even stated that claimant should increase her physical activity within certain restrictions on lifting and bending. These are the same restrictions which Dr. Gustafson placed on claimant after the April 1975 injury. Also it must be emphasized that the only objective findings found concerning claimant's current condition were in existence during the original arbitration proceeding. There is no evidence that claimant's current condition is any different than it was during the arbitration proceeding in which a permanent partial disability was established. The medical evidence overwhelmingly indicates that claimant's current condition is the same as it was at the conclusion of the original arbitration proceeding and that she is capable of doing the same work she could do following the arbitration proceeding. Claimant has failed to satisfy her burden of proof for a running award of temporary total disability.

* * *

Signed and filed this 4th day of January, 1979.

ROBERT C. LANDESS
Industrial Commissioner

Appealed to District Court: Affirmed.

HAZEL FARNUM,

Claimant,

vs.

HOENER-WALDORF,

Employer,

and

AETNA CASUALTY &
SURETY COMPANY,

Insurance Carrier,
Defendants.

Order

BE IT REMEMBERED that on April 3, 1979 claimant herein filed a motion for default. Said motion alleged that the defendants received a copy of claimant's petition on February 23, 1979 and had failed to appear or to answer within twenty days of service of said petition. No resistance to said motion was filed; however, on April 6, 1979 defendants filed their answer to claimant's petition.

Review of the industrial commissioner's file reveals that on February 23, 1979 claimant filed an application for review-reopening and Code section 85. 27 benefits. Affidavit of Mailing the original notice and petition was filed on April 3, 1979. The Motion For Default with attached copies of the return receipt from the employer and from the insurance carrier was also filed on April 3, 1979.

Industrial Commissioner Rule 500-4.9 states that "[a] respondent shall appear within twenty days after the service of the original notice and petition upon such respondent." Industrial Commissioner Rule 500-4.36 permits the industrial commissioner to close the record to further activity or evidence by a party failing to comply with the rules of the agency. Default judgments have been entered for failure to timely respond to an original notice and petition. See *Frances Sherwood vs. Collins Radio Company,* 33rd Bien-

nial Report of the Industrial Commissioner, page 66.

Unlike the *Sherwood* case wherein the defendant did not respond within ten days to claimant's motion for default, the defendants herein filed an answer within three days of the filing of the motion. However, as indicated above, no reason for the forty-three day delay in answering the petition was given by defendants in resistance to the motion for default. It may be that some excusable neglect existed for the delay. See and compare *Dale E. Jensen v. Conger Construction Company and Employer's Insurance of Wausau,* 33rd Biennial Report of the Industrial Commissioner, p. 66.

It should be noted that Industrial Commissioner Rule 500-4.9 quoted in the *Jensen* case was the predecessor of the rule in effect today and required an appearance to be filed within twenty days after filing the original notice and petition rather than within twenty days after the respondent was served with said petition. Although prior to said rule change, it might have been argued that because Industrial Commissioner Rule 500-4.8 (in effect then and now) states that "[n]o action shall be taken on any contested case until a copy of the original notice, and petition if required, is filed in compliance with this rule," and that such notice and petition shall be accompanied by proof of mailing, defendants had twenty days from the date proof of mailing "completed" the filing of the original notice and petition to respond, such analysis would not apply to the present case, and, more importantly for purposes of ruling on the present motion for default, any failure to adhere to changes in the Industrial Commissioner Rules would not constitute excusable neglect. In examining the reasons for setting aside a default judgment, the Iowa Supreme Court stated:

> What constitutes good cause in relation to grounds of mistake, inadvertence and excusable neglect has been settled in our cases. Good cause is a sound, effective, truthful reason, something more than an excuse, a plea, apology, extenuation, or some justification for the resulting effect. The movant must show his failure to defend was not due to his negligence or want of ordinary care or attention, or to his carelessness or inattention. He must show affirmatively he did intend to defend and took steps to do so, but because of some misunderstanding, accident, mistake or excusable neglect failed to do so. Defaults will not be vacated where the movant has ignored plain mandates in the rules with ample opportunity to abide by them. (citations) *Dealers Warehouse Co. vs. Wahl & Associates,* 216 N.W.2d 391, 394-95 (Iowa 1974).

WHEREFORE, it is found that review of the file does not indicate wherein a ruling of excusable neglect would be justified, and therefore, a default judgment will be entered at this time. In the event the defendants determine they have evidence of excusable neglect, they may timely move to set aside the default judgment.

THEREFORE, IT IS ORDERED that defendants herein are in default for failure to timely respond to an original notice and petition as required by Industrial Commissioner Rule 500-4.9, a hearing will be scheduled for the claimant to establish the nature and extent of permanent disability and the reasonableness and necessity of medical care resulting from the industrial injury in issue. Pursuant to Industrial Commissioner Rule 500-4.36, the record will be closed to further activity or evidence by the defendants.

Signed and filed this 12th day of April, 1979.

LEE M. JACKWIG
Deputy Industrial Commissioner

No Appeal.

ELMER C. FEURING,

Claimant,

vs.

CHARLES FEURING, d/b/a
DEXTER QUALITY MEATS,

Employer,

and

UNITED FIRE & CASUALTY CO.,

Insurance Carrier,
Defendants.

Appeal Decision

Defendant employer, Charles Feuring, d/b/a Dexter Quality Meats, and its insurance carrier, United Fire & Casualty Company, have appealed from a proposed arbitration decision wherein claimant was awarded permanent partial disability, healing period and medical expenses.

The defendant employer, Charles Feuring, owns and operates Dexter Quality Meats, a small meat processing plant which engages in custom meat processing, as well as wholesale and retail sales. In conjunction with this operation, he purchases cattle for slaughter and processing. Of the cattle purchased, only the fat cattle go directly to Dexter Quality Meats for processing, while the rest are kept at defendant's farm for fattening.

The defendant's farm is over twenty miles from the meat processing plant and is thirty-four acres in size. The farm is used to raise corn, oats and hay for the purpose of fattening the cattle at the farm -- a process taking from sixty to ninety days -- and to raise horses. Once the cattle are fattened, they are transported to Dexter Quality Meats for processing.

Claimant, Elmer C. Feuring, the sixty-year-old father of the defendant employer, was employed full-time by his son to perform a variety of jobs at Dexter Quality Meats. However, perhaps once a week at his son's request he would do jobs at his son's farm.

On November 16, 1977 the defendant told the claimant to go to the farm and feed the cattle, a job entailing picking corn. Claimant was injured while trying to extract a cornstalk that had caught in the corn picker he was operating at the farm.

The issue in this case is whether claimant should have been exempted from coverage under section 85.1(3) as an agricultural employee, and further whether claimant should have been exempted from coverage under section 85.1(3)(b)(1) because he was defendant employer's father.

The defendants on appeal allege that well-established Iowa case law applicable to this case would exempt claimant from coverage as an agricultural employee under section 85.1(3). They further allege that claimant is exempted from coverage as the father of defendant employer under section 85.1(3)(b)(1).

Section 85.1, Code of Iowa, provides that:

> Except as provided in subsection 5 of this section, this chapter shall not apply to:
>
> * * *
>
> 3. Persons engaged in agriculture, insofar as injuries incurred by employees while engaged in agricultural pursuits or any operations immediately connected therewith whether on or off the premises of the employer, ...

Claimant, contending that he was not engaged in agriculture, relies on 1B *Larson's Workman's Compensation Law,* §53.32 at 9-115, and *Bob White Packing Co. v. Hardy,* 340 S.W.2d 245 (Ky. 1960). These cited authorities are distinguishable from the present case. More importantly, they are not compatible with the Iowa case of *Crouse v. Lloyd's Turkey Ranch,* 251 Iowa 156, 100 N.W.2d 115 (1959), which is on point in this case and which indicates that claimant was engaged in agriculture within the meaning of the above cited statute.

Crouse involved a six-acre tract of land owned by the defendant employer and used for raising turkeys and chickens. The employer also maintained and operated a turkey processing plant on the same land. The claimant was injured while working in the processing plant. The Iowa Supreme Court found the question in *Crouse* to be when the processing of crops raised on a farm ceased to be agriculture and becomes a commercial enterprise. The court defined "agriculture" as:

> The art or science of cultivating the ground, including harvesting of crops and rearing and management of livestock.
>
> * * *
>
> It is the equivalent to husbandry . . . the business of a farmer, comprehending agriculture of tillage of the ground, the raising, managing and fattening of cattle and other domestic animals, the management of the dairy and whatever the land produces.

The court found the employer to be engaged in agriculture, but stated that an employer may be engaged in two distinct occupations, one agricultural and one commercial, manufacturing, or otherwise industrial. The court reaffirmed this view in the more recent case of *Snook v. Herrmann,* 161 N.W.2d 185 (Iowa 1968). In determining whether the employer was merely engaged in agriculture or in two distinct occupations, the court in *Crouse* used the following analysis:

> There is no evidence as to the custom of turkey raisers in processing their own turkeys, or selling them live. The New Jersey Supreme Court has held that the cleaning, grading and packing of potatoes is essential to the preparation of the potatoes for market, and so excluded from the Unemployment Compensation Law. (Citations) . . . . But we think there is a difference between the processing of potatoes involved therein and the slaughter of turkeys. If the defendant had been engaged in extensive raising of hogs, or cattle, and had set up a packing plant on his premises, we think it would not be greatly debatable that he was engaged in two different occupations, one within and one excluded from the Act. The record shows it was possible to sell the turkeys alive, because the defendant did so with about one half of his crop.

The Iowa court determined that the employer was engaged in two distinct occupations, one agricultural and one non-agricultural. They ruled that the claimant was entitled to recover, because her injury occurred while she was engaged in the non-agricultural occupation of her employer, which is covered under the Iowa Workers' Compensation Act. To be excluded from the act, one must meet the limitations the court adopted from Maurice H. Merrill's analysis of this statute, 32 Iowa Law Review 1, 7, which states:

> The exclusion is limited to people [persons] who are 'engaged in agriculture' and then only if at the time of injury they are engaged in an agricultural pursuit or an operation closely connected therewith.

It is clear from the court's reasoning in *Crouse* that the defendant employer in this case is involved in two distinct occupations. His farm, where he fattens his cattle, is clearly agricultural in nature under the Iowa Supreme Court's definition of agriculture. The farm is not essential to the operation of defendant's meat processing plant, as is evidenced by his ability to buy and slaughter fattened cattle purchased on the open market. The meat processing plant, however, is a non-agricultural business.

It is also clear that under the agricultural exclusion analysis that the court adopted in *Crouse,* claimant is barred from compensation. The claimant was engaged in agriculture as defined by the court, and at the time of his injury he was engaged in an agricultural pursuit. Therefore, claimant falls under the exemption of section 85.1(3).

As was mentioned earlier in this decision, authorities which supported a view contrary to the one seen in *Crouse* are distinguishable from this case. *Larson's, supra,* states:

> Similarly, it has been held that when a packing company acquires land on which to keep animals pending slaughter, and carries on some farm work there, a claimant employed for such work is not an agricultural worker, since the 'farming' is essentially part of the meat-packing process.

The employer's farm in this case is not used to keep animals pending slaughter. The evidence shows that fattened cattle are taken directly to Dexter Quality Meats for processing. The cattle kept at the farm are there to be fattened for sixty to ninety days. This is an agricultural

pursuit that is not essential to the meat processing plant.

The facts of the case of *Bob White Packing Co. v. Hardy, supra,* show that the defendant owned a farm where cattle purchased to be processed by his meat packing company were kept until they were slaughtered. As with the above cited authority, the farm was used solely in a custodial sense and not as a cattle-feeding operation. If cattle could not be immediately slaughtered upon arrival at the plant, it was essential that they be kept somewhere until they could be slaughtered. In *Bob White,* the farm could be seen as essential to the meat packing company. This was not the situation in this case, where the farm was not used to store cattle just prior to slaughter but to fatten the cattle over a period of time in preparation for slaughter. *Bob White* does not address itself to the facts of this case, where it is obvious that *Crouse* does.

As the claimant was engaged in agriculture, the exemption under section 85.1(3) (b) (1) appears to apply. This section in part states that:

> b. The following persons or employees or groups of employees shall be specifically included within the terms of the exception from coverage of this chapter provided by this subsection:
>
> (1) The spouse of the employer and parents, brothers, sisters, children and stepchildren of either the employer or the spouse of the employer; . . . .

As the claimant is the father of the defendant, claimant is exempted from coverage under section 85.1(3) (b) (1).

WHEREFORE, it is found:

That defendant employer's business could be divided into a commercial enterprise and an agricultural operation.

That claimant's injury of November 16, 1977 occurred when he was working in the agriculture operation and is therefore excluded from coverage under Iowa Code section 85.1(3).

That claimant is further excluded from coverage because he is the father of defendant employer and thus exempted by Iowa Code section 85.1(3) (b) (1).

THEREFORE, it is ordered:

That claimant take nothing from these proceedings.

That defendants pay costs.

Signed and filed this 26 day of April, 1979.

ROBERT C. LANDESS
Industrial Commissioner

Appealed to District Court; Pending.

RANDY LEE FOX,

Claimant,

vs.

WATER SYSTEMS, LTD., and HAROLD COWDIN,

Employer,
Uninsured,
Defendants.

Arbitration Decision

This is a proceeding in arbitration brought by Randy Lee Fox, the claimant, against his employer, Harold Cowdin individually and doing business as Water Systems Ltd., uninsured, to recover benefits under the Iowa Workmen's Compensation Act as a result of an injury he sustained on June 26, 1976.

* * *

Claimant amended his application for arbitration prior to the hearing naming Harold Cowdin as an additional defendant, the defendant's corporation having been formed after the industrial injury in question.

* * *

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

Claimant, single, age 21 had been employed beginning in March 1976 as an installer and repairman of residential water systems. For work performed, claimant received a series of payroll checks (claimant's exhibit Q) signed by Harold E. Cowdin on an account carried with Iowa Des Moines National Bank and Bankers Trust respectively in the name of Lindsay Water Conditioning Co. Defendant-employer was the holder of a franchise for Lindsay as a sole proprietor. As part of claimant's duties he was required to journey to Newbury, Ohio in order to pick up equipment. These trips were always made on a weekend.

Defendant-employer had accompanied the claimant on one of the previous trips. Claimant had relatives living in Dover, Ohio and since these weekend trips to Newbury, Ohio began on Friday night with the pickup of equipment scheduled for Monday morning, it was claimant's practice to "overnight" in Dover. Defendant-employer accompanied claimant during one of these trips staying overnight with claimant at claimant's relative's residence in Dover. Defendant-employer reimbursed claimant for all fuel purchased during the journey. Defendant-employer did not pay motel expense since by staying with relatives no such expenses were incurred. Notwithstanding that claimant was the registered owner of the truck being used to haul the equipment, defendant-employer paid the necessary insurance premiums and also paid the monthly payments to the lending institution that had loaned claimant the funds used to purchase the truck.

On June 26, 1976, a Saturday, at 5:41, a.m., the claimant, while last bound on Interstate Highway 70 in Hancock County Indiana, fell asleep, left the roadway and rolled over (joint exhibit 1).

Defendant-employer has refused to reimburse the claimant for his medical expenses incurred by him as necessary to treat the injuries sustained, bringing to the fore the primary issue in this matter which is whether or not the claimant was in the course of his employment activities at the time of the accident.

> In order for an injury or death to be compensable, it must occur within the scope of employment. Injury or death within the scope of employment, in turn, must both arise out of and occur in the course of employment. §85.3, The Code. *McClure v. Union, et al., Counties,* 188 N.W.2d 283, 287 (Iowa 1971). See

Cedar Rapids Community School v. Cady, 278 N.W.2d 298, 299 (Iowa 1979).

Also see, *Hawk v. Jim Hawk Chev.-Buick, Inc.,* 282 N.W.2d 84, (Iowa 1979).

Claimant must conceed that his side trip to Dover, Ohio is not on the most direct route between Des Moines and Newbury, Ohio. However, the defendant, by his failure to pay motel expenses, contemplated that claimant would be staying overnight in Dover, especially in light of having done so personally during a previous trip and after having knowledge of claimant's intention to overnight in Dover, cannot now object to claimant's activities.

It is held that the claimant was within the scope of his employment at the time of the motor vehicle accident in question. Claimant was on a mission for the defendant-employer, taking a circuitous route, with the defendant's tacit approval.

* * *

Claimant, upon return from Dover, Ohio resigned his position with the defendant-employer after one week and on August 30, 1976 enlisted in the United States Air Force.

On September 27, 1976 the claimant was separated from the Air Force under honorable conditions (joint exhibit 2).

While so serving as an air-man, claimant sustained a "back injury" which occurred around September 3, 1976 (joint exhibit 2). Claimant's claim for a service connected disability seems to have been denied, in that he testified that he received a medical discharge in September.

On October 21, 1977 claimant was seen by Walter G. Robinson, Jr., M.D., an orthopedic surgeon in the state of Colorado, who upon examination reported as follows:

> 10-21-77: (Dr. R)
>
> Pt. is a 20 year old Caucasian male brought in by his father, Mr. Richard Fox, whom I saw in consultation at Lutheran Hospital for Dr. John Mara. Pt. has been having low back pain since about 1972. At that time, he was involved in an auto accident and sustained a whiplash injury to his neck. X-rays were taken of his back because of low back pain and this revealed an abnormality in the lumbar spine. In 1976 he rolled his pickup truck and was re-x-rayed because of increasing low back pain and was told that his condition had slightly worsened. He has been cared for in the past by a chiropractor in Ohio were manipulations were carried out to no real avail. He says the pain in his low back radiates into both hips and slightly into the left thigh. His hips feel numb at times, and there is a hot burning feeling in his back when the pain is particularly bad. He worked as a framer for a construction company which requires a lot of time up on his feet and also some heavy lifting and carrying and this seems to aggravate his problem. He has had ultrasound and physical therapy in the past with no relief but has not ever worn a brace. He states the pain is so bad that it wakes him up at night and he is acutely interested in having something done.

Notwithstanding that just some 30 days prior to the visit to Dr. Robinson, claimant had received a medical discharge following a "back injury" sustained around September 3, 1977, none of this information is contained in the medical history taken by the doctor. This concealment of such vital medical information renders the claimant's entire testimony suspect and such testimony is given little weight in this decision.

It follows there that the medical evidence of Dr. Robinson, since it is based upon a partial and incomplete history, must also be disregarded.

The claimant has the burden of proving by a preponderance of the evidence that the injury of June 26, 1976 is the cause of the disability on which he now bases his claim. *Bodish v. Fischer, Inc.,* 257 Iowa 516, 133 N.W.2d 867 (1965). *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 testimony. *Bradshaw v. Iowa Methodist Hospital,* 251 Iowa 375, 101 N.W.2d 167 (1960).

In applying the foregoing legal principles to the case at hand it is clear the claimant has failed in the burden of proof in that the testimony concerning his "injury" is found to be unreliable.

* * *

Signed and filed this 27 day of March, 1980.

HELMUT MUELLER
Deputy Industrial Commissioner

No Appeal.

GARY FREMONT,

Claimant,

vs.

GOMACO CORPORATION,

Employer,

and

TRAVELERS INSURANCE COMPANY,

Insurance Carrier,
Defendants.

Appeal Decision

This is a proceeding brought by defendants, Gomaco Corporation, employer, and Travelers Insurance Company, insurance carrier, appealing a proposed arbitration decision wherein claimant was found to have sustained a 22% permanent partial disability to the body as a whole.

* * *

Claimant sustained a myocardial infarction on December 12, 1975 which he asserts was precipitated by emotional stress and strain caused by his employment. The deputy industrial commissioner found that there were stress factors

at claimant's place of employment greater than those in his nonemployment environment sufficient to bring about the attack. Defendants contend on appeal that claimant's myocardial infarction did not arise out of and in the course of his employment.

Claimant testified to continued mental and emotional stress and strain in his employment environment such as the failure to receive adequate guidance in new projects undertaken and the absence of positive reinforcement for tasks completed. According to claimant's testimony, his paycheck received December 12, 1975 did not include an amount as high as he expected for a salary increase and bonus. On that day claimant received his paycheck shortly before noon. Claimant testified to being infuriated and frustrated as a result of not receiving the raise. He vocalized his dissatisfaction about the paycheck and the company to a co-worker. He then drove the six to seven miles to his home for lunch and told his wife of his threats to quit. Claimant wrote out some checks to pay bills and his bank deposit while at home and then proceeded back to work, stopping at a service station to pay a fuel bill and to fill his car with gas. While at the station, claimant testified that he experienced a "light-headed, tingly-type of feeling." Claimant continued on toward work but began to feel worse and turned around to go back home. Claimant complainted to his wife about feeling sick and was shortly thereafter taken to the hospital by his wife. The diagnosis of his condition was acute myocardial infarction.

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. "Arising out of" the employment contemplates a causal connection between the employment and the injury. *Volk v. International Harvester Company,* 252 Iowa 298, 106 N.W.2d 649 (1960). To establish causal connection, it must be shown that an employee has received a compensable injury which "materially" aggravates or accelerates a preexisting condition, resulting in disability or death. *Yeager v. Firestone Tire & Rubber Co.,* 253 Iowa 369, 112 N.W.2d 812 (1961). A personal injury results when an employee's condition is "more than slightly" aggravated. *Ziegler v. U.S. Gypsum Co.,* 252 Iowa 613, 106 N.W.2d 591 (1961).

In *Almquist v. Shenandoah Nurseries,* 218 Iowa 724, 254 N.W.35 (1934), the Iowa Supreme Court, in defining personal injury at 732, , said:

> 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.

Sondag v. Ferris Hardware, 220 N.W.2d 903 (Iowa 1974), sets out two theories by which a claimant with a preexisting heart condition may recover workers' compensation benefits with proper medical evidence. The court, at 905, said:

> In the first situation the work ordinarily requires heavy exertions which, superimposed on an already-defective heart, aggravates or accelerates the condition, resulting in compensable injury.

The court further elaborates on this theory by noting that where there is a personal contribution to the injury, that is a weakened or diseased heart, the employment must contribute an exertion greater than that evident in nonemployment life.

Accepting arguendo claimant's testimony that he did not experience stress and strain on the job, the question is whether or not this strain was greater than that experienced in the nonemployment life of this or any other person.

Physical exertion is not involved in the case subjudice but rather the alleged mental and emotional stress and strain which resulted from the failure of claimant to receive an expected salary raise and bonus. This was the significant employment event on the day the claimant sustained his myocardial infarction.

Claimant's theory that emotional stress brought about by his personal feelings that he was not being paid what he was worth and therefore should receive benefits for a coronary attack precipitated by stress brought about from receiving a paycheck that included less than he anticipated is unique. Under this theory a majority of the working public could bring claims for any number of nervous disorders as the feeling of being undercompensated is shared by a large number of workers.

There is little doubt that everyone experiences stressful situations in the employment setting as well as nonemployment life. It is also without question that individuals have differing emotional reactions to these instances. The circumstances testified to by the claimant as causing him stress and strain were not unusual or uncommon among employees. In comparison to one's nonemployment life, it cannot be said that claimant's experience at work produced a greater degree of stress and strain than unfulfilled expectations in nonemployment life. Therefore, claimant's claim must fail under this theory.

The second theory enumerated in *Sondag, supra,* comes into play when the medical testimony reveals an episode of "unusually strenuous employment exertion" coupled with preexisting heart disease. There was no physical stress as in *Guyon v. Swift & Co.,* 229 Iowa 625, 295 N.W. 185 (1940), which was cited by the court in *Sondag, supra,* in support of the second theory of compensability, in which case the employment exertion on the day in question was the emergency repairing of a conveyor which involved extensive physical activity.

As previously noted, the incidents of stress and strain testified to by claimant were not uncommon to an employment setting nor greater than those experienced by an individual in his nonemployment life. Furthermore, the record does not reveal that claimant was involved in an incident of excessive physical exertion.

Drs. Mohiuddin and Sinnott both testified to the existence of a preexisting arteriosclerotic condition. As stated in *Sondag, supra,* at 905, quoting from *1A Larson's Workmen's Compensation Law,* §38.83, p. 7-172:

> But when the employee contributes some personal element of risk -- e.g., by having * * * a personal

disease -- we have see that the employment must contribute something substantial to increase the risk. * * *

The evidence is insufficient to establish by the requisite preponderance that claimant's condition was a result of an injury arising out of and in the course of his employment.

* * *

Signed and filed this 13 day of February, 1979.

ROBERT C. LANDESS
Industrial Commissioner

Appealed to District Court: 2/27/79

VIRGINIA M. FULLER, as surviving spouse of LIONEL M. FULLER, deceased,

Claimant,

vs.

INTERNATIONAL HARVESTER COMPANY,

Employer,
Self-Insured,
Defendant.

Appeal Decision

This is a proceeding brought by claimant, Virginia M. Fuller, surviving spouse of Lionel M. Fuller, deceased, appealing a proposed arbitration decision wherein claimant was denied benefits but for 5% of two specified medical bills.

* * *

Claimant contends that the decedent's employment activity was the proximate cause of decedent's death on May 20, 1976. Claimant further contends that decedent's work on April 23, 1976 either precipitated or aggravated decedent's myocardial infarction for which he was hospitalized on April 27, 1976. Decedent did not work between April 27, 1976 and May 20, 1976, the date of his death.

On April 19, 20, and 21 of 1976 (Monday-Wednesday), decedent was working the night shift at defendant employer's, which went from 4:30 p.m. to 1:00 a.m., and was involved in repairing his home, which had suffered damage due to fire, during the day. On April 22, decedent attended a mechanic's school. The following morning decedent began to experience aching chest pain which persisted until about one-half hour after he arrived at work. Claimant and decedent spent an uneventful weekend with decedent returning to his painting on Monday, April 26, and work that evening. Decedent became ill upon his arrival home and was subsequently hospitalized during the early morning of April 27, 1976. His condition was diagnosed as a myocardial infarction.

Claimant contends that decedent's going to work on April 23, 1976 aggravated a myocardial infarction already in progress, or in the alternative, precipitated the infarction which resulted in decedent's hospitalization on April 27, 1976.

In *Sondag v. Ferris Hardware,* 220 N.W.2d 903 (Iowa 1974), the court stated at 906: "It has long been legally recognized that damage caused by continued exertions required by the employment after the onset of a heart attack is compensable." The case sub judice is clearly distinguishable from the facts in *Sondag.* In *Sondag* the onset of symptoms occurred while work for the employer was being performed. In the case sub judice decedent went to his employment at 4:30 p.m. after having suffered from symptoms of a heart attack since early morning of the same day. The symptoms subsided a half hour after arriving at his job. On the day before the onset of the symptoms, the only work activity on behalf of the employer was attending a mechanics school during the day. The evidence does not disclose anything to precipitate symptoms occurred while claimant was at this school. On the days prior to April 27, 1976, the decedent's activities in addition to his normal work activities included painting on a house he owned.

The deputy commissioner found, and rightly so, that if the myocardial infarction occurred on April 27, 1976, the incident was not compensable in that decedent's employment activity was no greater than his nonwork activity. *Sondag, supra.*

Dr. Paul From, decedent's treating physician, testified that the decedent's myocardial infarction was 90% due to decedent's preexisting arteriosclerotic condition, and the remainder was due to aggravation on the job. The aggravation was attributed to both psychological and physical factors. The psychological stress was said to be a result of his working the night shift. The evidence supports the finding that claimant was not experiencing psychological stress as a result of being on the night shift, but rather preferred this shift at this particular time as he was working on his home during the day. Thus, a psychological stress factor is not found to exist as to decedent's employment. The physical factor included in Dr. From's "remainder" was, at the most, minimal.

Whether an injury or disease has a direct causal connection with the employment or arose independently thereof is essentially within the domain of expert testimony. *Musselman v. Central Telephone Co.,* 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).

To establish causal connection, it must be shown that an employee has received a compensable injury which "materially" aggravates or accelerates a preexisting condition, resulting in disability or death. *Yeager v. Firestone Tire & Rubber Co.,* 253 Iowa 369, 112 N.W.2d 812 (1961). A personal injury results when an employee's preexisting condition is "more than slightly" aggravated. *Ziegler v. U.S. Gypsum Co.,* 252 Iowa 613, 106 N.W.2d 591 (1961). The testimony most favorable to the claimant is insufficient to

establish the requisite causal connection.

The evidence indicates that decedent's first instance of pain occurred on April 23, 1976. The onset of pain occurred after a period of relatively sedentary activity and subsided approximately one-half hour after he arrived at work. Although there was evidence that the decedent performed a somewhat heavy job during his first hours of work that evening, decedent experienced no further pain until three days later following an uneventful weekend and a day of painting and work on April 26, 1976.

The Iowa Supreme Court in *Almquist v. Shenandoah Nurseries,* 218 Iowa 724, 254 N.W. 35 (1934), at 731, , stated: "[t]he result 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." In defining a personal injury the court at 732, , said:

> A personal injury, contemplated by the Workmen's Compensation Law, obviously means an injury to the body, the impairment of health, or a disease . . . 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.

To accept claimant's position would extend compensation to every person who is employed who dies as a result of a myocardial infarction. Claimant's position is equivalent to stating that compensation must be paid to all individuals whose work activity as well as nonwork activity contributed to a condition which eventually resulted in death.

WHEREFORE, claimant should be denied benefits under the Iowa Workmen's Compensation Act.

* * *

Signed and filed this 7 day of December, 1978.

ROBERT C. LANDESS
Industrial Commissioner

No Appeal.

OSCAR GADDY,

Claimant,

vs.

IOWA BEER AND LIQUOR CONTROL COMMISSION,

Employer,

and

STATE OF IOWA,

Insurer,
Defendants.

Appeal Decision

This is a proceeding brought by claimant, Oscar Gaddy, appealing a proposed review-reopening decision wherein claimant was denied further benefits under the Iowa Workmen's Compensation Act.

* * *

The injury which is the subject of this action occurred on July 1, 1975. Claimant was paid 36 weeks of benefits plus medical expenses as evidenced by a Form 5 filed May 17, 1976.

Claimant was informed that his benefits would be terminated and of his right to file an application for review-reopening by a letter dated April 15, 1976, On June 14, 1976, claimant's original notice and petition for review-reopening was filed alleging further disability. A decision rendered July 25, 1977 denied claimant's request and found that claimant had no resulting disability from his injury on July 1, 1975.

Claimant filed an application for rehearing before the deputy industrial commissioner on August 2, 1977. This application was denied in an order filed August 16, 1977. Claimant subsequently appealed the deputy's decision to this commissioner on August 19, 1977. The record was closed on appeal as of January 20, 1978. In a motion for summary judgment filed June 2, 1978, claimant alleged that his due process rights had been violated by the defendants' termination of his workers' compensation benefits based upon *Auxier v. Woodward State Hospital-School,* 266 N.W.2d 139 (1978). Claimant's motion was denied by this commissioner on June 27, 1978, noting that even if *Auxier, supra,* was applicable, it did not justify a motion for summary judgment at this stage of the proceedings. Claimant then appealed this determination to the district court, also seeking a writ of mandamus to compel officials of the State of Iowa to take steps to pay claimant weekly compensation from the date of termination, April 16, 1976, to July 23, 1977. Claimant subsequently dismissed this appeal without prejudice on September 12, 1978. Thus, the final decision rests with this commissioner as to the nature and extent of claimant's disability and the applicability of *Auxier, supra,* to the case sub judice.

The deputy industrial commissioner determined that claimant had not sustained any permanent disability as a result of the July 1975 incident and thus denied further benefits. On reviewing the record, it is found that the deputy commissioner's proposed findings of fact and conclusions of law are proper. Therefore, we may proceed to the second issue in this matter.

The decision in *Auxier, supra,* was filed by the Iowa Supreme Court on May 17, 1978. The court held in that case that the claimant had been denied due process of law when her workers' compensation benefits were unilaterally terminated without sufficient notice. The court proceeded to establish five due process requirements. Of primary importance is the thirty-day notice requirement prior to termination of benefits. At the time this decision was rendered, the deputy commissioner's decision in the instant case was on appeal to this commissioner and the record had been closed. Claimant's benefits in this matter were

terminated more than two years before the decision in *Auxier, supra.* Thus, the issue remains as to the applicability of that decision to the case sub judice.

The majority of cases which deal with the retroactivity or prospectivity of judicially-established constitutional rights are in the criminal law area; however, it is arguable that this same approach should be used in the civil area as well where a constitutional right is in issue. The United States Supreme Court in *Linkletter v. Walker,* 381 U.S. 618, 85 S.Ct. 1731, 14 L.Ed.2d 601 (1965), noted that there is no distinction between civil and criminal litigation when considering the retrospective/prospective issue. In that case, the court was faced with determining the application of the exclusionary rule under *Mapp v. Ohio,* 367 U.S. 643 (1961), to an individual convicted some time before the decision was filed.

In *State v. Monroe,* 236 N.W.2d 24, 38 (1975), a criminal case, the Iowa Supreme Court cited *Linkletter, supra,* and adopted a number of considerations utilized by the United States Supreme Court in resolving the retrospective/prospective issue.

> In a substantial number of opinions subsequent to *Linkletter,* the United States Supreme Court has consistently looked to a number of considerations in determining the extent to which a change of law will be made retroactive. These considerations include the purpose of the new standards, the reliance which may have been placed upon prior decisions on the subject, and the effect on the administration of justice of a retroactive application. [Citing authorities] Underlying all of the considerations above is the basic inquiry as to how seriously the invalid prior rule affected the very integrity of the fact-finding process or produced the clear danger of convicting the innocent.

A civil case in Iowa which deals with the issue is *Catholic Charities of Archdiocese of Dubuque v. Zalesky,* 232 N.W.2d 539 (1975). In that case, the Iowa Supreme Court held that the father of an illegitimate child must be accorded notice and an opportunity to be heard regarding a proposed adoption of the child. Although the case represents a different area of the law than that under consideration here, the court, when considering its retroactive effect, stated:

> And if such requirements were to be applied retroactively the impact would be chaotic. Surely the interests of society, tranquility of many homes, and rights of numberless children presently enjoying a wholesome family environment outweighs any procedural flaws which may have attended such previously effected adoptions.

Applying these considerations to the case sub judice, it is found that the requirements established by *Auxier v. Woodward State Hospital-School,* 266 N.W.2d 139 (1978), do not apply to those cases in which benefits were terminated prior to May 17, 1978. Those claimants who did not receive the benefit of the thirty-day notice requirement and were subsequently found to be disabled in a review-reopening proceeding were not deprived of those additional benefits, but their receipt was merely postponed. The result of a retroactive determination would be an influx of claims seeking additional benefits without even a showing of continued disability from those whose benefits were terminated without a thirty-day notice. Such a result would create insurmountable burdens on employers, insurers and this agency. In essence, the considerations weigh heavily in favor of prospective application.

Based upon a review of the record and the additional findings previously noted, claimant's application for relief should be and is hereby denied.

* * *

Signed and filed this 11 day of October, 1978.

ROBERT C. LANDESS
Industrial Commissioner

Appealed to District Court: Affirmed.

GARY GARNER,

Claimant,

vs.

ARMSTRONG RUBBER COMPANY,

Employer,

and

LIBERTY MUTUAL INSURANCE CO.,

Insurance Carrier,
Defendants.

Appeal Decision

Defendant employer, Armstrong Rubber Company, and its insurance carrier, Liberty Mutual Insurance Company, have appealed from a proposed arbitration decision wherein claimant was awarded certain medical and mileage expenses.

* * *

On August 19, 1977 the claimant strained his back and neck when he slipped on some oil on the defendant employer's plant floor. The claimant continued to work after his injury, but was placed on light duty work by the company doctor, William P. Wellington, M.D.

The events that have followed since the claimant was placed on light duty work status can best be characterized as an effort by the claimant to be reinstated to full duty work status. Besides seeing Dr. Wellington, he had himself examined by Marshall Flapan, M.D., Edward L. Miles, D.O., and James Laughlin, D.O. It appears from the record that the claimant was not seeking medical treatment from these physicians, but rather a medical release to return him to full duty work.

Apparently, the defendant employer's physician and the claimant's physicians did not agree as to the work status of the claimant. So, in accordance with the contract in force between the defendant employer and the claimant's union,

a meeting took place between the parties. As a result it was decided to seek the opinion of a third doctor, Peter D. Wirtz, M.D., whose opinion of claimant's work status would be taken as dispositive of the issue by both parties. In line with Part IV, Article XVI, Section 16.13 of the employee benefit programs between the defendant employer and the claimant's union, the cost of Dr. Wirtz's examination and opinion was to be borne equally by the parties involved. The claimant brought this arbitration proceeding before the commissioner to compel the defendant employer to pay for all of Dr. Wirtz's bill, in addition to other medical expenses and mileage incurred in the course of events since claimant's injury.

The claimant relies on Iowa Code section 85.27, which states in part:

> For purposes of this section, the employer is obliged to furnish reasonable services and supplies to treat an injured employee, and has the right to choose the care. The treatment must be offered promptly and be reasonably suited to treat the injury without undue inconvenience to the employee. If the employee has reason to be dissatisfied with the care offered, he should communicate the basis of such dissatisfaction to the employer, in writing if requested, following which the employer and the employee may agree to alternate care, the commissioner may, upon application and reasonable proofs of the necessity therefor, allow and order other care. In an emergency, the employee may choose his care at the employer's expense, provided the employer or his agent cannot be reached immediately.

It is clear that Iowa Code section 85.27 deals with the medical care or treatment of an injured employee. Treatment and care of an injured employee was not the objective of the medical examination with Dr. Wirtz. The objective appears to have been the attainment of a medical work release to return claimant to full duty status.

The Iowa Industrial Commissioner is 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. Resolution of disputes arising under labor contracts is not a responsibility with which this agency is entrusted.

WHEREFORE, it is found:

That claimant is not entitled under the provisions of Iowa Code Section 85.27 to be reimbursed seventy-three and 75/100 dollars ($73.75) for the examination performed by Dr. Peter D. Wirtz. As defendants have indicated transportation expenses have been offered, no finding need be made in that regard.

* * *

Signed and filed this 27 day of July, 1979.

ROBERT C. LANDESS
Industrial Commissioner

No Appeal.

ALDIN J. H. GEORGE,

Claimant,

vs.

WINNEBAGO INDUSTRIES, INC.,

Employer,

and

GREAT AMERICAN INSURANCE COMPANIES,

Insurance Carrier,
Defendants.

Ruling

NOW on this 4th day of March, 1980 defendants' motion to dismiss, filed February 22, 1980, claimant's notice of appeal, filed December 19, 1979, comes on for determination. The record reflects:

1. A review-reopening decision was filed by Deputy Industrial Commissioner Thomas R. Moeller in the above entitled case on November 28, 1979.

2. A notice of appeal was duly filed by the claimant on December 19, 1979.

3. On December 20, 1979, a letter from the Iowa Industrial Commissioner's office was sent to the attorney for the claimant, advising said attorney that the claimant had 30 days in which to file a transcript in connection with the appeal.

4. The transcript on appeal has not been filed within the 30 days prescribed by Rule 500-4.3.

5. The claimant makes no showing he intends to perfect his appeal nor has he made any showing a transcript has been ordered in said proceedings.

WHEREFORE, claimant's appeal is hereby dismissed for failing to comply with the Rules of the Iowa Industrial Commissioner requiring the filing of a transcript within 30 days.

Signed and filed this 4 day of March, 1980.

ROBERT C. Landess
Industrial Commissioner

No Appeal.

ED GIBSON,

Claimant,

vs.

BEST REFRIGERATED EXPRESS,

Employer,

and

EMPLOYERS INSURANCE OF WAUSAU,

Insurance Carrier,
Defendants.

Arbitration Decision

INTRODUCTION

This is a proceeding in arbitration brought by Ed Gibson, claimant, against Best Refrigerated Express, employer, and Employers Insurance of Wausau, insurance carrier, for benefits as a result of an injury on August 4, 1976.

* * *

FACTS

On April 19, 1976 Claimant started working for defendant as a semitruck driver. On August 4, 1976 claimant received an injury which arose out of and in the course of his employment. Claimant was driving in the state of Ohio when he lost his steering, ran off the road and hit a culvert. Claimant was treated at the Willard Area Hospital in Willard, Ohio, by R. L. Jackson, M.D. Dr. Jackson treated claimant for laceration of the orbicularis oris which required plastic repair plus multiple small lacerations and abrasions of the knees, left cheek, right arm, right first finger and right side of forehead. Upon coming back to Iowa, claimant saw J. A. Saporta, M.D. Claimant testified that the pain in his left shoulder and right index finger kept him from working until September 22, 1976 when he returned to work. Claimant was then terminated because of the accident. On February 16, 1978 claimant saw Maurice P. Margules, M.D., for neurosurgical evaluation. Dr. Margules determined that surgery would not help claimant.

Claimant is presently working for K & K Transportation. Claimant stated that his left shoulder and right index finger still give him problems. Claimant testifies that on damp or warm days his shoulder gives him more of a problem, especially in turning the steering wheel of the truck and that his shoulder hasn't gotten any better since the accident. The main problem with his right index finger is in closing it.

ISSUES

The issues presented by the parties at the time of hearing were whether there is a causal relationship between the injury and the disability; whether claimant is entitled to benefits for healing period or permanent partial disability.

APPLICABLE LAW

The claimant has the burden of proving by a preponderance of the evidence that the injury of August 4, 1976 is the cause of his disability on which he now bases him claim. *Bodish v. Fischer, Inc.*, 257 Iowa 516, 133 N.W.2d 867 (1965). *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).

The pertinent part of §85.34(2)(u) states:

> 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.

In determining a disability to the body as whole, we are trying to determine what is referred to as industrial disability which is the reduction of earning capacity. Functional disability is an element to be considered but consideration must also be given to the injured employee's age, education, qualifications, experience and the inability to engage in employment for which he is fitted. *Olson v. Goodyear Service Stores,* 255 Iowa 1112, 125 N.W.2d 251 (1963); *Barton v. Nevada Poultry,* 253 Iowa 285, 110 N.W.2d 660 (1961).

ANALYSIS

Based on the foregoing principles, it is found that claimant has met his burden in proving that the injury on August 4, 1976 is the cause of the disability upon which he now bases his claim. The report of Dr. R. L. Jackson quite clearly shows that claimant's injuries were not limited to the face. Although neither exhibit A or B referred to an injury to the right finger or left shoulder, both state that claimant had multiple abrasions. In his report of March 2, 1978 Dr. Margules expressed the opinion that claimant's injury to his right index finger and left shoulder were causally connected to the truck accident. Dr. Margules indicated that claimant had a partial ankylosis of his right index finger. James A. Cousins, M.D., who examined claimant on behalf of defendants, stated that claimant had full extension of his PIP joint while flexion was limited to 90 degrees, and the finger could not be extended passively beyond that degree. Dr. Cousins stated that claimant had a 6 percent disability to his right index finger. Dr. Margules failed to give a percentage of disability to claimant's right index finger.

In determining the permanent disability, if any, to claimant's left shoulder, more weight was given to Dr. Margules' rating of 15 percent permanent partial disability of the left upper extremity because claimant was his patient for the purpose of obtaining a neurosurgical evaluation. Because both Dr. Margules and Dr. Cousins indicate this injury was to the rotator cuff or shoulder, the injury is to the body as a whole and not limited to the arm.

Claimant is 29 years old, a high school graduate and has completed a course as a computer programmer as well as diesel mechanic. Claimant has worked the last nine years as a truck driver and has been a diesel mechanic on the side. Claimant also testified he did other things such as automotive painting. Although claimant testified this limits his ability to do his job, it does appear that claimant is still employed as a truck driver. It is therefore determined that claimant's permanent partial disability is 5 percent of the body as a whole.

Claimant stated that he did not return to work until he was able to which was on September 22, 1976. J. A.

Saporta, M.D., who saw claimant shortly after claimant returned to Council Bluffs, indicated in his report that he felt claimant could return to work on September 1, 1976 but his report does not treat claimant's finger or shoulder as a significant injury. Dr. Margules' report and deposition quite clearly indicate that claimant's injury to his shoulder and finger were significant. Therefore it is determined that claimant's healing period terminated upon his return to work on September 22, 1976.

* * *

Signed and filed this 7th day of May, 1979.

DAVID E. LINQUIST
Deputy Industrial Commissioner

No Appeal.

DOCK H. GIPSON,

Claimant,

vs.

LEO WELDER,

Employer,
Defendant.

Arbitration Decision

This is a proceeding in arbitration brought by the claimant, Dock Gipson, against his employer, who is uninsured, to recover benefits under the Iowa Workmen's Compensation Act by reason of an alleged industrial injury that occurred May 7, 1977.

* * *

The issue requiring resolution is whether or not at the time of the alleged incident of May 7, 1977 the claimant was in fact an employee of the defendant.

Claimant and W. L. Green testified that the arrangement with the alleged defendant employer was that they were to be paid for loading salvaged railroad ties at a rate of three dollars per hour for a ten-hour day, five-day week. The employer responded by testifying that the claimant was a "spot laborer" and that he was paid daily without any withholding tax taken from the wage agreed upon, which was twenty-five cents for each railroad tie that the claimant was able to load onto a John Deere loader.

Defendant introduced five cancelled checks payable to the claimant and to Junior Reed individually (defendant's exhibit A). The two checks issued on April 30, 1977 were drawn in the amount of $150.00 payable to the claimant and to Junior Reed, corroborating the claimant's version of the arrangement.

Section 85.61(3), Code of Iowa, reads as follows:

> 3. The following persons shall not be deemed "workers" or "employees":
>
> a. A person whose employment is purely casual and not for the purpose of the employer's trade or business except as otherwise provided in section 85.1.
>
> b. An independent contractor.
>
> c. Partners; directors of any corporation who are not at the same time employees of such corporation; or directors, trustees, officers or other managing officials of any nonprofit corporation or association who are not at the same time full-time employees of such nonprofit corporation or association.

The defendant testified he is in the railroad tie salvage business and therefore the relationship between the parties is not of a purely casual nature.

The defendant controlled the claimant's activities and provided the equipment, resulting in a finding that the claimant was not an independent contractor. *Nelson v. Cities Service Oil Co.,* 259 Iowa 1209, 146 N.W.2d 261. Section 85.61(3), *supra,* makes no mention of a "spot laborer" as being exempted from the provision of the Iowa Workers' Compensation Act. It is found that a relationship of employer-employee existed at the time of the industrial injury under consideration.

Claimant testified that he waited for his last check on the date of the injury and then saw a physician at the outpatient clinic at Mercy Hospital in Des Moines, Iowa, on May 7, 1977. On May 12, 1977 claimant was seen by Steve R. Eckstat, D.O., the emergency department physician at Mercy Hospital, who reported as follows (claimant's exhibit 1):

> Examination revealed pain and spasm of the right side of the cervical spine and of the left and right lumbosacral areas. His deep tendon reflexes [sic] and neurological examination were within normal limits. X-rays were taken of the lumbo-sacral spine and cervical spine, and were felt to be within normal limits. Diagnosis of myofascial strain of cervical and lumbosacral spine was made, * * * *
>
> The patient did return on May 17, 1977 . . . . Physical examination concurred [sic] spasm and pain of the cervical and lumbo-sacral areas. Deep tendon reflexes were still present and equal bilaterally, and there was still no weakness of the legs. Diagnosis of unresolved myofascial strain of the cervical and lumbo-sacral spine was made. * * * *
>
> The patient was seen again in the Emergency Department . . . on May 25, with continuing pain and spasm in the neck and lower back. * * * *
>
> The patient returned to the Emergency Department on May 28, 1977, at which time I saw the patient again. The patient still had unresolved pain and spasm of the cervical and lumbo-sacral spine areas. It was at that time that I referred the patient to the Orthopedic Associates.

A medical bill from Orthopedic Associates, which is part of claimant's exhibit 1, indicates that on May 28, 1977 the claimant was seen by Dr. Sidney H. Robinow. No report from Dr. Robinow is contained in this record.

The claimant has the burden of proving by a preponderance of the evidence that the injury of May 7, 1977 is the cause of the 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.

In applying the foregoing to the case at hand, the claimant has established by a preponderance of the medical evidence of Dr. Eckstate that the episode of May 7, 1977 was the cause of his inability to work from May 7, 1977 to May 28, 1977.

The record fails to contain any medical evidence in support of the claimant's contention that he was unable to work until January 31, 1978.

* * *

Signed and filed this 20 day of November, 1978.

HELMUT MUELLER
Deputy Industrial Commissioner

No Appeal.

ROBERTO GOMEZ,

Claimant,

vs.

E. C. ERNST MIDWEST,

Employer,

and

THE TRAVELERS INSURANCE COMPANY,

Insurance Carrier,
Defendants.

Arbitration Decision

FACTS

Claimant, age 58, has been an electrician employed by employer at its job site at the Caterpillar Plant at Mt. Joy, Iowa, since June, 1977. On April 19, 1978, claimant began his regularly scheduled vacation from work. His vacation was to run from April 19, 1978, to and including April 25, 1978. Claimant's next regular payday was to be April 20, 1978. Employer does not mail paychecks to its employees. On paydays all employees pick up their paychecks at employer's trailer on the job site.

On April 20, 1978, claimant went to the job site and picked up his paycheck. While still on the job site, returning to his car, claimant jumped over a water puddle and injured his knee upon landing. It had rained earlier in the day and the job site was in a muddy condition. Claimant has had surgery on his knee and alleges permanent, partial disability.

APPLICABLE AUTHORITY

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. *McDowell v. Town of Clarksville,* 241 N.W.2d 904 (Iowa 1976); *Musselman v. Central Telephone Co.,* 261 Iowa 352, 154 N.W.2d 128 (1967).

The Iowa Supreme Court in *McClure v. Union Et al, Counties,* 188 N.W.2d 283 (Iowa, 1971) stated:

> We have frequently said "in the course of" the employment refers to time, place and circumstances of the injury. "Arising out of" relates to the cause and origin of the injury. An injury occurs in the course of employment when it is in the period of employment at a place where the employee reasonably may be performing his duties, and while he is fulfilling those duties or engaged in doing something incidental thereto (cites omitted)."

In *Crees v. Sheldahl Telephone Co.,* 258 Iowa 292, 298, 139 N.W.2d 190 (1965) the court stated:

> . . . An injury in the course of employment embraces all injuries received while employed in furthering the employer's business, and injuries received on the employer's premises, provided that the employee's presence must ordinarily be required at the place of the injury, or, if not so required, employee's departure from the usual place of employment must not amount to an abandonment of employment, or be an act wholly foreign and to his usual work. [Citations] 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."

Larson puts in another way:

> . . .The act does not expressly say that the employee must at the time of injury have been benefiting his employer; it merely says that the injury must have arisen in the course of the employment, so that if it can be shown that particular activity, beneficial or not, was indeed a part of this employment, either because of its general nature or because of the particular customs and practices in the individual plant, the statute is satisfied.

IA Larson's *Workmen's Compensation Law,* Sec. 20.20 (5-3) 1979.

ANALYSIS

Based on the foregoing principles, it is found that claimant has met his burden in proving that his injury arose out of and in the course of his employment. The parties stipulated that when claimant was injured he was "on the job site". In this particular case the job site is synonymous with premises. It can also be said that claimant was on the premises for the benefit of the employer because the

employer would save the expense of postage and typing by requiring its employees to pick up their checks. Such a practice would also keep employees who were either sick or on vacation in closer contact with the employer. From the agreed statement of facts it is quite evident that the defendant made it a custom or practice to have "all employees" pick up their paychecks on the job site.

* * *

Signed and filed this 16th day of May, 1979.

DAVID E. LINQUIST
Deputy Industrial Commissioner

Appealed to Commissioner; Affirmed 9/5/79.

JOHNNY WAYNE GOSSETT,

Claimant,

vs.

EBASCO SERVICES, INC.,

Employer,

and

U. S. FIDELITY & GUARANTY

Insurance Carrier,
Defendants.

Partial Commutation Decision

This is a proceeding brought by Johnny Wayne Gossett, Claimant, against Ebasco Services, Inc., employer, and U.S. Fidelity & Guaranty, insurance carrier, for a partial commutation of an award filed October 24, 1978.

* * *

Claimant is now seeking a partial commutation to pay bills and attorney's fees previously incurred. At the time of hearing claimant had the following debts:

Harry H. Smith	$2,200.00
Grand Jewelers	950.00
Singer Sewing Machine Company	425.00
Sears	850.00
Wards	2,000.00
Marian Health Center	335.00
Dr. Thomas Coriden	175.00
Dr. Satterfield	200.00
Plymouth County Real Estate Tax	354.00

Claimant testified that he has been working as a boiler maker in Denver, Colorado and can work any time he wants to making $12 per hour. This is more per hour than when claimant was working as a boiler maker prior to his injury. Claimant is presently contemplating moving to Denver with his family and has put his house up for sale.

Section 85.45(2) of the 1977 Code of Iowa, discloses that in making a decision on whether or not a commutation should be granted, the best interests of the claimant are of prime consideration. In *Diamond V. Parsons Co.,* 256 Iowa 915, 129 N.W.2d 608 (1964) the court stated at 929: "The court should not act as an unyielding conservator of claimant's property and disregard his desires and reasonable plans just because success in the future is not assured.".

It would appear from the evidence presented that a partial commutation would be in the claimant's best interests. This decision is based partly on the fact that claimant does not seem to have any problem with employment as a boiler maker. Therefore, the benefits are not being used as a substitute for the weekly or monthly paycheck. Claimant originally asked for 29 weeks in the commutation. Fourteen weeks have passed since the hearing which leaves 15 weeks to be commuted. The commuted value factor is 14.8880 times a weekly rate of $160 equals a commuted value of $2,382.08. The remainder after commutation is 4 weeks at a rate $160 which equals $640.

The undersigned deputy industrial commissioner wishes to make it perfectly clear that since a part of the reason for the commutation is to pay the attorney's fee, the attorney's fee must be factored in the same way as the commutation. In the statement in support of partial commutation the claimant states: "Further, claimant has utilized the legal services of Harry H. Smith in these proceedings and is indebted to Harry H. Smith for services rendered in the sum of $2,200.00 based a fourth contingent fee on the weeks represented by the unpaid eleven percent." Based on the above, claimant's attorney would be entitled to $600 in attorney's fees for the 15-week period. Multiplying the attorney's fees times the same factor is used for determining claimant's benefits. It is determined that the attorney's fees should be $595.52 which would reduce the total amount owed by claimant to his attorney by $4.48.

WHEREFORE, claimant is to be paid the commuted value two-thousand three-hundred eighty-two and 08/100 dollars ($2,382.08) and claimant's attorney's fees should be reduced by the amount of four and 48/100 dollars ($4.48).

* * *

Signed and filed this 22nd day of May 1979.

DAVID E. LINQUIST
Deputy Industrial Commissioner

No Appeal.

BRIAN GREBNER,

Claimant,

vs.

FARMLAND INSURANCE COMPANY,

Defendant.

Appeal Decision

This is a proceeding brought by claimant appealing a proposed declaratory ruling wherein claimant was found not to be entitled to any increase in the weekly amount of

his healing period benefits but was restricted to the rate applicable at the time of his injury.

The basic position of this agency has been clearly set out in several previous appeal decisions and declaratory rulings, the first of which were filed November 8, 1978 in the consolidated cases of Roxine Kruger and Charlene Babb v. Employers Mutual Casualty Company and The Fidelity and Casualty Company of New York. Those cases held that, under section 85.31, Code of Iowa, surviving spouses are not entitled to any increase in the amount of weekly compensation benefits but were only entitled to the amount of the weekly benefits in effect at the time of their spouses' death.

It was noted as a caveat in the Kruger and Babb cases that Iowa Code section 85.34(2) and (3) and section 85.37 contain parallel language; and therefore, the same rationale would be applied if an adjustment in benefits were to be sought under any of these sections.

In this case the benefits sought to be increased are for healing period as provided in section 85.34(1). The benefits for healing period are "as provided in section 85.37." Therefore, the previous holdings would be applicable in this matter as well. See William W. Ridgely v. Hawkeye-Security Insurance Co., filed May 29, 1979; Dortha Roske and Pat Paplow v. Hawkeye-Security Insurance Co. and Aetna Life & Casualty Co., filed May 7, 1979; and Clarence Delanoit v. The Travelers Insurance Company, filed December 27, 1978.

* * *

Signed and filed this 24th day of October, 1979.

ROBERT C. LANDESS
Industrial Commissioner

Appeal to District Court: Pending.

THOMAS C. GREENE

Claimant

vs.

CENTRAL IOWA REGIONAL ASSOCIATION OF LOCAL GOVERNMENTS

Employer
Defendant.

Appeal Decision

This is a proceeding brought by defendant, Central Iowa Regional Association of Local Government (CIRALG), appealing a proposed arbitration decision wherein claimant was found to be a worker or employee within the meaning of Iowa Code § 85.61(2) and thus entitled to disability benefits and medical expenses.

* * *

Claimant, who had worked at several janitorial jobs, was told by a friend, Robert Cresbach, that a janitorial job was available with CIRALG at its East Locust Street location in Des Moines. Robert Cresbach was aware of the procedure that was required to obtain the janitorial job with CIRALG, which entailed submitting a bid. It appears that claimant was unfamiliar with the bid procedure and so Robert Cresbach wrote out a bid for claimant. The bid was accepted by CIRALG. There is no evidence that any other bid was submitted for the custodial job.

Claimant started his janitorial duties with CIRALG in February, 1974. Claimant could set his own hours for the job, but he was given a list of tasks which had to be completed. Claimant has worked continuously and exclusively at the East Locust Street location since February of 1974, except for the period he was off because of the injury in question.

Sometime in the spring of 1976, claimant learned from William Shepherd, a friend who worked at the Bell Avenue location of CIRALG, that Terry Smith, the executive director of CIRALG, had recommended claimant for yard work at Bell Avenue. In response to this information, claimant went to see Robert Parkey, who was in charge of all maintenance work at Bell Avenue. As a result of that meeting, claimant started working on April 14, 1976. His duties included planting hedges, putting in flower beds, replacing sod, seeding grass and fertilizing. Evidence indicates that claimant had not done this type of work before. Claimant was paid six dollars per hour for the gardening work which he continued to do through May 20, 1976. In May, 1976 and continuing through August claimant began receiving one hundred dollars per month to cut the grass and to pull some weeds at Bell Avenue. In an April 20, 1976 letter to Robert Parkey which was referred to in the Gales deposition, claimant stated that he would do any lawn work that was necessary to keep the grounds properly maintained at Bell Avenue.

Claimant's injury occurred on August 27, 1976, at Bell Avenue when the lawnmower he was using struck a tree and jumped back severing several of claimant's toes on his left foot.

The issue to be determined is whether or not claimant was a worker or employee as contemplated in §85.61(2) of the Iowa Code when he was injured on August 27, 1976, while cutting grass for CIRALG.

Iowa Code §85.61(2) defines the terms "worker" or "employee" as "a person who has entered into the employment of or works under contract of service, express or implied, or apprenticeship, for an employer . . . ."

Claimant has the burden of showing an employer-employee relationship. However, once a claimant has established a prima facie case the defendant then has the burden of going forward with the evidence and overcoming or rebutting the case made by claimant. The defendant must establish an affirmative defense, such as independent contractor, by a preponderance of evidence. *Nelson v. Cities Service Oil Co.*, 259 Iowa 1209, 146 N.W.2d 261 (1967). Should it be found that claimant has made a prima facie showing that he is an employee it will be incumbent upon the defendant to establish by a preponderance of evidence that claimant is an independent contractor.

The Iowa Supreme Court has recognized five factors in determining whether or not an employer-employee relationship exists. (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. (5) Is the party sought to be held as the employer the responsible authority in charge of the work or for whose benefit the work is performed. The court has also looked to the intentions of the parties, but this criteria is viewed only in conjunction with the above criteria and serves as an aiding rather than a determinative element. *Nelson v. Cities Service Oil Co.,* supra.

The first factor in determining whether there is an employer-employee relationship is the right of selection or to employ at will. Although claimant submitted a bid for the Locust Street location, he did not submit a bid for the Bell Avenue location. Rather, for the Bell Avenue job claimant went to see Robert Parkey, who was responsible for the upkeep at Bell Avenue, and they discussed the type of work that was to be done and the amount that was to be paid. As a result of this meeting, claimant started working at Bell Avenue. Under normal CIRALG hiring procedures an employee must fill out an employment application and a W-4 tax form. Also an employee is normally assigned a specific job description and a supervisor and an evaluation process is set up. None of these procedures were followed when the claimant was hired. On the other hand, CIRALG normally requires a bidding procedure for its contracts, but no bid was submitted by Mr. Greene for the Bell Avenue job. The fact that there was no bid must be given greater weight than the fact that normal employee procedures were not followed because the lack of a bid procedure indicates the defendant's ability to select the person of their choice. Thus this factor of the employer-employee relationship is satisfied.

The second factor is the responsibility to pay wages. When claimant took the job at Bell Avenue he was paid six dollars per hour for planting. After a period of time claimant was approached by CIRALG about changing the method of payment from an hourly to a monthly wage. No other employee at CIRALG was paid by the hour and it was found to be burdensome on the accounting procedure to pay claimant by the hour. The change in the method of pay was merely for the convenience of the accounting procedures of CIRALG. Claimant was never paid for the specified completion of a unit of work; that is, he was not paid a flat fee for planting flowers nor was he paid a fee every time he completed mowing the lawn. Checks from Bell Avenue were made payable to "Thomas C. Greene" rather than to "Greene Maintenance Service" as was done at East Locust. The second factor of the employer-employee relationship is satisfied in that claimant received wages from CIRALG.

The third factor is the right to discharge. Anthony W. Gales, operational director at Bell Avenue testified that if claimant's work was found to be incompetent he could be discharged at Gales' recommendation. Gales believed that the executive director could terminate an employee with a contract without going to the association. Since CIRALG did not follow its own normal procedures when they hired the claimant for the Bell Avenue job, this factor has little impact for any method of termination described by the defendant would be pure speculation and thus must be given little weight.

The fourth factor is the right to control the work. The test is the right to exercise control and not the actual exercise of the power of control. *Hjerlied v. State,* 229 Iowa 818, 295 N.W. 139 (1940). It is important to heed the caution expressed by the Iowa Supreme Court in *Smith v. Marshall Ice Company,* 204 Iowa 1348, 217 N.W. 264 (1928). The opinion of the court stated at 1351,

> Even though it be true that, because of the confidence reposed in the employee, the employer left the manner of making the repairs [employee was a carpenter] largely to the knowledge, skill and judgment which he knew the employee possessed, he still had the reserved right to control the method and means of doing the work, and the employee was at all times subject to any instructions or directions from the employer in regard thereto.

Parkey selected the flowers to be planted at Bell Avenue and then told claimant when, where and how to plant them. Gales testified that he told claimant when and where to sod. Claimant was shown how to use fertilizer and weed killer by an employee of the defendant. Claimant received help from clients of the defendant in the gardening and when claimant was injured one of the defendant's clients took over the lawnmowing responsibilities. Claimant was told by Parkey where he was to start cutting the grass using defendant's lawnmower and gas. Claimant always reported to Parkey or Gales before commencing mowing. Gales believed that he could call claimant to cut the grass if he felt it was too high. Although lawnmowing is an unskilled job allowing for little use of discretion, it appears defendants retained control of whatever discretion claimant might have elected to exercise. All these facts lead to the conclusion that defendant had the right to control claimant's work. Thus this factor of the employer-employee relationship is satisfied.

The fifth factor is that the work benefit the one sought to be named employer. Claimant's efforts to improve the physical appearance at Bell Avenue was of course of benefit to defendant.

The additional factor which may be considered to illuminate the relationship of the parties is their intention. Intent, however, must be dealt with carefully with what parties do carrying more weight than what they say. When the claimant was hired at Bell Avenue there was no bid procedure and the actual hiring appears to have resulted from an interview conducted by Robert Parkey. Claimant agreed to plant gardens and maintain the lawn in general, subject to the control of the employer, as evidenced by the hourly wage and the directions on planting. The nature of this relationship changed only in respect to the method of payment which was a result of CIRALG procedures and not because of any substantive change in the work relationship. The actions of the parties reveal, their intent to form an employer-employee relationship.

Claimant has established a prima facie case for an employer-employee relationship. Now it must be determined whether defendant has established by a preponderance of the evidence that claimant was an independent contractor.

The following are the recognized tests for an independent contractor: (1) The existence of a contract for the performance by a person of a certain kind of work at a fixed price; (2) The independent nature of the person's business or of the person's distinct calling; (3) The person's employment of assistants with the right to supervise their activities; (4) The person's obligation to furnish necessary tools, supplies and materials; (5) The person's right to control the progress of the work, except as to the final results; (6) The time for which a person is employed; (7) The method of payment, whether by time or by job, and; (8) Whether the work is part of the regular business of the employer. *Nelson v. Cities Service Oil Co.*, supra.

First, even though claimant had other tasks such as an occasional pulling of weeds, his primary task under the $100 per month arrangement was lawnmowing. However, it is difficult to distinguish the planting aspect from the grass cutting aspect of the job. Only the method of payment changed and thus it is doubtful whether there was a contract for the performance of a certain kind of work for a fixed price.

Second, claimant never held himself out as a lawn care service. In his billing he used the name Greene's Maintenance Service, however, this use appears to be out of habit and uniformity rather than an intent on the part of the claimant. Claimant began using the title Greene's Maintenance Service so that his wife could absorb any excess earnings and claimant would not lose social security benefits. Claimant had never been employed or contracted as a lawn maintenance man in the past and defendant found it necessary to instruct claimant on the use of fertilizers and weed killers. Claimant was not hired because of his lawn care abilities but because of CIRALG's satisfaction with claimant's ability to do well the duties he was assigned as a janitor. Although there are, of course, companies which operate solely to furnish lawn care services, the type of lawn maintenance claimant was doing can be considered unskilled and performed exclusively for CIRALG and not for other customers. Thus there was no distinct skill involved and this factor is not satisfied.

Third, although his spouse had helped claimant with the work on East Locust Street, she did not help at Bell Avenue nor did claimant employ any assistants on the lawn care job. However, CIRALG did supply some assistance to help maintain the grounds. Also claimant had no control over the selection of these individuals.

Fourth, CIRALG supplied all the equipment necessary to perform the lawn care job.

Fifth, claimant could control the progress of his own work so long as his rate of work pleased CIRALG. There is testimony that if claimant's work did not please the defendant, CIRALG would have the power to tell claimant to do what needed to be done. The most important factor in an independent contractor relationship is whether the one doing the work is able to choose the manner in which the specified result is to be accomplished. *Daggett v. Nebraska-Eastern Exp., Inc.*, 252 Iowa 341, 107 N.W.2d 102 (1961). The claimant did not have such freedom in this case.

Sixth, claimant cut the grass or worked on the lawn during regular business hours. He apparently was hired to cut the grass for a majority of the grass-mowing months of the year of 1976. Also a question may arise as to the short length of employment contemplated, but lawn care is a seasonal job and thus the length of the work experience is not important in this case.

Seventh, claimant was paid by the month for cutting the grass but as previously mentioned this method of payment appears to have been dictated by CIRALG's accounting procedures and not because of the nature of the employment relationship. At no time was claimant paid a set amount for a specific job.

Finally, the question of whether lawn maintenance is within the regular business of CIRALG is debatable, but even if the answer would be "no" this would not be determinative on the outcome of this decision.

The trier of fact determines "whether or not there is a sufficient group of favorable factors to establish the relation." Based upon the record as a whole it is found there were not a sufficient group of favorable factors to establish the independent contractor relationship. *Daggett v. Nebraska-Eastern Exp., Inc.*, supra, citing to RESTATEMENT (SECOND) OF AGENCY §220(2), comment c. Defendant has, therefore, failed to establish by a preponderance of evidence that claimant was an independent contractor. This conclusion was not arrived at easily and the question was a close one in this case. The factors in both the employer-employee relationship and the independent contractor were discussed according to the weight given to the testimony of the parties and their actions. It is found that claimant preponderates but just barely. The undersigned has duly considered the fact that claimant does not appear to be an employee according to the formal structure of the CIRALG organization, but the real nature of the work relationship between claimant and defendant is found to be an employer-employee relationship as contemplated in §85.61(2) Code of Iowa.

The finding of disability in the arbitration decision is proper.

* * *

Signed and filed this 11th day of August, 1978.

ROBERT C. LANDESS
Industrial Commissioner

No Appeal.

JIMMIE E. GREGORY,

Claimant,

vs.

LONG MANUFACTURING N.C., INC.,

Employer,

and

AMERICAN MUTUAL LIABILITY INSURANCE CO.,

Insurance Carrier,
Defendants.

Appeal Decision

Claimant has appealed from a proposed review-reopening decision wherein it was found that claimant had failed to establish his claim.

* * *

On reviewing the record, it is found that the deputy's findings of fact and conclusions of law are proper.

It is clear from the record that the claimant has severe problems and is in pain. However, numerous practitioners have examined claimant and have failed to ascertain any physical manifestations which would indicate the origin of claimant's disability. It is well established that claimant must prove by a preponderance of the evidence that the injury upon which he bases his claim is the cause of his disability. Because the expert medical testimony in the record does not establish the origin or cause of claimant's disability, claimant's claim must fail.

* * *

Signed and filed this 28th day of June, 1979.

ROBERT C. LANDESS
Industrial Commissioner

Appealed to District Court: Pending.

JOHNATHAN D. GUYNN,

Claimant,

vs.

ALUMALINE CUTLERY,

Employer,

and

IMT INSURANCE COMPANY,

Insurance Carrier,
Defendants.

Arbitration Decision

This is a proceeding in arbitration brought by the claimant Johnathan D. Guynn, against his employer, Alumaline Cutlery, and IMT 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 October 7, 1975.

* * *

The issue regarding determination in this matter is whether or not the claimant established that he complied with §85.23, Code of Iowa, which required him to notify his employer of an industrial injury within 90 days from the date of occurrence. Defendants, in their answer, raised the issue of the claimant's failure to so notify as an affirmative test.

Section 85.23, Code of Iowa, 1975, reads 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 of 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.

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

Claimant, age 34, married, with one minor dependent, testified that he has been employed by Alumaline Cutlery since March 1972 and that his duties required him to run a grinder and buffer in the fabrication of steel cutlery. He was occasionally called upon to assist in the unloading of shipments of steel that arrived at his employer's premises by motor vehicle. On October 7, 1975, while attempting to unload a box of steel and being assisted by Philip Boysen, Jerry Oltman, Wanda Nielson and Carroll Cox, the load shifted and injured the claimant's lower lumbar area.

Jerry Oltman, an alleged eyewitness, testified as a defense witness and testified that he had no recollection of any incident resulting from the unloading of steel.

Wanda Nielson, another alleged eyewitness, testified on behalf of the defendant that she did help from time to time unloading steel and that the claimant also assisted in these duties; but she had no memory as to the alleged incident of October 1975.

Philip Boysen, another co-employee and alleged eyewitness to the October occurrence testified that he had no recall of the alleged incident wherein the claimant was injured while unloading a box of steel.

John Winburn, president and manager of the defendant employer, testified that the claimant failed to tell him, nor was he aware of that October 1975 injury. Mr. Winburn further testified that his first notice of this incident was the

receipt by him of the application in arbitration.

Further impeachment evidence is contained in this matter as found in the history of the physical therapist progress notes (claimant's exhibit A, page 26) where claimant stated he hurt his back while baling hay. The testimony of Curt Kelley, an insurance agent in Dyke, Iowa, was that the claimant made a prior inconsistent statement by telling Mr. Kelley, "No, I was hurt helping my father-in-law bale hay" in response to the inquiry as to whether or not he had been hurt while in the course of his employment at the defendant employer's premises.

If the claimant is to recover in this matter, the employer must have had actual knowledge or notice of the alleged injury. Code of Iowa, §85.23, supra. The absence of such knowledge or notice is an affirmative defense and the burden of proof rests with the defendant. *DeLong v. Iowa State Highway Commission,* 229 Iowa 700, 47 N.W.2d 236 (1951). Due to the lack of credibility on the part of the claimant's evidence which manifested itself throughout this hearing, it was held that the defendants have carried their burden of lack of notice.

* * *

Signed and filed this 2nd day of November, 1978 at the office of the Iowa Industrial Commissioner at Des Moines, Iowa.

HELMUT MUELLER
Deputy Industrial Commissioner

No Appeal.

ALFRED A. HAGEMAN,

Claimant,

vs.

IOWA ELECTRIC LIGHT AND POWER COMPANY,

Employer,
Self-Insured,
Defendant.

Arbitration Decision

This is a proceeding in Arbitration brought by Alfred A. Hageman, the claimant, against Iowa Electric Light and Power Company, his employer and holder of a certificate of exemption, as contemplated by Section 87.11, Code of Iowa, to recover benefits under the Iowa Workers' Compensation Act by virtue of an alleged industrial injury which occurred on March 15, 1977.

* * *

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

Claimant, age 36, married, with two dependent children, has been an employee of the defendant-employer for eleven years. For the past four years he has been a nuclear central systems technician. His primary responsibilities were calibration of various gauges and maintenance of nuclear plant equipment.

On March 15, 1977 the claimant, a large-framed, taciturn individual was moving a 55-gallon drum for use as a scaffold, and in so doing, felt a sharp pain in his lower back (Trans. p. 7 and 8). The discomfort initially was of short duration and allowed the claimant to continue his normal work activities. On Sunday, March 20, 1977, the claimant was called in to the plant to assist in the running of a special test, by which time, his back discomfort was increasing causing him to limp noticeably. (Trans. p. 92 and 93)

The claimant sought medical attention at the out-patient clinic of Mercy Hospital on March 25, 1977, where he was examined by G. L. Schmit, M.D., who, upon examination, made the following diagnosis (Depo., p. 10, l. 18):

> Examination some tenderness over the left sciatic notch with minimal spasm of the left paralumbar muscle group. He had good range of motion of the lumbosacral spine. Straight leg raising was minimally positive on the left with good reflexes. No hypesthesia.

After conservative treatment during a period of hospitalization, beginning April 11, 1977, a laminectomy was performed by Martin F. Roach, M.D., an orthopedic surgeon (depo. p. 8, l. 5). The claimant resumed employment as an assistant business agent of Local 204 of International Brotherhood ofElectrical Workers on May 1, 1977.

The issue requiring a ruling is whether or not based upon the evidence, the claimant has established by a preponderance that injury of March 15, 1977 is the cause of his disability.

Defendant's thrust is centered upon claimant's failure to properly advise management of the pain he felt after the barrel episode under consideration in violation of previous instructions.

Without reciting the lengthy record, the evidence contained therein fails to support the defendants' position. The claimant, while he was aware that "injuries" requiring immediate medical attention, were brought to the defendant-employer's notice, he clearly felt that this back discomfort would improve. Upon failure of this expectation, the claimant sought medical attention ten days later. Having witnessed the demeanor of all of the many witnesses called in this case, the testimony of the claimant is given the greater weight in this decision. The examining physicians found abnormality within ten days of the occurrence. The claimant was demonstrating pain within a few days of the episode and demonstrated a normal degree of masculine stoicism by continuing to work until an appropriate time presented itself to seek medical attention. March 25, 1977 was the date of a union meeting; the claimant signed "off" that day in order to attend the meeting, seeking medical assistance after the meeting's conclusion.

The claimant's ability to deal with pain is further confirmed by his continuing to work until April 11, 1977, the date of his hospitalization.

The claimant has the burden of proving by a preponder-

ance of the evidence that the injury of March 15, 1977 is the cause of his disability on which he now bases his claim. *Bodish v. Fischer, Inc.,* 257 Iowa 516, 133 N.W.2d 867. *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 medical testimony. *Bradshaw v. Iowa Methodist Hospital,* 251 Iowa 375, 101 N.W.2d 167.

In applying the evidences as recited above and contained in this record to the foregoing legal principles, it is concluded that the claimant has sustained his burden of proof.

Martin F. Roach, M.D., the operating surgeon, expressed the medical opinion that as a result of the surgery the claimant has sustained a functional impairment of 10% of the body as a whole.

The claimant's current physical activities are currently limited to those customarily associated with administrative matters. Claimant is required to drive a motor vehicle in the course of his employment for Local 204 attending meetings.

Claimant further testified that he felt he could return to his former position at the Duane Arnold Energy Center upon completion of his current union assignment. Claimant has suffered little diminution of earning capacity and it appears that the claimant's industrial disability is of a minimal nature.

Functional disability is an element to be considered in determining industrial disability which is the reduction of earning capacity, but consideration must also be given to the injured employee's age, education, qualifications, experience and inability to engage in employment for which he is fitted. *Olson v. Goodyear Service Stores,* 255 Iowa 1112, 125 N.W.2d 251 (1963); *Barton v. Nevada Poultry,* 253 Iowa 285, 110 N.W.2d 660 (1961).

In applying the foregoing legal principles to the case at hand, it is concluded that the claimant has sustained an industrial disability of 10% of the body as a whole. The claimant began to lose time from his regular employment on April 11, 1977, the date of his hospitalization. Claimant resumed gainful employment on May 1, 1977, thereby being entitled to a healing period of three weeks. The claimant's gross weekly wages being $332.20 thereby entitles him to a weekly benefit rate of one hundred seventy four and no/100 dollars ($174.00).

* * *

Signed and filed this 2nd day of May, 1979.

HELMUT MUELLER
Deputy Industrial Commissioner

No Appeal.

LOREN HAHLE,

Claimant,

vs.

SNAP-ON-TOOLS CORPORATION,

Employer,

and

INSURANCE COMPANY OF NORTH AMERICA,

Insurance Carrier,
Defendants.

Appeal Decision

This is a proceeding brought by claimant appealing an arbitration decision wherein claimant was awarded permanent partial disability under the Iowa Workers' Compensation Act for an injury arising out of and in the course of his employment on August 26, 1976.

* * *

Two petitions were filed in this action -- one in review-reopening and one in arbitration. As there is a memorandum of agreement on file, the action properly would be cast as a review-reopening.

Claimant contends the deputy industrial commissioner erred in finding that claimant had sustained a thirteen percent loss of the left upper extremity and in applying the wrong criteria in computing claimant's permanent partial disability. While claimant's argument on first reading has some winning aspects, the position he sets out is not the law as it relates to scheduled injuries.

Larson in *2 Workmen's Compensation,* §58 at 10-28 (Desk ed. 1976) discussed the nature of scheduled benefits and points out that "payments are not dependent on actual wage loss" and that they are not "an erratic deviation from the underlying principle of compensation law -- that benefits related to loss of earning capacity and not to physical injury as such." The theory, according to Larson, is unchanged with the only difference being that "the effect on earning capacity is a conclusively presumed one, instead of a specifically proved one based on the individual's actual wage-loss experience."

On reviewing the record, it is found that the deputy industrial commissioner's findings of fact and conclusions of law are proper.

WHEREFORE, it is found:

That the proposed decision of the deputy industrial commissioner is adopted as the final decision of this agency.

THEREFORE, it is ordered:

That defendants pay to claimant thirty-two and one-half (32½) weeks of permanent partial disability compensation at the rate of one-hundred thirty and 22/100 dollars ($130.22).

That defendants receive credit for the permanent partial disability compensation already paid.

That defendants pay the costs of this action.

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

ROBERT C. LANDESS
Industrial Commissioner

Appealed to District Court: Remanded
Remanded to Deputy

Appealed to Commissioner: Settlement and Commutation

WAYNE E. HAMMES,

Claimant,

vs.

RUSTLERS RENDEZVOUS,

Employer,

and

INSURANCE COMPANY OF NORTH AMERICA,

Insurance Carrier,
Defendants.

Appeal Decision

This is a proceeding brought by claimant, Wayne E. Hammes, appealing a proposed decision in arbitration wherein claimant was denied benefits under the Iowa Workers' Compensation Law for an injury stipulated to have occurred on May 4, 1977.

* * *

Claimant worked part-time as a bartender. His job commenced between 5:00 and 6:00 p.m. At 7:00 p.m. a tornado struck the building in which claimant was working. Claimant was injured when the south wall of the building blew in and debris fell on top of him.

At issue is whether or not claimant's injuries suffered as a result of a tornado striking the building in which he was working arose out of his employment.

Claimant argues that *Reid vs. Automatic Electric Workers Co.,* 189 Iowa 964, 179 N.W. 323 (1920) is applicable. In *Reid* the claimant died from injuries he received when a windstorm blew debris into a factory. Although the facts here presented appear similar, the cases are distinguishable. Claimant in *Reid* was a foreman whose duties specifically included closing windows. Instead of escaping to safety, he returned to his work area to perform that task. The opinion of the court noted that deceased was in the place where his job required him to be and, therefore, that he was subjected to greater hazard. While wind was acknowledged to be an act of God, these factors listed above were viewed as human intervention. Additionally, the court noted a wall built by "human agency" which was incapable of withstanding the force of the wind and perhaps a lack of diligence on the part of the employer in sounding an alarm. Claimant in the case sub judice was doing a task he would have been doing in any event. He was not performing any duty necessitated by the approaching storm as was the claimant in *Reid.*

The stipulation, submitted by the parties indicates that other tornados hit Fort Dodge on the evening of May 4. Claimant alleges that the place of his employment "was located in a place of special danger . . . . more exposed and more susceptible to the hazard of storms." Claimant also alleges that other buildings in the area were not damaged and personal injuries were not sustained by others, concluding that "Claimant was subjected to a 'causative danger peculiar to the work, and not common to the neighborhood.' " These allegations, although possibly correct, are not supported by the stipulation of facts.

Claimant also suggests the application of the positional risk rule or of contact with the premises. Neither of these rules has been adopted by the Iowa Supreme Court. Claimant's arguments may have merit; however, Iowa at present follows the general rule that an injury in a windstorm arises out of employment only when an employee is subjected to an increased risk of harm required by the employment. Such a risk was found by the Supreme Court of Iowa in *Reid,* supra; but it is not found here.

WHEREFORE, it is found:

That claimant's injury of May 4, 1977 did not arise out of his employment.

* * *

Signed and filed this 16th day of August, 1978.

ROBERT C. LANDESS
Industrial Commissioner

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

IRENE C. HARRILL,
(Milburn M. Harrill),

Claimant,

vs.

DAVENPORT MOTORS CORPORATION,

Employer,

and

UNIVERSAL UNDERWRITERS INSURANCE COMPANY,

Insurance Carrier,
Defendants.

Arbitration Decision

This is a proceeding in arbitration brought by Irene C. Harrill, widow of Milburn M. Harrill, deceased, against Davenport Motors Corporation, the decedent's employer, and Universal Underwriters Insurance Company, the insurance carrier, to recover benefits under the Iowa Workers' Compensation Act by nature of an industrial injury which occurred on July 7, 1977.

* * *

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

The decedent, Milburn M. Harrill, age 56 at the time of his death, had been employed by the defendant-employer,

as parts manager for the last 20 years. In addition to the normal duties of a parts manager the decedent did all the necessary building maintenance chores.

Wayne Chase, body repairman and shop foreman for Davenport Motors, was on July 7, 1977 opening a heavy wooden 10'x10' overhead door when "[a] cable came off a roller and went up through the ceiling." Chase called decedent whom he thought arrived between 9:00 and 9:15 to fix the door. After decedent arrived, the door was lifted by decedent, Chase, and Bob Harrill and was propped partially open; and a wooden ladder was obtained. The witness said he started to get a longer prop, leaving decedent attempting to take the cable down through the ceiling with metal handled vice-grips; heard something like 'ughm;" heard the vice grips drop; and then saw decedent fall. Following the fall, Chase thought the cable had been pulled out of the ceiling and was hanging down the wall. The witness recalled decedent's landing on the back of his head and shoulders and rolling to his side. Although Chase thought when he reached his side, decedent was alive, he quickly decided decedent "was not going to make it" when breathing stopped. After decedent was taken in the ambulance an electrician came in to check the area but did not in the presence of the witness remove the ceiling.

Decedent's nephew, Bobby Harrill, went to the garage at approximately 8:00 o'clock to ask his uncle about some air conditioning parts he needed. Harrill said that decedent had the parts, but wanted to help in repairing an overhead wooden door before he went to get them. At first an unsuccessful attempt was made to lift the door. Then decedent got a ladder and tried to get a cable out of the ceiling to hook to a spring. When that tactic also failed, Harrill said:

> Well, Wayne went after a board or something to lift it up and about that time I heard that big spring let go up there and slap against the wall and I turned around and Milburn was falling off the ladder. When he fell he hit the door jamb and then he kind of rolled over on his back and just acted like he was going to get up and then he just laid there.

At some moment Harrill recalled a groan from decedent. The witness who thought at the time his uncle had been electrocuted said when decedent began having trouble breathing, turned blue and got stiff, he "pumped on his chest."

Claimant's nephew, Porter Harrill, found his brother Bob at Davenport Motors giving artificial respiration to his uncle whom he said was unconscious. Harrill thought the ladder was wood and was located on the north wall. About four feet to the left of the ladder, he observed an electrical wire entering the ceiling.

Joan Scott, member of the emergency crew, testified claimant's decedent never regained consciousness. Jane Murray, another member of the crew, who gave oxygen recalled no signs of external force being applied to claimant's body. David S. Murray, a third and lead member of the emergency team, said that when the crew reached Harrill he was blue, had no pulse, and was not breathing. After decedent was loaded into the ambulance cardiopulmonary resuscitation was administered. A fourth person, Janya Lee, drove the emergency vehicle.

Walter Davenport, president of defendant-employer. testified that decedent, whose primary duties related to parts, "was really my right-hand man. He done everything we needed to have done." According to Davenport, decedent's weekly salary was $150 guaranteed, plus commission. On the morning of July 7, 1977, the witness was notified by Wayne Chase that decedent was unconscious and that Chase thought he had been electrocuted. Davenport reported calling a Dr. Pigneri and later John Winans, an electrician.

Walter Keast, general manager and vice president of Davenport Motors, who sold cars and managed the business, said decedent had primary responsibility for the parts department. Keast saw decedent on the morning of July 7, 1977, observed nothing unusual, was unaware of any physical problems or medication decedent might have had, and stated that decedent was "always there." The witness had received no reports of electrical problems or of workers being shocked subsequent to the July 7, 1977 incident.

Eldon S. Colvin, car salesman for Davenport Motors, claimed decedent did a number of favors for him and actually sold some cars for him while he was in the hospital. With the approval of Walter Davenport, Colvin paid decedent a portion of his commission for the aid he acquired.

Mary Lorraine Shald, bookkeeper for Davenport Motors, testified that decedent was paid $150 a week with additional pay for shop labor at the rate of two and a half percent of the shop labor billing each month and an amount determined by Colvin for the favors he performed.

On July 7, 1977 at approximately 10:00 A.M., electrician, John M. Winans, was called by Walter Davenport to Davenport Motors to check the wiring and to check for anything which might have killed decedent. He found no current in either the track or the cable and no blown fuses. Winans checked the lines with an amp probe and a continuity tester and found nothing. Although he did not look for wiring above the false ceiling on July 7, he subsequently returned and found two romex wires located above the ceiling running to ceiling lights. The witness found no burned marks on the line. It was Winans' opinion that decedent had not been killed by electricity.

Decedent's spouse, Irene, testified that her husband had always been in good health and had not to her knowledge had problems with his heart.

K. L. Thompson, M.D., eighty-six-year-old physician and surgeon, who had been decedent's physician for many years, saw decedent on July 5, 1977. At that time decedent was complaining of shortness of breath. Dr. Thompson recorded decedent's blood pressure as 170/90 and his pulse at 72. Decedent had no chest pain or sweating and his urinalysis was normal. The doctor gave him medication for blood pressure.

Records for Jennie Edmundson Memorial Hospital gave a history of a fall from a ladder at an unknown time. Decedent was pronounced dead at 9:40 a.m.

Samuel Rosa, M.D., family practitioner and Pottawat-

tamie County Medical Examiner, was called to examine decedent after his death and was told that decedent had been electrocuted. He found no burns, bruises, cuts, lacerations, or punctures outside of what was done in the emergency room. Because Dr. Rosa had been told of the electrocution, no autopsy was performed. The certificate of death lists three causes: cardiac arrest, ventricular fibrillation and accidental electrocution. That certificate was amended to "Ventricular Fibrillation, Acute Coronary Occlusion, Other Sign Cond. Hypertension because 'erroneous information given at Time of Death Reinvestigation revealed above conditions.'" It appears that the doctor assumed an electric current was passing through the door and when he was informed by the employer that such was not the case, he amended the certificate. He was unaware of where he obtained information as to decedent's hypertension.

Ward Alan Chambers, M.D., board certified cardiologist, found significance in two events -- the "grunt or groan" by decedent and decedent's falling back after attempting to raise himself. In regard to the groan, he said:

> People that have very sudden catastrophic events are not able to cry out. In other words, it is a very sudden catastrophe. The most these people are able to do is make some sort of noise. This is quite common in many of the cardiovascular or cerebral catastrophes and one that physicians working in this area are able to observe firsthand from time to time. If someone has a condition that occurs over a period of seconds, such as losing one's balance, becoming dizzy, they usually are able to yell out either for help or whatever they deem appropriate as they fall.

As to decedent's attempt to raise himself Dr. Chambers stated:

> If the patient had suffered from a ventricular fibrillation acutely, which would certainly be consistent with his lack of yelling, I rather doubt that he would have been able to raise himself from the floor. People from this arrhythmia usually become unconscious and are unable to perform any voluntary activity whatsoever.

The cardiologist suggested four possibilities for the cause of decedent's death. The first was electrocution with two potential modes of death, one from disruption of the brain stem requiring a massive amount of electricity, the other requiring little electricity from ventricular arrythmia. The second potentiality was acute ventricular fibrillation, a diagnosis inconsistent with decedent's raising himself. The third possibility was stroke; the fourth, a pulmonary embolus. The likelihood of a pulmonary embolus was diminished by the lack of evidence decedent would be predisposed to blood clots. The doctor also said there was nothing to indicate decedent had coronary artery disease. Of these four Dr. Chambers believed a stroke was the most likely, and he was not in agreement with the causes of death listed by Dr. Rosa. Although the doctor was unable to say whether a stroke was just as likely at home as on the job, he testified:

> Be it a stroke or cardiac disease, catastrophic events can certainly be random associated with rest and they can also be precipitated by physical exercise. As I stated, it is possible that the physical exercise precipitated this event and that it would not have occurred had he not been doing that.

* * *

> By virtue of the fact that as he was pulling, pulling that way is what we call isometric exercise. If he were not holding his breath, his blood pressure would have shot up probably to an inordinately high level than would normally have occurred during regular exercise. This is certainly shown to be detrimental. If he were holding his breath, which is the usual situation when people pull and strain, he would have probably had a significant lowering of his blood pressure. This probably could have precipitated this acute event.

The issue requiring resolution is whether or not the cause of the decedent's death arose out of decedent's required work activity.

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 (1971). "Arising out of" suggests a causal relationship between the employment and the injury. *Crow 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." *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 (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 344, 288 N.W. 402 (1939). Note also that the opinion of experts need not be couched in definite, positive or unequivocal language. *Dickenson 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 claimant has the burden of proving by a preponderance of the evidence that the injury of July 7, 1977 is the cause of the death on which she now bases her claim.

In applying the foregoing legal principles to the case at hand it is apparent that the claimant has sustained her burden of proof.

Dr. Chambers whose testimony is given the greater weight in this decision expressed his medical opinion that the episode of straining "probably could have precipitated this acute event."

The testimony of the two eye-witnesses, Wayne Chase and Bobby Harrill, indicate that the decedent was standing on a step ladder pulling on a door spring which spring was capable of lifting a 400-pound overhead door. While this record contains no evidence as to the amount of pull necessary to stretch such a spring, while standing on a step ladder it would take an effort of such magnitude so as to have caused the intracranial accident which resulted in the death of the decedent.

* * *

Signed and filed this 6th day of June, 1979.

HELMUT MUELLER
Deputy Industrial Commissioner

Appealed to Commissioner: Modified Rate. ($121.35/wk.)
Appealed to District Court: Affirmed
Appealed to Supreme Court: Pending

IRENE C. HARRILL (MILBURN M. HARRILL),

Claimant,

vs.

DAVENPORT MOTORS CORPORATION,

Employer,

and

UNIVERSAL UNDERWRITERS INSURANCE COMPANY,

Insurance Carrier,
Defendants.

Appeal Decision

The defendants have appealed from a proposed arbitration decision wherein claimant was awarded death benefits under Iowa Code section 85.31(1)(a), together with the statutory burial expense.

* * *

On reviewing the record, it is found that the deputy's findings of fact and conclusions of law are proper. Modification is made only to find the correct weekly entitlement of the claimant.

It appears from the deputy's decision that the gross wages paid claimant's decedent during the first twenty-seven weeks of 1977, were divided by that number of weeks to result in a gross weekly wage of $227, for a weekly entitlement of $143.65. There is no statutory authority which supports this result.

While claimant's decedent had a weekly salary of $150, he also received a two and one-half percent share of the shop labor per month as well as irregular commission payments. Claimant's weekly entitlement should be computed pursuant to Iowa Code section 85.36(6) in this case. Iowa Code section 85.36(6) states:

> In the case of an employee who is paid on a daily, or hourly basis, or by the output of the employee, the weekly earnings shall be computed by dividing by thirteen the earnings, not including overtime or premium pay, of said employee earned in the employ of the employer in the last completed period of thirteen consecutive calendar weeks immediately preceding the injury.

In applying Iowa Code section 85.36(6) to the facts of this case, it is clear that claimant's decedent earned $2,475.76 during the thirteen consecutive week period immediately preceding claimant's decedent's injury. This amount consists of thirteen weekly salary payments of $150 each; claimant's decedent's shop labor shares for April, May and June; and one commission payment in May. The amount does not include what is apparently an accrued vacation payment of $300. Pursuant to Iowa Code section 85.36(6), it is clear that claimant's decedent had a rounded off gross weekly wage of $190, for a weekly entitlement of $121.35.

* * *

Signed and filed this 6th day of November, 1979.

ROBERT C. LANDESS
Industrial Commissioner

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

GERALD J. HASS,

Claimant,

vs.

WOODFORD MANUFACTURING COMPANY,

Employer,

and

AETNA CASUALTY AND SURETY COMPANY,

Insurance Carrier,
Defendants.

Review-Reopening Decision

INTRODUCTION

This is a proceeding in review-reopening brought by Gerald J. Hass, claimant, against Woodford Manufacturing Company, employer, and Aetna Casualty and Surety Company, insurance carrier, for the recovery of further benefits as the result of an injury on September 1, 1976.

* * *

FACTS

Claimant started working for defendant-employer on August 18, 1976. On September 1, 1976 claimant received an injury which arose out of and in the course of his employment with defendant when, while trying to finish a run on the sodder wheel, a basket weighing 50 pounds under 1,800 pounds of pressure struck his right chest in the axillary area and then pinned him between the basket and an adjacent I-beam. Claimant testified he blacked out and the next thing he knew, he was in front of his machine. The rescue squad took him to Iowa Lutheran Hospital, but he was not hospitalized. He was given pain pills and instructed to go home. Claimant testified he had right arm and chest pain, but the doctors said nothing was wrong. Claimant stated he saw Dr. Linford twice a week for two to three weeks. Claimant then returned to regular work without limitations. Claimant testified he had no feeling in his right hand for two to three months which he claimed caused him to miss his quota.

Claimant saw Dr. Dubansky on December 3, 1976. Dr. Dubansky instructed claimant on certain exercises and prescribed an anti-inflammatory drug. Dr. Dubansky again saw claimant on March 5, 1978 at which time claimant was instructed to return in six weeks. Dr. Dubansky next saw claimant on March 5, 1978 in a hospital emergency room. Claimant indicated to Dr. Dubansky that the previous day he had developed severe pain in the right side of his chest. Dr. Dubansky prescribed heat and pain pills.

The claimant's present complaints are pain in his sternum, shoulder and side, and limited motion of his arm. Claimant indicated this gives him problems at work when turning wheels or using wrenches.

ISSUES

The issues presented by the parties at the time of hearing were whether there is a causal connection between claimant's disability and his injury on September 1, 1976 and the extent of any permanent partial disability.

APPLICABLE LAW

The claimant has the burden of proving by a preponderance of the evidence that the injury of September 1, 1976 is the cause of his disability on which he now bases his claim. *Bodish v. Fischer, Inc.,* 257 Iowa 516, 133 N.W.2d 867 (1965). *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).

It is further clear that the claimant has sustained an industrial disability which is defined in *Diederich v. TriCity Railway Co.,* 219 Iowa 587, 593, 258 N.W.2d 899 (1935) 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]. 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.****

ANALYSIS

Based on the foregoing principles and the evidence presented, it is determined claimant has met his burden in proving the causal connection between his disability and the injury he received on September 1, 1976. This is supported both by the testimony and reports of Dr. Dubansky and Dr. Blenderman who saw claimant for evaluation.

Dr. Dubansky, in his deposition and report, indicated that he felt claimant had a 9 percent physical impairment to the upper extremity. Attached to his report of August 4, 1978 is a sheet indicating how he made that determination using range of motion of the shoulder. At the same time, Dr. Dubansky indicated in his deposition that claimant's complaints did not extend beyond the humerus. In that the range of motion of claimant's shoulder is limited, and Dr. Blenderman indicates the injury includes the rotator cuff, it is determined that the pathology goes into the shoulder joint and will be considered an injury to the body as a whole.

In determining claimant's functional disability, it is noted that Dr. Blenderman rated claimant's disability as 25 percent of the upper extremity while Dr. Dubansky rated claimant at 9 percent of the upper extremity which is equal to 5 percent of the whole man by use of the *Guides to the Evaluation of Permanent Impairment* by the American Medical Association. More weight is given to the testimony of Dr. Dubansky, the treating physician, because he spent more time with claimant and gave an explanation as to how he reached his conclusion regarding a disability rating. Functional disability, however, is only one of the factors to be taken into consideration in determining industrial disability.

Claimant is 23 years old, a high school graduate with two years of college. Claimant worked as a cook in high school and in college. Claimant worked as a truck driver for four to five months and repaired electrical motors for approximately eight months. Besides the injury which is the basis for this action, claimant has residuals following an epiphysitis of the first, second and third lumbar vertebrae, a healed leg Perthes' disease of the right hip and discomfort on both kees. Although claimant is limited in his ability to work due to his prior disabilities, Dr. Blenderman indicated that claimant's shoulder injury had no greater effect on his ability to work. Dr. Blenderman indicated that the shoulder injury would not prevent the claimant from working but heavy lifting would cause pain. It is noted that claimant did not follow the exercise program that Dr. Dubansky suggested. Mr. Reasland, defendant-employer's production supervisor, testified that although part of the operation carried on by Defendant-employer in Des Moines is being moved to Colorado, he does not contemplate that claimant will lose his job and indicated satisfaction with claimant's work. Based on these facts, it is determined claimant has received no more industrial disability than his functional rating of 5 percent permanent partial disability to the body as a whole as a result of his injury.

* * *

Signed and filed this 28th day of September, 1979.

DAVID E. LINQUIST
Deputy Industrial Commissioner

Appealed to Commissioner; Dismissed.

GLADYS L. HATCH,

Claimant,

vs.

MARSHALLTOWN MANUFACTURING COMPANY

Employer,

and

EMPLOYERS INSURANCE OF WAUSAU,

Insurance Carrier,

vs.

THE HARTFORD INSURANCE GROUP and AETNA CASUALTY & SURETY CO.,

Insurance Carrier,
Third Party Defendants.

Ruling

This matter was originally filed as a Review-Reopening proceeding by Gladys L. Hatch, the claimant, against Marshalltown Manufacturing Company, her employer, and Employers Insurance of Wausau, the insurance carrier, to recover additional benefits under the Iowa Workers' Compensation Act by virtue of her exposure to mercury over a 12-year period prior to November 1, 1976. In due course the defendant, Employers Insurance of Wausau, upon proper motion joined as additional insurance company defendants, the Hartford Insurance Group and Aetna Casualty & Surety Co., as the prior insurance carriers providing coverage for the period of claimant's exposure to mercury.

The three defendants stipulated that the Aetna Casualty and Surety Company was the Workmen's Compensation carrier from July 1, 1966 to July 1, 1971 and that the Hartford Insurance Group was the Workmen's Compensation carrier from July 1, 1971 to 1974, at which time Employers Insurance of Wausau became the carrier.

The claimant and the defendants, Marshalltown Manufacturing Company and Employers Insurance of Wausau, entered into an agreement for special case settlement pursuant to §85.35, Code of Iowa, which was approved by the Iowa Industrial Commissioner. By the terms of the settlement, the defendants paid the claimant $50,000.00 for all her rights under the Iowa Worker's Compensation Act.

The defendants, Marshalltown Manufacturing Company and Employers Insurance of Wausau, allege that the claimant suffered injuries under Chapter 85 during the time of coverage of both third-party defendants and request that an order of reimbursement be entered against the third-party defendants.

The defendants, Aetna and Hartford, resist such an order setting forth the provisions of §85A.10, Code of Iowa, which reads as follows:

> Last exposure-employer liable. Where compensation is payable for an occupational disease, the employer in whose employment the employee was last injuriously

> exposed to the hazards of such disease, shall be liable therefor. The notice of injury and claim for compensation as hereinafter required shall be given and made to such employer, provided, that in case of pneumoconiosis, the only employer liable shall be the last employer in whose employment the employee was last injuriously exposed to the hazards of the disease during a period of not less than sixty days.

The primary issue to be determined in this matter concerns the applicability of the Iowa Code Chapter 85A concerning occupational diseases. It is clear that the defendants' Original Notice to the third-party defendants indicated that relief was sought under the chapters of the Iowa code relating to Occupational Disease Act benefits.

Larson, Workmen's Compensation, §39-40 contains the contrast between accidental injury and occupational disease.

Prior to 1973, the Iowa Code classified seventeen diseases as occupational diseases under Chapter 85A.

The elements of an occupational disease under the present law is that such diseases are not readily contracted in everyday life, or in other occupations, but have a direct connection to the employment because of the peculiar risks incident thereto, §85.A9, Code of Iowa. If the employment activities are attended with poisons, chemicals, fumes, dust or other conditions directly causing or contributing to a disease peculiar to the business and not readily contracted in everyday life, the definition of occupational disease is certainly met.

The symptomotology alleged and testified to by the claimant is found to be an occupational disease. The claimant worked for twelve years in a factory which manufactures mercury thermometers. She has established continuous exposure to mercury during this twelve-year period and has been diagnosed as having mercury poisoning by Dr. Ambre, Dr. Patterson and Dr. Nieman.

Having concluded that the nature of the claimant's claim for benefits must come within the provisions of Chapter 85A (Code), the next matter requiring resolution is the application of §85A.10 supra, to the case at hand.

Professor Larson, in his thesis on Workmen's Compensation §95.20 et.seq., comments on this rule as follows:

> Occupational disease causes typically show a long history of exposure without actual disability culminating in the enforced cessation of work on a definite date. In a search for an identifiable instant in time, which can perform such necessary functions as to start claim periods running, establish claimant's rights to benefits, determine which years the statute applies and fix the employer and the insurer liable for compensation, the date of disability has been found the most satisfactory.
>
> Legally, it is the moment at which the right to benefits accrues; as to limitations, it is the moment at which in most instances, the claimant ought to know he has a compensable claim; and as to the successive insurers, it has the one cardinal merit of being definite, while such other possible dates as that of the actual contraction of the disease are not usually susceptible to positive demonstration.
>
> Among the conditions to which this rule has been applied are asbestosis, silicosis, penumoconiosis, tuberculosis, arthritis, dermititis, occupational loss of hearing and various diseases produced by inhalation of chemicals and fumes. Larson, *Workmen's Compensation*, §95.21, pp. 17-79 through 17-87 (citing numerous authorities).

The Iowa legislature in passing §85A.10 supra has adopted the "last exposure" rule, which holds that liability for a disabling occupational disease falls upon the insurance carrier covering the risk at the commencement of the disability.

The defendants contend that the commissioner should adopt the same rule with respect to successive insurance carriers as the Iowa legislature has deemed fit to provide for successive employers in Iowa Code Section 85A.10. Jurisdictions with statutes similar to Iowa's have had no problem in extending this principle in this type of case.

One of the most frequently cited cases supporting this extension is Judge Medina's opinion in *Travelers Insurance Company v. Cardillo,* 225 F2d 137 (2d Cir. 1955). The judge commented on the problem as follows:

> The nature of occupational diseases and the dearth of medical certainty with respect to the time that is required for them to develop and the permanence of the result and injurious effects at different stages of the disease's evolution, make it exceedingly difficult, if not practically impossible, to corrolate the progression of the disease with specific points in time or specific industrial experiences.

After finding that the last employer would be liable in full under federal law, but that the federal statutes made no provisions for insurance carriers, the court held at 145 as follows:

> There remains the question, which carrier or carriers are responsible . . . . Here we are frankly groping in the dark. But the conclusion already arrived at with respect to the liability of the employer may fairly be thought to mark the path to be followed here as well.
>
> If administrative ease of handling was a consideration of significance in the formulation of the act with reference to the liability of the employer, then there is small reason to suppose that it was the intention of the Congress to inject into the determination of carrier liability the very same conjectural and unsatisfactory estimates which would have been involved in attempting to apportion liability among employers.
>
> Rather it would seem far more in keeping with the Congressional recognition of the overriding importance of efficient administration in this area, to conclude that the treatment of carrier liability was intended to be handled in the same manner as employer liability, and that the carrier who last insured the 'liable' employer, during the claimant's tenure of employment, prior to the date claimant became aware of the fact that he was suffering from

an occupational disease arising naturally out of his employment, should be held responsible for the discharge of the duties and obligations of the 'liable' employer. We so hold.

In the matter of *Johnson vs. Franklin Mfg. Co.,* (Iowa Industrial Commissioner Review-Reopening decision filed August 30, 1978) the following language is found at 4:

> Furthermore, the defendants' contention that Hartford Accident & Indemnity Insurance Company be made a party is without merit in light of Iowa Code Section 85A.10, which states that the employer in whose employment the employee was last injuriously exposed to the hazards of such disease is liable. This rule can be logically extended to cover the employer's insurance carrier at the time of the last injurious exposure. Thus the Travelers Insurance Company is liable for any award made to claimant in this proceeding, since they were the employer's insurance carrier in April and May of 1974.

It is clear that when applying the foregoing rationale and principles to the case at hand, that the insurance carrier providing coverage at the time of the actual date of disablement should be, and is, subject to §85A.10 in like manner as the employer.

IT IS SO ORDERED and the application for apportionment of settlement of funds of defendant, Employers Insurance of Wausau be and the same is hereby dismissed.

Signed and filed this 29th day of December, 1978.

HELMUT MUELLER
Deputy Industrial Commissioner

No Appeal.

ESTATE OF JAMES V. HAWK, II,

Claimant,

vs.

JIM HAWK CHEVROLET-BUICK, INC.,

Employer,

and

UNIVERSAL UNDERWRITERS INSURANCE COMPANY,

Insurance Carrier,
Defendants.

Appeal Decision

This is an appeal by defendants from a proposed commutation decision entered December 17, 1979, which awarded claimant a lump-sum commutation of benefits of sixty-five thousand eight hundred fifty and 24/100 dollars ($65,850.24) representing the present and commuted value of 1,212.48 weeks of benefits at ninety-one dollars ($91) per week.

* * *

The issue on appeal is whether the commutation of all remaining benefits is in the best interest of the widow and minor children entitled to the compensation. With the exception of the number of accrued weeks not paid and the adjusted total of the accrued amount, the parties stipulated to the accuracy of the computation in the application. Consequently, the period during which compensation is payable can be definitely determined and is not at issue.

The Petition for Commutation indicates that claimant was paid compensation for eight weeks at a rate of ninety-one dollars ($91) per week until November 25, 1979, for a total of seven hundred-twenty eight dollars ($728). In addition, the modified petition indicates a period of 313 weeks at the same rate accrued but not paid to October 1, 1979, including the statutory interest, in the amount of thirty-four thousand three hundred thirty-eight and 72/100 dollars ($34,338.72). The remainder to be commuted is 1,212.48 weeks at the rate of ninety-one dollars ($91) per week totalling one hundred ten thousand three hundred thirty-five and 68/100 dollars ($110,335.68). At the same weekly rate, using a factor of 723.6291, a commuted value of sixty-five thousand eight hundred fifty and 24/100 dollars ($65,850.24) remains.

Mary Jean Hawk, claimant, has two children from her marriage to decedent. James was born March 12, 1969, and David was born November 10, 1971.

At the time of the hearing decedent's widow was 32 years of age. Claimant testified she has not remarried and is not presently contemplating remarriage. Her testimony indicates that her present annual income is seventeen thousand sixteen dollars ($17,016). This is derived from Social Security benefits, dividends from corporate stocks, interest on savings, and minimal income from part-time employment as an interior decorator. Claimant testified that she plans to pursue her interior decorating job.

Claimant's anticipated annual expenses are approximately twenty thousand three hundred seventy-four dollars ($20,374). Additionally, claimant intends to send her children to a private parochial school at a cost of four hundred fifty dollars ($450) per child. Claimant's anticipated expenses are greater than her present overall income.

The proposed trust agreement in which claimant and her two minor children are income beneficiaries was submitted in support of the request for commutation. Claimant, her father, Clyde Blanchard, and her father-in-law, James Hawk, would act as co-trustees. Claimant is named as grantor of the trust.

Section 10 of the proposed trust agreement indicates that the primary purpose and intent of the trust is to provide for the income beneficiaries, with the rights and interests of the remainderman subordinate and incidental to that purpose. The claimant's statement in support of the petition anticipates that all sums received from the commuted value of the death claim would be placed in the trust for the maintenance, support, and education of the children through their majority and college education. The trust agreement would terminate when the children completed their college education. Claimant testified that the pro-

posed trust agreement would be in the best interest of the trust beneficiaries.

Mr. Clyde Blanchard testified that he was president of the Council Bluffs State Bank before retiring in 1960, and that he has handled his family's financial affairs and investments for approximately twenty years. Mr. Blanchard indicated that the anticipated average growth income from investments of the assets of the trust would be between 8 to 10%. At this rate the corpus of the trust would be preserved, allowing the beneficiaries to live off the income. Mr. Blanchard additionally testified that it is in the best interests of the persons entitled to the compensation that the death benefits be commuted.

James Hawk, father of the decedent, testified that he was a self-employed businessman and owner and president of several successful business ventures. He agreed that the trust agreement is in the best interest of the beneficiaries.

Iowa Code §85.45 (1) provides that future payments of compensation may be commuted to a present worth lump-sum payment if the period during which compensation is payable can be definitely determined. Iowa Code §85.45 (2) provides in part for commutation if it is shown to the satisfaction of the industrial commissioner that the commutation will be for the best interest of the person or persons entitled to the compensation.

The supreme court in *Diamond v. The Parsons Co.*, 256 Iowa 915, 129 N.W.2d 608 (1964), stated that commutation may be ordered when it is shown to the satisfaction of the court or judge that the commutation will be for the best interest of the person or persons entitled to compensation or that periodical payments as compared to lump-sum payment will entail undue expense, etc., on the employer. In *Diamond* the court looked to the circumstances of the case, claimant's financial plans, and claimant's condition and life expectancy in awarding the commutation. The court stated that it "should not act as an unyielding conservator of claimant's property and disregard his desires and reasonable plans just because success in the future is not assured." *Id.* at 929, 129 N.W.2d at . A reasonableness test was applied by the court in *Diamond* to determine whether a commutation would be in the best interest of the person or persons entitled to the compensation.

Professor Larson's philosophy on granting commutation is much more restrictive than that of the Iowa Supreme Court in 1964. He warns that:

> In some jurisdictions the excessive and indiscriminate of the lump-summing device has reached a point at which it threatens to undermine the real purposes of the compensation system. Since compensation is a segment of a total income-insurance system, it ordinarily does its share of the job only if it can be depended on to supply periodic income benefits replacing a portion of lost earnings. . . . The only solution lies in conscientious administration, with unrelenting insistence that lump-summing be restricted to those exceptional cases in which it can be demonstrated that the purposes of the act will be best served by a lump-sum award. The beginning point of the justifiability of the lump-summing in a particular case is the standard set by the statute. This is usually so general, however, as to supply little firm guidance and control, turning on such concepts as the best interests of the claimant or the avoidance of manifest hardship and injustice. *Larson, Treatise on the Law of Workmen's Compensation,* §82.70.

Professor Larson indicates that experience has shown that a claimant is often under pressure to seek a lump-sum payment, and once the payment is received it is soon dissipated.

Additionally, Iowa's first industrial commissioner, in the first *Biennial Report of the Workmen's Compensation Service* (1916) at page 12, pointed out that, although in exceptional cases commutation promotes personal welfare, weekly payments should be regarded as a general rule better adapted to the real needs of compensation service since large lump sums are often unwisely used by beneficiaries.

Despite the rational reasoning in support of the more restrictive views on commutation of compensation benefits, the *Diamond* guidelines still prevail in Iowa. Relying on *Diamond* and claimant's substantial monetary resources, excluding weekly compensation benefits, this commissioner would be hard-pressed to conclude that a lump-sum payment would not be in the best interest of claimant, notwithstanding the periodic payment philosophy of wage replacement upon which the theory of workers' compensation is based.

WHEREFORE, it is found that the period during which compensation is payable can be definitely determined, and that the commutation of all remaining benefits is in the best interest of claimant and her dependent children.

* * *

Signed and filed this 18th day of June, 1980.

ROBERT C. LANDESS
Industrial Commissioner

Appealed to District Court: Pending.

VINTON V. HAYS,

Claimant,

vs.

ARMSTRONG RUBBER COMPANY,

Employer,

and

LIBERTY MUTUAL INSURANCE COMPANY,

Insurance Carrier,
Defendants.

Arbitration Decision

INTRODUCTION

This is a proceeding brought by the claimant, Vinton V.

Hays, against Armstrong Rubber Company, employer, and Liberty Mutual Insurance Company, insurance carrier, for benefits as the result of an injury on October 26, 1978.

* * *

FACTS

Claimant testified that he is a tire builder for the defendant and works the 11:00 p.m. to 7:00 a.m. shift. Claimant's weekend runs from 7:00 a.m. Friday morning until 11:00 p.m. Sunday evening. Claimant testified that on October 26, 1978 he worked all night but had problems with the "truck tread in the book" and "cord". Claimant testified that the truck tread stuck to the pages of the book and the cord was tacky and hard to work with. Claimant stated he therefore had to work harder than normal. After the shift was over, claimant went to sleep but woke up early because his left wrist was hurting. Sunday evening claimant went to work and worked approximately one-half hour when he reported to his foreman that he had pain in his left wrist. Claimant saw the plant nurse and told her he did not know of any specific incident that caused the pain to his wrist. After seeing the plant nurse Sunday evening, claimant went home.

The following morning the claimant saw Joel M. Linford, M.D., his family physician. Claimant testified that Dr. Linford diagnosed his injury as tendonitis of the left wrist. Dr. Linford gave claimant a work release indicating he could do light duty. Claimant tried to return to work but the plant refused to give him any light duty work because his injury was not job related. Claimant's foreman sent him home for two weeks. On November 3, 1978 claimant saw William P. Wellington, M.D., the company doctor. On November 6, 1978 claimant saw a Dr. Garcia, who is another company doctor. On November 17 claimant had a physical before returning to work and in fact returned to work on November 20.

ISSUES

The issues presented by the parties at the time of hearing are (1) whether claimant received an injury which arose out of and in the course of the employment; (2) whether there is a causal relationship between the alleged injury and the disability; (3) whether claimant is entitled to benefits for temporary healing period or permanent partial disability.

APPLICABLE LAW

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. *McDowell v. Town of Clarksville,* 241 N.W.2d 904 (Iowa 1976); *Musselman v. Central Telephone Co.,* 261 Iowa 352, 154 N.W.2d 128 (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). The mere fact that a person reaches a point of disablement while at work does not make an injury compensable under the Workers' Compensation Act. There must be a direct causal connection between the exertion of the employment and the injury. *Almquist v. Shenandoah Nurseries, Inc.,* 218 Iowa 724, 254 N.W.35 (1934).

"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).

ANALYSIS

Based on the foregoing principles, it is found that claimant has failed to establish his claim. Although claimant testified that he thought his hard work on October 26 caused his injury, there is nothing else in the record to support that position. Claimant failed to offer any medical reports which would indicate his injury arose out of his employment. In talking to his foreman and the plant nurse, claimant did not reveal his alleged problems with the tread book or cord. Furthermore, there is testimony that claimant finished well above the 100 percent rate on October 26, 1979. The only evidence which would tend to support claimant's position that the injury arose out of his employment is in defendant's exhibit H which states: "On this report Dr. Linford also attempted to change the cause of the condition as probably work related." No report of Dr. Linford was introduced into evidence and the basis on which Dr. Linford may have made such a statement is unknown. However, in defendants' exhibit H, Dr. Wellington did reveal that he did not believe the injury was job related. Without any other evidence other than claimant's statements that the injury arose out of his employment, it cannot be said he had met his burden of proof.

* * *

Signed and filed this 30th day of March, 1979.

DAVID E. LINQUIST
Deputy Industrial Commissioner

No Appeal.

EDWARD F. HICKSON,

Claimant,

vs.

W. A. KLINGER CO., INC.

Employer,

and

THE SECOND INJURY FUND OF IOWA,

Defendants.

Appeal Decision

This is a proceeding brought by defendant, the Second Injury Fund of the State of Iowa, (hereinafter referred to as Fund) appealing a proposed arbitration decision wherein

claimant was found to be permanently and totally disabled as the result of separate injuries to his left and right upper extremities and thus was awarded benefits from the Fund.

* * *

Because of the importance of the chronology of the actions taken in this matter and the pertinent facts brought out in each, they will be set out in some detail.

On February 12, 1975 claimant's First Report of Injury was filed with this office. The report noted that claimant was injured on January 31, 1975 when he "slipped on bolts spilled on steps in yard office -- fell on left shoulder." A form 5, filed February 18, 1975, indicates that claimant was paid two days of healing period benefits. Claimant's original notice and petition against the defendant employer and insurance carrier was filed June 21, 1976. In that petition, claimant described the incident as follows: "Returning from warehouse to office I stepped on loose bolts on the steps and fell and injured left shoulder and neck." The petition indicated that the "left shoulder and neck" were the parts of claimant's body affected or disabled by the incident. Subsequent to this, on August 27, 1976, the parties filed an application for commutation. The application noted that claimant had sustained torn muscles and ligaments of the left shoulder and was suffering from degenerative arthritis of the left shoulder. The parties sought an agreement based upon 50 percent permanent partial disability of the left arm which was approved by a deputy industrial commissioner.

Exhibit A, submitted with the application for commutation, included three medical reports, the doctor's first report to the insurance carrier and a personal statement of the claimant. The doctor's first report to the insurance carrier, made out by Joe M. Krigsten, M.D., indicated that claimant had sustained "torn muscles and ligaments left shoulder and cervical area." William M. Krigsten, M.D., who notes in his April 29, 1975 report that he has treated claimant many times for pain in his neck and shoulders, states ". . . the patient has almost complete degeneration of both shoulder joints . . . ." In a March 15, 1976 report, Dr. Krigsten concluded that claimant had reached maximum recovery and should be allowed to retire. His final diagnosis was "degeneration complete right and left shoulders". His last report of May 19, 1976 notes that claimant's pain continues and that the "shoulder is same as for the past two years."

Following the approval of the commutation and the filing of the form 5, which noted that the sums agreed to had been paid by the defendant, claimant filed an original notice and petition on December 29, 1976 against the Fund alleging that a previous disability to his right shoulder combined with the left shoulder injury entitled him to Fund benefits. A motion to dismiss the application for benefits was made by the fund contending the claimant had not alleged a loss or loss of use of a member or organ as contemplated by §85.64. An order was entered on February 18, 1977 denying defendants' motion noting that the word shoulder may refer to only that portion which is the arm but also suggested the Fund request a more specific statement of the nature of the two injuries.

Claimant's disability to his right shoulder occurred as the result of an accident at work in 1965. In claimant's answers to interrogatories, he described this incident as "stepped on grain conveyor and fell off door injuring right shoulder and arm." A review-reopening decision filed October 29, 1968 found that claimant had sustained a 45 percent loss of use of the upper right extremity. Claimant describes the January 31, 1975 incident at work in his answers to interrogatories by stating "Fell on loose bolts on steps and fell down two flights of steps left shoulder, arm and neck." A number of additional medical reports are included with claimant's answers to interrogatories dating back to the 1963 incident. It is necessary to discuss several of the reports in order to assess claimant's condition and its progression over the years. Following claimant's injury at work in 1965, Dr. William M. Kingsten's report of February 23, 1966 notes claimant had a 50 percent loss of motion due to pain in his right shoulder and right knee as of his examination of August 14, 1963. He further states that by January 8, 1966, claimant had arthritis of the right shoulder secondary to the injury. In a September 17, 1967 report he notes a permanent impairment of 75 percent of claimant's right upper extremity based upon his limited motion and considerable discomfort. By 1973 Dr. Krigsten reported he was treating both shoulders and the right wrist. Dr. Albert D. Blenderman's report of June 5, 1974 included a diagnosis of "osteoarthritis, both shoulders, moderately severe" and suggested claimant discontinue his work as a laborer. Thus, prior the 1975 incident, claimant had received treatment for both shoulders and had been advised to seek retirement.

Joe M. Kingsten, M.D., who initially saw claimant on the day of his January 31, 1975 injury, gave his impression of claimant's condition as "torn muscles and ligaments of the shoulders; cervical syndrome, osteoarthritis, both shoulders." Dr. William M. Kingsten, who consulted on the case, gave his impression that claimant had "torn muscles and ligaments of the left shoulder and neck, overlying a rather advanced degree of arthritis of the left shoulder and the cervical spine, mainly, at C6-7."

At this point in the proceedings, claimant dismissed the action as to defendant employer. An arbitration decision was then filed September 26, 1977 wherein claimant was awarded benefits from the Fund based upon a finding of permanent and total disability.

Defendant Fund contends in its brief that even though it was not a party to the commutation and had no involvement in the 1968 review-reopening decision, such does not foreclose it from raising issues as to the nature and extent of claimant's disability as these determinations imposed a potential liability on the Fund. The Fund further alleges that claimant had a pre-existing arthritic condition in both members and that such injuries were to claimant's shoulders and thus to the body as a whole under *Alm v. Morris Barick Cattle Co.*, 240 Iowa 1174, 38 N.W.2d 161 (1949).

Based upon the evidence set forth, it is apparent that the extent of claimant's disability is somewhat uncertain. The medical evidence as well as statements from the claimant himself primarily refer to both shoulders and the cervical area. There appears to be substantial evidence that claimant's disability was not limited to his arm. The application

for commutation states in paragraph 8 that the injuries to claimant consisted of "torn muscles and ligaments left shoulder, degenerative arthritis left shoulder" and goes on in paragraph 9 to assign a permanent partial disability rating of 50 percent of the arm.

The first requirement for granting a commutation is that the period during which compensation is payable can be *definitely* determined. Code §85.45. The period during which compensation is payable cannot be definitely determined until a determination has been made concerning the nature and extent of the resultant injury. This is often done by agreement of the parties. However, the Second Injury Fund was not a party to nor aware of any agreement concerning the nature or extent of the resultant injury and therefore should not be bound by that agreement. *Special Disability Trust Fund v. Tropicana Products, Inc.,* 358 So.2d 1 (1978), the supreme court of Florida stated:

> Since money to be received by injured claimant in settlement of his claim will in part be paid by the Fund, obviously the Fund is a party "interested" in the settlement to the same extent as others financially responsible, such as the employer and the carrier.

The court went on to hold that the Fund has a right to intervene in a lump sum settlement proceeding where the employer or insurance carrier is seeking reimbursement from the Fund a portion of the compensation payments at issue. Although the procedure regarding the Fund in Florida is different than in Iowa, the principle of a party participating in an agreement which creates a liability upon that party is the same.

In the case at bar, the Fund's first knowledge of the injury or the proceeding was when claimant filed his original notice and petition seeking benefits from the Fund. This occurred subsequent to the agreement and commutation as to claimant's second injury. The fact that the Fund was not a party to the review-reopening proceeding which resulted in the commutation and thus not aware of its potential liability should not foreclose it from challenging the nature and extent of claimant's disability. The agreement as to disability contained in the approved application for commutation is not binding upon the Fund. The Fund should have an opportunity to produce evidence as to the nature and extent of the claimant's disability as a result of the 1975 injury.

This is not to infer that the Fund should be able to participate in all claims involving injury to the members or organs contained in §85.64, but if one of those members or organs is previously lost or lost usage, then an agreement as to the nature and extent of disability in which the Fund does not participate will not be binding upon them.

WHEREFORE, it is held that the commutation is not binding upon the Fund as to the nature and extent of claimant's disability.

THEREFORE, it is ordered.

That this matter be remanded to a deputy industrial commissioner to determine the nature and extent of claimant's disability as a result of the January 31, 1975 injury.

Signed and filed this 4th day of August, 1978.

ROBERT C. LANDESS
Industrial Commissioner

No Appeal.

JOHN J. HILD,

Claimant,

vs.

NATKIN AND COMPANY,

Employer,

and

UNITED STATES FIDELITY AND GUARANTY COMPANY,

Insurance Carrier,
Defendants.

Ruling

NOW, on this 17th day of June, 1980, the matter of claimant John J. Hild's Motion to Introduce New Evidence or Remand comes on for determination. After due consideration it is determined that the Motion to Introduce New Evidence or Remand should be overruled.

Pursuant to Industrial Commissioner Rule 500-4.28(4), a request for the taking of additional evidence must be filed with the industrial commissioner within twenty days of the filing of the appeal. Claimant filed his Notice of Appeal on March 14, 1980. Claimant's Motion to Introduce New Evidence or Remand was filed on June 11, 1980 and as such was untimely filed.

A decision by the industrial commissioner to remand is within the purview of the appeal discretion granted by Iowa Code §86.24. A decision to remand, if any, will be made when this entire matter is submitted for review, not upon motion of a party.

THEREFORE, claimant John J. Hild's Motion to Introduce New Evidence or Remand is overruled.

Signed and filed this 18th day of June, 1980.

ROBERT C. LANDESS
Industrial Commissioner

No Appeal.

FRANK HOLLAND,

Claimant,

vs.

IOWA POWER & LIGHT COMPANY,

Employer,
Self-Insured,
Defendant.

Appeal Decision

Defendant appeals a decision wherein claimant was awarded healing period benefits as a result of a myocradial infarction which occurred on August 2, 1976.

* * *

The issue requiring resolution is whether or not the myocardial infarction suffered by claimant arose out of his employment.

In 1952 claimant began work for defendant as a lineman. He was promoted to foreman, working at the time of his attack under the supervision of Keith Hackney, field supervisor for Iowa Power. Claimant and Hackney's perception of their working relationship differs somewhat. Claimant testified that when he tried to tell Hackeny of his problems, he was told just to get his work done, that he believed Hackney neither liked nor trusted him and that he had been singled out for criticism by Hackney. What claimant viewed as arguments or angry exchanges were to Hackney "discussions" which he had with all of his foremen.

Claimant, who was the only foreman on the project, had been assigned to Deer Creek which according to claimant and Hackney had been plagued with problems, including pacing the water main where electric cables were to be laid, soil conditions which contributed to cave-ins and weather. In addition to those problems, claimant complained that changes in his whole crew; i.e., the apprentice lineman and a truck driver-groundman, every two to three weeks "finally got . . . [him] down." He also reported a failing "to be comfortable" with employment after knee surgery in the fall of 1975. Claimant said initially he had been allotted twenty working days to complete the Deer Creek project which was in its fourth month at the time of claimant's infarction.

Regarding the morning of claimant's attack, Hackney recalled claimant "questioned whether he could get the work done that I had given him because of Mike Mossman [sic] needing to leave at two o'clock for a doctor's appointment." However, Hackney told claimant "to go on out and get to work and if he got the job done, or I thought he could get the job done. If he didn't get it done, well, we would go back tomorrow and finish it." Hackney did not remember leveling any personal criticism at claimant for his work on the Deer Creek project and indicated almost daily reassurance was given to claimant that delays were not his fault.

On August 2, 1976, following what appears, from claimant's testimony, to have been a relaxing weekend, claimant reported for work at 7:30 a.m. Defendant's exhibit A shows that temperatures on August 2 were in the low to mid-seventies. Claimant's crew was composed of Ron Slater and Mike McCann. There was an equipment breakdown which necessitated the crew's waiting for repairs before they could commence the day's task which the claimant said was "to dig up two faults in the cable which had been located and repair the cable and fill the holes and energize the line up to a certain transformer, energize all three phases, ..." Waiting for repairs produced at least an hour's delay in reaching the job site. A backhoe was used to uncover the first fault. While the fault was being uncovered, Slater told that if he and claimant were doing anything, it would be getting out equipment. Not remembering for sure in this specific instance, Slater said it was usual for the workers to have to do some digging with spades in an operation like this. Claimant, although testifying that there was no work to cutting cable, believed he would be responsible for the major portion of the work, which he described as strenuous and "medium heavy," but not unusual, as Slater had not spliced cable before. It is unclear from the record at what point claimant knew McCann had to leave the project for a doctor's appointment in the afternoon. However, claimant said McCann's leaving "was no big thing" in that an adjustment in division of labor could be made. Working in the ditch, claimant began to feel "a little woozy" and to think he was coming down with the flu. The crew broke for lunch. Claimant had a cup of coffee and "a little something." He then started vomiting. He was taken to the shop where the crew was told to take him home. Enroute claimant felt chest pains and decided to go to Dr. Weigel who sent claimant to the hospital where it was found that claimant had a myocardial infarction.

Claimant's medical history includes a familial history of three siblings with heart trouble and a father's death from a heart attack. Claimant had been hospitalized with an appendectomy in 1941 and with a back injury requiring traction in 1959. Following an on-the-job accident nine years before, claimant had knee surgery in September 1975. Claimant denied any prior heart problems or hypertension. He did acknowledge taking medication for nervousness, and having several years ago an involuntary contraction of the digestive tract. Claimant's emotional history contained a family problem which resulted in the entire family's seeking counseling at the West Central Mental Health Clinic.

Expert medical testimony in this case was provided by Perry L. Weigel, M.D., Chad Lee Williams, M.D., Neil J. McGarvey, M.D., and Paul From, M.D.

Dr. Weigel began seeing claimant in 1971 for complaints he described as stress, meaning "general somatic complaints" for which there was no out-and-out organic basis. In a physical conducted on July 8, the doctor began to suspect claimant might have chronic obstructive pulmonary disease. The doctor recalled claimant's having mentioned difficult working conditions, trouble with his supervisor, problems with his son and his spouse's reactions to those problems. Dr. Weigel listed claimant's risk factors as smoking, weight, family history and stress. The stress factor appears not to have arisen until claimant's hospitalization, when it was viewed as a precipitating factor. Specifically, the doctor said, "That [stress from the circumstances of August 2, 1976] would not cause a heart attack. It certainly could help to precipitate, or change the situation and make it more likely, as a stress factor." A report dated September 25, 1976 states:

> For several years prior to Frank Holland's M.I. I have been seeing him for treatment of various problems. He has mentioned work-related stress on a number of occasions. This information coupled with the supervisory position led me to conclude that his heart attack was precipitated or aggravated by his work.

Dr. Williams, board certified internist and cardiologist, first saw claimant on the day of his attack. Regarding heart attacks and inferior myocardial infarction, he said:

> All heart attacks are usually caused either by a clot or obstruction to a coronary artery supplying the heart when either the heart's demands superseded the amount of flow or a vessel becomes blocked for a period of time. The muscle then dies, and then has to go through a period of healing.
>
> Now, "inferior" just locates what part of the heart. Myocardial infarction, myocardial referring basically to the heart; infarction meaning that a tissue has lost its blood supply and has, therefore, died.

He continued:

> myocardial infarctions happen, we know, from one extreme, where people have normal coronaries and are just under a high degree of stress, can still have an infarction; and then to the most common, where they have arteries that have been plugged and narrowed through the years that have ultimately formed a clot; or the third way is people that have relatively normal coronaries will do what we call dissect; in other words, they will lift up a little layer in the vessel itself, and tear and obstruct.

The doctor found narrowings of the coronary arteries, but they were "not so impeded as to account totally for the myocardial infarction." Dr. Williams speculated that pain claimant reported having prior to his attack which were relieved by belching, walking or drinking could mean that claimant was having coronary insufficiency prior to his attack. The doctor said claimant had a positive family history -- one of the preconditions of a heart attack. Claimant had neither of the other two preconditions which were diabetes and high cholesterol and triglyceride count. In reference to the role stress can play in heart attacks, Dr. Williams suggested, "we certainly know stress can accelerate vascular disease, the disposition of cholesterol and triglyceride in the vessels, and that people that are under stress have a higher adrenalin, and their hearts go faster, and they demand a little more oxygen." Moving from the general to the more specific, he said:

> we know that stress is one of the things that brings on what we call an angina or coronary insufficiency. That also depends on the individual, as to whether those kinds of situations stressed him. If they stressed him, it certainly could aggravate it. If it didn't stress him, then it certainly didn't aggravate it. But if he gets upset over it, I would say it certainly could have aggravated the situation. It's one of the major things that bring on angina or coronary insufficiency attacks that we look for in the history.

Regarding the effect of claimant's continuing to work, the doctor asserted, "Certainly when you're either having coronary insufficiency or in the process or having a heart attack, it's double jeopardy to keep working at doing anything you're doing. The normal thing to do is stop what you're doing and rest." In a report on October 8, 1976, the doctor wrote, "Since the patient's heart attack occurred while on the job, this should be considered an on-the-job causal relationship since the patient was doing heavy work, and probably would not have had the infarction if he had not been doing heavy work at the time."

Neil J. McGarvey, M.D., board eligible internist, had never actually treated claimant but had reviewed medical records and the depositions of claimant and Dr. From. Dr. McGarvey expressed the strong feeling that stress, which he said could be emotional or psychological, and strain "could precipitate a myocardial infarction, always understanding that the underlying disease is present." The underlying disease could be used to rule out coronary spasm as a primary cause. This underlying disease was present in claimant. The doctor was without doubt

> that patients can have very definite ischemic or changes in the myocardial muscle without the patient being aware of it whatsoever, because we are well aware of the fact that there are statistics to show that there are such things as silent myocardial infarctions. Maybe 10, 15, 20% of the people that have coronary artery disease are not really aware of the ischemic changes that are taking place.

Dr. McGarvey responded to a hypothetical question:

> this gentleman has had evidence of coronary artery disease, undoubtedly for some period of time in view of the catheterization studies which had been done post-myocardial infarction.
>
> My personal feeling is that there was no causal relationship or job relationship to his coronary artery disease, based primarily on the fact that this patient . . . has been in this occupation for approximately 20 years; that some of the stress and strain of this particular job has been part of his way of life for nearly 20 years and I do not feel that despite the fact that he may have used a shovel, that he may have had some job problems prior to coming to the job that morning; that I really feel that the underlying condition was such that it could have occurred at almost any time, regardless of the catheterization studies or the results of the catheterization studies that were later done.

The doctor allowed that it was "extremely hard" to answer the question of whether or not claimant's continuing to work after the onset of his symptoms aggravated or accelerated claimant's condition. Dr. McGarvey presumed

> there are cases in which conditions or coronary conditions are aggravated by continuing on and I'm sure from our experience in the treatment of coronary artery disease we have seen people that have worked extremely hard throughout the day with their coronary, survived and made a good recovery and have not felt that they have been actually aggravated by it.

He further testified:

> It seemed to me the condition was already underway.

> Whether it [continuing to work] worsened the condition -- it did not certainly cause it.

Dr. From, board certified internist with a subspecialty in cardiology, had not treated the claimant but had examined medical records and the depositions of claimant and Dr. Williams. In response to a hypothetical question, Dr. From denied belief in any relationship between the work and the onset of the myocardial infarction. The doctor pointed out a number of risk factors, citing family history which he viewed as strengthening his opinion, and pipe smoking. An absence of family history of heart difficulties would not, however, he claimed, change his opinion. As far as claimant's work being a contributing factor, the doctor said:

> He had been on this job for at least twenty years. There was nothing unusual about the work he was doing that day. In fact this was a Monday, after a weekend in which he had not worked. He arrived at work apparently feeling well, did practically no work during the morning while this conduit was being uncovered, and then at work about twenty minutes or so, roughly between twenty -- fifteen and twenty-five minutes, splicing with conduit, which he himself said was heavy, but not hard work, when he developed his first symptomology [sic].
>
> In fact he had symptoms which basically suggested gastrointestinal origin, in that he basically complained of nausea and it wasn't until later that these progressed further that he began to have other symptoms, such as weakness, sweating, and then finally pain as the last symptom, rather than the first, as it often occurs.
>
> To me, knowing that in a -- knowing that the diagnoses from that point on actually was that of an inferior posterior and basal myocardial infarction, knowing that the man had previously peptic ulcer disease, and that he had a very gradual build up of symptomology [sic] and signs of hemodynamic change unless he finally had pain . . .

The doctor concluded

> that at the very most onset he started out with an infarction and in doing work to which he was accustomed for a very, very short period of time under no unusual conditions, I could see no causal relationship between that job and the onset of that infarction, especially in this man who has the genetic background to develop coronary artery disease from whence came the occlusion and infarction.

In further elaboration he said:

> work to which one is accustomed is unlikely to produce significant hemodynamic changes in the heart. The heart of vascular system is accustomed to that particular activity, level of mets, or metabolic equivalence that it takes, and the person has a pattern established so that's done in the easiest way possible, and so forth.

The doctor assumed claimant

> hardly had a good warmup period, only been at it roughly twenty minutes, and I could see no relationship between unusual work and what happened while repairing the conduit.

There is similarity between the testimony of Dr. McGarvey and Dr. From regarding claimant's continuing to work following the onset of symptoms. Dr. From said:

> I think that it probably didn't do him any good to keep working after the onset of symptoms. I'm not certain that it did him any harm. Actually he lived through the entire episode and left the hospital later, and so forth. I think that the infarction began with the onset of his symptoms, or shortly before that, and it's hard to say exactly how long before that. Anywhere from one minute to fifteen to thirty minutes, maybe, before, but once those symptoms began he had already -- was already having this infarction, and that was going to progress no matter what he did.

In evaluating the position taken by Dr. Williams, Dr. From said:

> There is some truth in that the statements made by Doctor Williams, but I don't believe that he thought it through to its very fine points. Today -- before in the past we used to think that we could have a heart attack, a myocardial infarction, if we did not have disease of the coronary arteries because we had a phenomenon in which the blood vessel could be spastic, tightened up. This would narrow the artery simply by the artery clamping down and the blood couldn't go by this area and so a muscle would be deprived of oxygen and would die or infarct.
>
> This goes back maybe only fifteen years, but about ten or twelve years, as coronary angiography became more common and since now we have probably performed more than a million coronary angiograms in this country and have this experience to draw on where we really didn't have objective evidence from the living human before, now we are flooded with this kind of evidence, and now most authorities would think that it's probably very rare that a person have a myocardial infarction if he does not have a disease of a coronary artery. That doesn't mean that it could never happen, but it's rare.
>
> Medically speaking, we say that fifty percent narrowing is probably not medically significant. You have to get up to seventy-five or eighty percent of the circumference of the vessel narrowed before that is really significant. If this man had an aneurysm, which has been demonstrated during the films of the angiography he had to have some trouble there because an aneurysm means the internal pressures of the heart ballooned out the muscle walls. Well, that just can't take place overnight. There has to be some

process, even though it may be of a painless type, taking place in that man's heart to allow him to develop this aneurysm. He could not have had even vaso spasms under today's thinking, most likely. If he didn't have the disease of the coronary artery -- it is unusual that it would be associated with the vaso spasm, then certainly he was not doing unusual work, and therefore in that kind of a sense I think there was no connection. I am not saying that we can say exactly what everything we do at one moment might mean because, you know, it gets extremely complicated. It's not just a matter of work units, but it's how we react to what we are doing, how do we feel about something at a time, what are we thinking about. Nobody knows what you are thinking about at the time, and this may enter into a situation with nerves coming in there playing upon arteries which are already diseased and thus become spastic, but I think in the legal sense of the term -- in the strict medical sense there was nothing of a cause and effect relationship between what Mr. Holland was doing at that time when he had the infarction or in the immediate past time before the infarction started. I don't think that Doctor Williams' reasoning is, therefore, correct when he said that because he only had fifty percent narrowing he must have been subjected to something unusual because it's unusual. I don't think that the corollary is there.

Claimant's discharge summary from Iowa Methodist Medical Center dated August 28, 1976 and dictated for Dr. Williams listed: "Organic heart disease. Etiology -- atherosclerotic heart disease. Anatomy -- coronary artery disease. Physiology -- status post inferior myocardial infarction, normal sinus rhythm, inferior posterior aneurysm, ventricular aneurysm. Functional -- Class II." Cardiac catheterization performed on August 24, 1976 "showed lesions in all three coronary arteries . . . not considered to be hemodynamically significant in that they were all less than 50% occlusions. There was good left ventricular function with exception for a small inferior posterior aneurysm. Left ventricular and dyastolic [sic] pressures were normal."

Also included in the record is a report from Jack T. Britton, social worker at West Central Mental Health Center, Inc., who felt "job pressures could be contributing to [claimant's] physical problem." A progress record of cardiac teaching done by nurses C. Christensen and A. Gillotte at Iowa Methodist Medical Center indicates that claimant was instructed regarding the risk factors relating to coronary atherosclerotic heart disease. Noted in the record were claimant's pipe smoking, improper eating habits -- ingesting too much food and too rich, and stress/marital problems and conflicts at work.

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. Claimant must preponderate. *Volk v. International Harvester Co.,* 252 Iowa 298, 106 N.W.2d 649 (1960). Preponderance of the evidence means the greater weight of evidence; i.e., the evidence of superior influence or efficacy. *Bauer v. Reavell,* 219 Iowa 1212, 260 N.W. 39 (1935). *Musselman v. Central Telephone Co.,* 261 Iowa 362, 154 N.W.2d 128 (1967). There is no issue here as to claimant's attack arising in the course of his employment, as he was on the job site at the time of the attack.

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 (1971). "Arising out of" suggests a causal relationship between the employment and the injury. *Crow 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).

The Iowa Supreme Court, in *Pace v. Appanoose County,* 184 Iowa 498, 168 N.W. 916 (1918), quoted with approval the language of *McNichol 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, ...

It is important to heed the caution issued by the supreme court in *Musselman, supra,* at 359, 132. The court warned that:

> 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.

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, supra.* 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).

This commissioner is not convinced that claimant has supported his claim by a preponderance of the evidence. Although Dr. Weigel had the advantage of being familiar with claimant's history, he does not have the advanced training in cardiology possessed by the other experts. He viewed stress as a precipitating factor rather than a cause. Dr. Williams, too, speaks in terms of stress being a precipitating or aggravating factor. Dr. Williams' testimony may have been colored by his feeling that he knew what claimant was doing on the job because the doctor's brother worked for Northwestern Bell Telephone, which the doctor apparently assumed to be a similar job and by his recollection of claimant's history of onset, which was in some respects contrary to claimant's testimony. Dr. Williams appears to conclude that just because claimant's attack occurred on the job and while claimant was doing what he assumed to be heavy work that the infarction arose out of the work situation. Dr. McGarvey, likewise, expresses the possibility of stress being a precipitating factor if one understood that an underlying disease would be present. He could find no causal relationship between claimant's job and his coronary artery disease. Dr. From's testimony is consistent with that of Dr. McGarvey and his analysis of claimant's situation and his evaluation of Dr. Williams' position are persuasive. While the medical report would acknowledge stress as a factor in heart attacks, they listed additional factors such as smoking, familial history and underlying disease. The record shows that if stress was present in claimant's life, it came not only from his work environment but from his personal situation as well.

WHEREFORE, it is found:

That claimant has failed to sustain his burden of proof that the myocardial infarction of August 2, 1976 arose out of his employment.

* * *

Signed and filed this 19th day of October, 1978.

ROBERT C. LANDESS
Industrial Commissioner

Appealed to District Court: Pending

EDYTHE L. HOLT,

Claimant,

vs.

IOWA STATE TREASURER,

Employer,

and

STATE OF IOWA,

Insurance Carrier,
Defendants.

Appeal Decision

This is a proceeding brought by defendants appealing a proposed decision in review-reopening wherein claimant was awarded temporary disability benefits and medical expenses under the Iowa Workmen's Compensation Act for an injury arising out of and in the course of her employment on June 21, 1976.

* * *

Defendants state(s) the issues on appeal as follows:

"1. Whether the evidence is sufficient to support the deputy's award of temporary total disability benefits."

* * *

Fifty-seven year old claimant was injured on June 21, 1976 when she was climbing down a ladder, missed the last step, and fell backwards, striking her tailbone. Claimant recalled having pain in her back and legs which she described as "numbing, tingling, lightning-like . . ., just kind of jabbing . . . ." She was hospitalized until July 1, 1976 and treated with hot packs, traction and medication. For the following month and a half claimant reported receiving outpatient treatments which provided temporary relief, but had no lasting effect.

Claimant who appears to have had no health problems before June 21, 1976, testified at hearing that she could not sit, stand or lie down for any extended period of time without experiencing pain from her lower back down to her legs. Claimant presently complains of a pain in her back that shoots down to her leg when she coughs or sneezes, of an inability to concentrate because of feeling pain, of difficulty in riding, of an incapacity for running the vacuum, and of a lack of capacity to pursue hobbies. Claimant reviewed a number of referrals from Dr. Joel Linford to Dr. Earl Redfield to Dr. Wirtz. She also reported having been to Mayo Clinic and to Dr. McClain.

Joseph A. Herman, D.O., listed the following final diagnoses after claimant's June 21, 1976 hospitalization:

1) Lumbosacral strain.
2) Coccydynia.
3) Acute myositis of the thoracic lumbar and sacral musculatures bilaterally.
4) Acute tendinitis of the thoracic lumbar vertebra bilaterally.
5) Acute ligamentitis of the lumbar sacral musculature bilaterally.

Peter D. Wirtz, M.D., orthopedic surgeon, first saw claimant on October 7, 1976 and found no aggravation of pain on coughing or sneezing and no tenderness on the tip of the bony structure of the tailbone. A neurological and an x-ray examination were normal and the doctor felt claimant had "a musculoskeletal strain of her lower back and sacral area." According to Dr. Wirtz, "[a] musculoskeletal strain is a stretching or injury to a musculature area in the body." He continued by saying "[t]his type of problem, biomechanically, as well as pathologically, heals itself over a six to 12-week period of time." A December 10, 1976 letter from Dr. Wirtz stated that while claimant had no permanent partial disability, "there is no permanent cure

for this situation." He viewed claimant's prognosis as excellent. In explanation of claimant's continuing complaints of back pain, the doctor said, "Each episode of musculoskeletal strain has an initiating cause, and if there are recurring symptoms, then there are recurring causes for the symptoms." The cause could be normal activities. The "persistency" of claimant's pain made Dr. Wirtz feel that claimant "probably has some psychosomatic aggravation of the area of back discomfort" as "mechanically, orthopedically, [claimant] . . . didn't have any disease process that I specifically diagnosed and treated . . . ." On January 4, 1977, the doctor wrote that he had suggested claimant make an appointment and seek another opinion. In December 1977, Dr. Wirtz felt claimant was able to return to light work.

David B. McClain, D.O., saw claimant at the request of an attorney on February 22, 1978 and made a diagnosis of lumbosacral nerve root compression which arose "from either cartilaginous or bony process pressing against the nerve root." On April 10, 1978, Dr. McClain hospitalized claimant, conducted various examinations including x-rays of the lumbar spine which showed a grade I spondylolisthesis, an abnormal bone scan and normal cervical, dorsal and lumbar myelograms which were later reported as unsatisfactory; and consulted with Michael J. Stein, D.O., neurologist, whose impression was chronic low back pain syndrome with coccydynia. The doctor's diagnosis was "herniated lumbar disc, with bilateral S1 nerve root compression." Subsequently, claimant was hospitalized for treatment and evaluation on August 2, 1978. At this time the electromyographic study was abnormal in that the findings were compatible with a polyradiculopathy. A bone scan showed increased radio-activity in the facet area at L-5 which was listed as related to degenerative arthritic changes rather than trauma or metastatic disease.

Dr. Stein wrote:

> She has had EMG changes from previous study musculature. I find it rather hard to believe that we are dealing with cervical or thoracic disease, although I do get a questionable sensory level on examination, which is a subjective findings. Symptoms can be radicular and very well may be of a posttraumatic nature in the lower lumbar region. She presents with a negative Hoover's on the left, which makes me suspect that there may be some supratentorial functional overlay. She had a positive scan on prior admission to the hospital.
>
> I feel that this patient warrants further investigation with a complete myelogram including the cervical, thoracic and lumbar regions. Presently, her symptoms seem to originate from the traumatic event in June of 1976, as she had no prior illnesses, at least by history, this morning. I doubt we are dealing with metastatic disease. However, I would recommend a five-hour glucose tolerance test to rule out the possibility of a metabolic disorder.

At the time of his deposition, Dr. McClain gave a diagnosis of "lumbar disc with sacral nerve root compression." On causal connection, the doctor said, "the employee was working on a regular basis without any history of stress, had the classic type of trauma with the fall, and subsequent clinical courses of symptoms, physical findings, and lack of success to treatment [sic] was in keeping with this clinical entity." As far as working goes, Dr. McClain said claimant would be restricted to "minimal activities." The doctor prognosed that "Surgery would be unwise. I think that we should try to treat her symptoms with medication as she learns to live with this. Her activities should be curtailed, and she should be told what she can and cannot do, and just try to live within her restrictions." In relation to a disability to claimant's body as a whole, Dr. McClain asserted:

> We can rate those, and basically in my mind, she is worse off than the people who are surgically operated and corrected. Good results of back surgery, of course, still leaves them in the range of 10 to 15 percent of disability. With no surgery and the state that she is in now, she's industrially disabled 100 percent in types of activities with twisting and bending, and so on and so forth. Other than that, her disability would be much higher than the 15 percent to what level we are comparing it to with the outlines we are trying to use to determine.

A March 27, 1977 letter from L.F.A. Peterson, M.D., orthopedic surgeon, contains a diagnosis of posttraumatic coccyodynia.

The claimant has the burden of proving by a preponderance of the evidence that the injury on June 21, 1976 caused the disability on which claimant based her claim. *Bodish v. Fischer, Inc.,* 257 Iowa 516, 133 N.W.2d 867 (1965); *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 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 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). Although expert testimony that a condition could be caused by a given injury is in itself insufficient to support a finding of causal connection, such testimony coupled with nonexpert testimony that a claimant was not afflicted with the same condition prior to the injury in question is sufficient to generate a fact question. Giere v. *Aase Haugen Homes, Inc.,* 259 Iowa 1065, 146 N.W.2d 911 (1966).

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 (1934) 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 hurts or damage to the health of 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 injuries 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 that it results in a disability found to exist, he is entitled to compensation to the extent of the injury. *Nicks v. Davenport Produce Co.*, 254 Iowa 130, 115 N.W.2d 812 (1962); *Yeager v. Firestone Tire and Rubber Co.*, 253 Iowa 369, 112 N.W.2d 299 (1961).

Claimant has been to a number of physicians. The evidence is sufficient in its current state to support an award of temporary total disability. In reaching this decision reliance is not placed on either the testimony of Dr. Wirtz or Dr. McClain. The opinions of the doctors as to the causal relatedness of claimant's total psychophysiological problems are not in agreement. Dr. Wirtz, who felt it had a musculoskeletal strain of her lower back and spinal area found no permanancy, but he indicated claimant "probably has some psychosomatic aggravation of the area of back discomfort." Dr. McClain's diagnosis was "herniated lumbar disc, with sacral nerve root compression." Dr. McClain consulted with Dr. Stein who suspected "some supratentorial functional overlay." Electromyographic studies were conducted during the McClain hospitalization in August which resulted in findings compatible with polyradiculopathy. A bone scan at that time revealed increased radioactivity in the facet area at L-5 which was listed as related to degenerative arthritic changes rather than to trauma or to metastatic disease. Dr. Peterson diagnosed posttraumatic coccyodynia.

It is difficult to believe claimant's total problem is related to a relatively minor work incident which is perceived to be cause for claimant to permanently abandon the labor market. A portion of the problem is related to the incident; a share is not. In an effort to insure that this claimant is not relegated to the human scrap pile of the permanently totally disabled, this decision will order defendants to offer and claimant to accept further medical evaluation to determine the causal relatedness of claimant's condition to the injury as a condition precedent to her continuing to receive weekly compensation benefits.

* * *

Signed and filed this 24th day of May, 1979.

ROBERT C. LANDESS
Industrial Commissioner

No Appeal

STEVEN HULEN,

Claimant,

vs.

S. S. OF IOWA, LTD.

Employer,

and

NORTHWESTERN NATIONAL CASUALTY COMPANY,

Insurance Carrier,
Defendants.

Appeal Decision

This is an appeal by claimant from a ruling filed December 27, 1978 sustaining defendants' motion for summary judgment.

Claimant was injured on December 18, 1974. A form 5 filed February 28, 1975 notes that he was paid eight weeks of temporary disability. Claimant's original notice and petition in review-reopening was filed February 20, 1978. Defendants' answer asserted that claimant's petition was barred by the statute of limitations under section 85.26, Code of Iowa. Defendants subsequently filed a motion for summary judgment based upon this defense on November 8, 1978.

The applicable statutory sections are as follows:

§85.26 Limitations of Actions.

2. Any award for payments or agreement for settlement provided by section 86.13 for benefits under the workers' compensation or occupational disease law may, where the amount has not been commuted, be reviewed upon commencement of reopening proceedings by the employer or the employee within three years from the date of the last payment of weekly benefits made under such award or agreement . . . .

3. Notwithstanding the terms of chapter 17A, the filing with the industrial commissioner of the original notice or petition for an original proceeding or an original notice or petition to reopen an award or agreement of settlement provided by section 86.13, for benefits under the workers' compensation or occupational disease law shall be the only act constituting "commencement" for purposes of this statutory section.

In this case, a draft was issued to claimant for eight weeks of temporary disability on February 18, 1975. An affidavit of Harold Larson, defendant employer's insurance agent, states that he received the draft payable to claimant from defendant insurance company on February 19, 1975 and mailed it to claimant that same day. The affidavit of the claimant indicates the draft was received by him on February 21, 1975. In a letter to Mr. Larson on February

21, 1975, claimant through his attorney returned the draft, requesting that a new one be issued which did not contain language releasing all claims. The defendant insurance company returned the draft to claimant with an explanatory letter dated February 24, 1975.

The issue in this proceeding is the meaning of the word *payment* within section 85.26(2), Code of Iowa. The deputy industrial commissioner found that *payment* meant the date of issuance of the benefit draft and therefore claimant's action was barred by the statute of limitations in that it had not been filed within three years from the date of the last payment of weekly benefits. Claimant appeals this determination.

In *Stroupe v. Workmen's Compensation Commissioner,* 151 W. Va. 415, 152 S.E.2d 544 (1967), the court held that the period for reopening began to run on the day of the last payment which was the day the check was first received by the claimant. The word *payment* in a workers' compensation limitation statute is the receipt of the instrument of payment by the workman. *Sturgill Lumber Co. v. Maynard,* Ky., 447 S.W.2d 638 (1969).

An employer cannot be allowed to issue a draft for workers' compensation benefits, hold onto that draft, thus tolling the statute of limitations, and thereby deprive a claimant of the right to reopen his claim; nor can an employee be allowed to delay the running of the statute after the draft has been received by refusing to accept it. Based upon these considerations and the applicable law, the date of *payment* within section 85.26(2), Code of Iowa, is the date on which a claimant receives the instrument of payment for workers' compensation benefits.

In the case *sub judice,* affidavits indicate the benefit draft was issued on February 18, 1975 and forwarded to claimant on February 19, 1975. The affidavit of the claimant indicates the draft was received on February 21, 1975.

Claimant's original notice and petition in review-reopening was filed on February 20, 1978. Thus, the review-reopening proceeding was commenced within three years from the date of the last *payment* of weekly compensation benefits.

WHEREFORE, claimant's original notice and petition was timely filed within section 85.26, Code of Iowa.

THEREFORE, it is ordered:

That defendants' motion for summary judgment should be and is hereby overruled.

Signed and filed this 15th day of March, 1979.

ROBERT C. LANDESS
Industrial Commissioner

No Appeal.

TERRY HUNTZINGER,

Claimant,

vs.

MOORE BUSINESS FORMS, INC.,

Employer,

and

SENTRY INSURANCE and LIBERTY MUTUAL INSURANCE COMPANY,

Insurance Carriers,
Defendants.

Ruling and Order

BE IT REMEMBERED that on the third day of October, 1979 Sentry Insurance Company's Motion for Summary Judgment came on for hearing before the undersigned deputy industrial commissioner as a preliminary matter to the case in chief.

The deputy, upon the record, after reviewing the argument and evidence made a Preliminary Ruling and Order dismissing Sentry Insurance Company as a party defendant to this claim.

After review and reconsideration of the applicable law the undersigned deputy industrial commissioner enters written Ruling and Order in partial modification of the same entered on the record.

Defendant Sentry's Motion is based upon the claimant's failure to institute this proceeding in the prescribed period of statute of limitations set out in Section 85.26, Code of Iowa, as it applies to Sentry Insurance Company as a named defendant. It is presently found that the Motion for Summary Judgment by defendant Sentry Insurance is sustained and granted as to any and all disability benefits herein claimed by the claimant pursuant to the Original Notice and Petition in Review-Reopening and/or Arbitration filed with the Iowa Industrial Commissioner on June 26, 1979.

It is specifically found that medical benefits which are causally related to the injury of May 21, 1971 are not barred by either Section 86.34, or Section 85.27, Code 1971 or Section 85.26(2), Code, 1971 when a memorandum of agreement, as in this case form 4, has been previously made. (See Iowa memorandum of agreement as to compensation approved by the deputy industrial commissioner Kenneth L. Doudna dated July 16, 1971). Section 85.27, Code, 1971 pertains to the ongoing duty of the employer to provide medical care to an employee determined to have received an injury arising out of and in the course of employment. That section shows that no statute period of limitations shall be applicable to the obligation to continue to provide reasonable and necessary medical care related to the injury. Said section reads, in part:

> The employer, with notice or knowledge of injury, shall furnish reasonable surgical, medical, osteopathic, chiropractic, podiatrial, nursing and hospital service and supplies therefore . . . The total amount which may be allowed for medical, surgical, hospital services and supplies, services of special nurses, one set of prosthetic devices, and ambulance charges, shall be

unlimited. However, if the aggregate thereof exceeds seventy-five hundred ($7,500) dollars, application for allowance for such additional amount shall be made to the commissioner by the claimant, and the commissioner may, upon reasonable proof being furnished of real necessity therefore, allow and order payment for additional surgical, medical, osteopathic, chiropractic, podiatrial, nursing and hospital services and supplies, *and no statutory period of limitation shall be applicable thereto.* (Emphasis supplied).

Section 85.26(2), Code, 1979, were it determined to be applicable, is even more specific regarding the obligations to provide benefits on a continuing nature pursuant to the previous law.

WHEREFORE, defendant Sentry's Motion to Dismiss must be sustained in part and overruled in part.

IT IS ORDERED that claimant's petition as to Sentry Insurance's liability for disability benefits, shall be and is hereby ordered dismissed.

IT IS FURTHER ORDERED that the defendant Sentry's obligation to provide benefits pursuant to Section 85.27, Code, 1971, which are related to the injury is ongoing and that portion of defendant's Motion to Dismiss pertaining to medical benefits is overruled.

Signed and filed this 17th day of October, 1979.

THOMAS R. MOELLER
Deputy Industrial Commissioner

No Appeal.

MRS. CHERYL HUSMANN,
Executor of the Estate of
Paul H. Husmann, Deceased,
and as surviving spouse of
Paul H. Husmann, Deceased,

Claimant,

vs.

WAYMAR TRANSPORT CORP.,
and SPENCER FOODS, INC.,

Employer,

and

TRAVELERS INSURANCE COMPANY,

Insurance Carrier,
Defendants.

Appeal Decision

This is a proceeding brought by defendant employer Waymar Transport Corporation (hereinafter Waymar) appealing a proposed decision in arbitration wherein it was ordered to pay death benefits to the dependents of Paul H. Husmann.

* * *

Defendant Waymar's contention throughout is that "the only control exerted by or attempted to be exerted by Waymar Transport Corporation was that required by the necessity to comply with the ICC regulations." The criteria to determine the existence of an employer-employee relationship established by the Iowa Supreme Court in *Hjerleid v. State,* 229 Iowa 818, 826, 295 N.W. 139, 143 (1940), are as follows:

> (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 (emphasis added).

It is unclear from the Iowa case law whether the claimant must preponderate on each criteria, on a majority of criteria, or on certain criteria. There is, however, an indication that the element of the right to control is entitled to greater weight. It is important to note that it is the *right* to control rather than the actual control emphasized by defendant Waymar which is determinative.

On reviewing the record, it is found that the findings of fact, the conclusion of law and the award are proper.

* * *

Signed and filed this 14th day of December, 1978.

ROBERT C. LANDESS
Industrial Commissioner

Appealed to District court: Dismissed.

ELAINE JACOBS,

Claimant,

vs.

CARROLL GEORGE, INC.,

Employer

and

IOWA MUTUAL INSURANCE COMPANY,

Insurance Carrier,
Defendants.

Appeal Decision

This is a proceeding brought by defendant employer and its insurance carrier appealing a proposed order entered February 7, 1979, a proposed order entered on February 12, 1979 and a proposed amended order entered on February 13, 1979.

On March 19, 1979 claimant filed a motion to dismiss defendants' appeal. That motion will be overruled and a decision rendered in this matter.

Section 85.45(1), Code of Iowa, indicates a condition of granting a commutation is that the period during which compensation is payable can be definitely determined. The order of the deputy in the review-reopening decision filed October 18, 1978 provides that payments to be made to the claimant "to the end of her disability as provided in §85.34(3), Code of Iowa." Although the deputy noted in his analysis that claimant's disability might be diminished if recommendations of psychiatric treatment were followed, benefits were awarded pursuant to the section of the law providing for permanent total disability.

Section 85.45(4) provides that "when a person seeking a commutation is a . . . permanently and totally disabled employee . . . the future payments which may be commuted shall not exceed the number of weeks which shall be indicated by probability tables designated by the industrial commissioner for death . . . ." The table designated by the industrial commissioner for this purpose is contained in 500--6.3(1) of the IAC (Rules of the Industrial Commissioner). Claimant was fifty-one years of age at the time of her injury, which according to the tables would allow her a life expectancy of 1310 weeks. She has received benefits for 184 weeks, leaving a remainder of 1126 weeks. Of this, 1117 are being commuted, leaving a remainder after commutation of nine weeks.

Professor Arthur Larson in his *Treatise on the Law of Workmen's Compensation* §82.70 writes about "lump-summing" of benefits.

A portion of this section states:

> In some jurisdictions, the excessive and indiscriminate use of the lump-summing device has reached a point at which it threatens to undermine the real purposes of the compensation system. Since compensation is a segment of a total income -- insurance system, it ordinarily does its share of the job only if it can be depended on to supply periodic income benefits replacing a portion of lost earnings. If a partially or totally disabled worker gives up these reliable periodic payments in exchange for a large sum of cash immediately in hand, experience has shown that in many cases the lump sum is soon dissipated and the workman is right back where he would have been if workmen's compensation had never existed. One reason for the persistence of this problem is that practically everyone associated with the system has an incentive--at least a highly visible short-term incentive--to resort to lump-summing. * * * The claimant is dazzled by the vision of perhaps the largest sum of money he has ever seen in one piece. The claimant's lawyer finds it much more convenient to get his full fee promptly out of a lump sum than protractedly out of small weekly payments. The claimant's doctor, and his other creditors and his wife and family, all typically line up on the side of encouraging a lump-sum settlement. * * *
>
> The only solution lies in conscientious administration, with unrelenting insistence that lump-summing be restricted to those exceptional cases in which it can be demonstrated that the purposes of the act will best be served by a lump-sum award. The beginning point of any consideration of the justifiability of lump-summing in a particular case is the standard set by the statute. This is usually so general, however, as to supply little firm guidance and control, turning on such concepts as the best interests of the claimant or the avoidance of manifest hardship and injustice.
>
> The clearest cases for lump-summing are those in which the rehabilitation of the worker would genuinely be promoted.
>
> * * *
>
> Of all the excuses put forward to justify lump-summing, the worst is that in a particular instance the claimant can, so to speak, beat the actuarial tables by taking a lump sump. Suppose claimant has an award for 500 weeks and is eighty years old and ill. Should he be allowed to rush in and ask for a lump sum? And should a benevolent commission join with him in his attempt to outfox the system? It has been tried more than once, but has seldom met with favor in the appellate courts, for reasons that hardly need argument.

Apparently the Iowa Supreme Court is not in full agreement with the philosophy espoused by Professor Larson. In the case of *Diamond v. The Parsons Co.,* 256 Iowa 915, 129 N.W.2d 608 (1964), the court recited at 928-929,

> The statute says the court may order commutation when it is shown to the satisfaction of the court or judge that such commutation will be for the best interest of the person or persons entitled to compensation or that periodical payments as compared to lump-sum payment will entail undue expense, etc. on the employer.
>
> The statute says nothing about denying commutation because of expense, hardship or inconvenience to the employer. We have here only the question of the best interests of the claimant.
>
> At the time of his injury in 1961, claimant was 65 years old. He was without skill or experience in the management of property or investments. He had some savings but was indebted for doctor bills and attorney fees. He wanted to use the commuted value of his compensation to pay his bills (a commendable purpose) and buy an equity in a three-apartment house. His plan was to live in one apartment, rent the other two and use the rent to retire the carrying charges. He had sons who expressed a willingness to help in the care of the property and competent counsel to advise him. He was presently living in rented quarters not convenient as to facilities or location.
>
> * * * However, in determining the "best interest of the person or persons entitled to the compensation" as required by the statute, claimant's condition and life expectancy may properly be considered along with other matters. Here, under weekly payments, if claimant lives out his expectancy, he will outlive his compensation period and be left with nothing. If he dies prematurely his total weekly payments may be less than the present commuted value.

> Based upon claimant's estimates and desires, the benefits and convenience from improved living quarters, the availability of family help, the testimony of real estate agents, and all surrounding circumstances, the trial court approved commutation. Whether the court was right in attempting to look into the future only the passage of time will tell. Claimant's plans may not develop as profitably as he hopes but they are not unreasonable. He may invest or spend unwisely but that possibility is present in every petition for commutation.
>
> The court should not act as an unyielding conservator of claimant's property and disregard his desires and reasonable plans just because success in the future is not assured.

This opinion relies upon the opinion of the Iowa Supreme Court set out in *Diamond* above. Under those guidelines which were established at a time when the district court had final approval of commutations this commissioner would be hard pressed to conclude that the purposes for which the claimant desires the partial commutation are not in the best interests of the claimant notwithstanding the periodic payment philosophy of wage replacement upon which the theory of workers' compensation is based.

The admonition of Iowa's first industrial commissioner in the first biennial Report of the Workmen's Compensation Service (1916) at page 12 should most likely be given more heed in the consideration of granting of commutations:

> In exceptional cases . . . commutation promotes personal welfare, but there is a growing tendency in all compensation jurisdictions to a closer scrutiny of circumstances and conditions in each particular case, and to regard weekly payments as a general rule better adapted to the real needs of compensation service. In most cases beneficiaries under the law are not accustomed to deal with considerable sums of cash in hand. They need income rather than ready money, so liable to be used in unwise expenditures. They need to a degree the guardianship of public administration to shield them from their own indiscretion and from the wiles of the designing to the end that the purpose of compensation service to provide support be not defeated by plot or prodigality. Society may well be concerned in this matter, for beyond the incentive of benevolence born of a desire that the poor and unfortunate come not to want is the strong probability that the lump sum settlement tends to a marked increase in the number of those who have to be supported by charity.
>
> In the compensation service everywhere more and more concern is apparent on account of pressure for lump sum settlement. Two years after the installation of this system in New Jersey the legislature of that state was moved to enact into law this distinct and forceful interpretation of legal provisions permitting commutation:
>
> "It is the intention of this act that the compensation payments are in lieu of wages, and are to be received by the injured employee or his dependents in the same manner in which wages are ordinarily paid. Therefore commutation is a departure from the normal method of payment and is to be allowed only when it clearly appears that some unusual circumstances warrant such a departure. Commutation shall not be allowed for the purpose of enabling the injured employee, or the dependents of a deceased employee, to satisfy a debt, or to make payment to physicians, lawyers, or any other persons."

Experience in this state fully justified all the criticism of other jurisdictions. * * * *

The dictates of the *Diamond* case would appear to be controlling in this case, however.

THEREFORE, it is ordered:

That defendants pay unto claimant forty-one thousand two hundred sixteen and 4/100 dollars ($41,216.04) in a lump sum representing the present value of one thousand one hundred seventeen (1117) weeks of benefits at fifty-nine and 58/100 dollars ($59.58) per week.

Signed and filed this 12th day of April, 1979.

ROBERT C. LANDESS
Industrial Commissioner

Appeal to District Court: Pending 5/11/79

SUSAN E. JAMES,

Claimant,

vs.

RALPH MCCARTNEY & JAMES ERB,

Employer,

and

THE IOWA NATIONAL MUTUAL INSURANCE COMPANY,

Insurance Carrier,
Defendants.

Arbitration Decision

This is a proceeding in arbitration brought by Susan E. James, the claimant, against Ralph McCartney & James Erb, her employer, and The Iowa National Mutual Insurance Company, the insurance carrier, to recover benefits under the Iowa Workers' Compensation Act by virtue of an alleged industrial injury which occurred on June 29, 1977.

* * *

The primary issues requiring determination are as follows, to wit:

Did the claimant notify her employer of the industrial mishap within the time provided for in §85.23, Code of

Iowa, 1977?

Did the claimant sustain an injury which arose out of an in the course of her employment or was the condition found by Dr. Fisher preexisting on the date of this occurrence?

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

Claimant, age 31, married, began her duties as a legal secretary for the defendant-employers in November, 1976. She alleges a work connected injury occurring on June 29, 1977.

A short recitation of claimant's medical history is indicated. Claimant's family physician is R. G. Boeke, M.D., who began treating claimant in 1972. Dr. Boeke's progress notes (claimant's exhibit 3) are unremarkable until April 22, 1975 when claimant was hospitalized for an "acute lumbrosacral sprain after developing a severe onset of pain while sneezing" (claimant's exhibit 1). In October, 1976 the claimant was hospitalized for a second time, for a three-day period, following a reoccurrence of pain after bowling. In the words of D. E. Fisher, M.D., claimant, "had rapid resolution of her major symptoms". Claimant's testimony confirms that she had made a good recovery following the October, 1976 aggravation, discharging her assigned duties without difficulty. On June 29, 1977 while attempting to retrieve a transfer case from the basement dead file storage area, she experienced an immediate onset of lumbar pain following a "popping noise". Claimant continued working for six days under increasingly difficult physical discomfort, using hot packs at home. On July 9, 1977 claimant's discomfort had increased sufficiently so as to have her seek medical care from Dr. Boeke, who referred claimant to Dr. Fisher, an orthopedic surgeon. Following a myleogram, which confirmed the existence of a large deformity at L4-5 interspace, Dr. Fisher surgically excised the protruding disc, releasing claimant to return to employment on September 22, 1977 as tolerated, and expressing his opinion that the claimant now has a 5 percent functional impairment of the body as a whole following the surgery. Defendant-employer saw fit not to resume the previous employer-employee relationship.

The claimant has the burden of proving by a preponderance of the evidence that the injury of June 29, 1977 is the cause of her disability on which she now bases her claim. Bodish v. Fischer, Inc., 257 Iowa 516, 133 N.W.2d 867 (1965). Lindahl v. L. O. Boggs, 236 Iowa 196, 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).

Claimant's husband's uncontradicted testimony that he notified Ralph McCartney of the episode on July 10, 1977 during a telephone conversation carries the claimant's burden as to statutory notice.

Claimant's testimony, together with the medical evidence is given the greater weight in this decision, and it is hereby found that she did injure her lower lumbar spine when attempting to lift the contents of a transfer case on her employer's premises.

The uncontradicted evidence of Dr. Fisher that the lifting episode was the direct cause of claimant's back condition and that her previous medical history lacked evidence that the claimant's ruptured disc preexisted June 28, 1977 allows the claimant to sustain her burden of proof.

While a claimant is not entitled to compensation for the results of a preexisting injury of 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. *Nicks v. Davenporrt Produce Co.* 254 Iowa 130, 115 N.W.2d 812 (1962). *Yeager v. Firestone Tire & Rubber Company,* 253 Iowa 369, 112 N.W.2d 299 (1961).

Claimant testified that she continues to have back difficulties and remains under a 25-pound weight restriction imposed by Dr. Fisher as well as an hour limit regarding her remaining in a sitting position without other physical movements.

Functional disability is an element to be considered in determining industrial disability which is the reduction of earning capacity, but consideration must also be given to the injured employee's age, education, qualifications, experience and inability to engage in employment for which he is fitted. *Olson v. Goodyear Service Stores,* 255 Iowa 1112, 125 N.W.2d 251 (1963). *Barton v. Nevada Poultry,* 253 Iowa 285, 110 N.W.2d 660 (1961).

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.2d 899 (1935), 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 Martin, supra,]. In determining industrial disability, consideration may be given to the injured employee's age, education, qualifications, experience and his inability, because of the injury, to engage in employment for which he is fitted. * * * *

In applying the legal principles to the case at hand it is found that this 31-year-old, high school graduate, has sustained an industrial disability of 12 percent of the body

as a whole, in that her ability to attend to her normal duties are limited to a two-hour period, after which she is required to stand or lie down depending on the severity of the pain.

This claimant will have continuing and limiting difficulty to obtain and hold positions of employment in the open job market. Claimant's testimony respecting her failures in finding employment prior to finding her current position of legal secretary is indicative of her disability.

* * *

Signed and filed this 7th day of December, 1979.

HELMUT MUELLER
Deputy Industrial Commissioner

No Appeal.

ROBERT H. JAMISON,

Claimant,

vs.

WILSON & COMPANY, INC.,

Employer,
Self-Insured,
Defendant.

Ruling on Remand

A hearing was held in this matter on October 27, 1978 in compliance with the January 19, 1978 order of Judge Ansel J. Chapman of the Sixth Judicial District of Iowa which required the taking of additional evidence and filing of that evidence along with modification or findings with his court. The only additional evidence submitted at the October 27 hearing was joint remand exhibit one which is a report from the Industrial Injury Clinic at Theda Clark Regional Medical Center where claimant was ordered to report for reexamination at Defendant's expense by this commissioner for an assessment of his potential for physical rehabilitation.

The report from the clinic indicates that further treatment will not be beneficial and may in fact be contraindicated. The report dated July 20, 1978 recommends that claimant return to work. It also expresses the following opinion:

> We do not believe that the continued use of physical therapy would be of any value. Nor do we believe that injections of analgesic medication would be beneficial or warranted. We do believe that the more treatment that is received from the medical community and the more differing diagnoses which are received will contribute to the continuing fixation of disability in the patient's mind.

A copy of joint remand exhibit one and a copy of this ruling will be filed with Judge Chapman.

WHEREFORE, it is found:

That no formalized program of rehabilitation is appropriate at this time.

* * *

Signed and filed this 31st day of October, 1978.

ROBERT C. LANDESS
Industrial Commissioner

Appealed to District Court: Affirmed.

JACK K. JAY,

Claimant,

vs.

FIRESTONE TIRE & RUBBER CO.,

Employer,

and

LIBERTY MUTUAL INSURANCE CO.,

Insurance Carrier,
Defendants.

Appeal Decision

Both defendants and claimant have appealed from a proposed review-reopening decision wherein claimant was found to have an industrial disability to the extent of 55% of the body as a whole. On June 30, 1979 this proceeding was remanded to the deputy industrial commissioner, who rendered the proposed review-reopening decision for the limited purpose of explaining his consideration of two previous awards of 15% permanent partial disability in arriving at his current finding of industrial disability. The deputy rendered a decision on remand on October 1, 1979. In the remand decision the deputy noted that he considered the permanent partial disability compensation paid for the prior injuries and concluded that the award of 55% was for permanent partial disability incurred from a January 14, 1975 injury.

* * *

In 1966 claimant was found to have 15% permanent partial disability to the body as a whole for an injury to his lumbar spine. In 1968 claimant was found to have 15% permanent partial disability to the body as a whole for an injury to his cervical spine. Claimant returned to work after this second injury and continued to work until January 14, 1975 when he suffered another injury to his lumbar spine. In his remand decision the deputy found claimant's ability to work between 1968 and 1975 to be significant. The deputy also noted that he had considered the prior injuries in making the present determination of industrial disability. With these explanations of the review-reopening decision, the deputy's finding of fact and conclusion of law are hereby affirmed.

* * *

Signed and filed this 23rd day of October, 1979.

ROBERT C. LANDESS
Industrial Commissioner

No Appeal.

JOAN L. JOHNSON,

Claimant,

vs.

IOWA CENTRAL COMMUNITY COLLEGE

Employer,

and

INSURANCE FROM CNA,

Insurance Carrier,
Defendants.

Ruling

BE IT REMEMBERED that on March 14, 1979 defendants herein filed a motion to adjudicate law point pursuant to Iowa Rule 105 of Civil Procedure alleging that the point of law raised in the answer and resistance to application to amend original notice and petition was a legal issue directed to the whole of claimant's case, that adjudication of said matter favorably to defendants would dispose of the case, and that the issues had been joined. On March 19, 1979 the claimant herein filed a resistance to motion to adjudicate law point contending that the motion did not set forth the particular point of law to which it was directed, that necessary discovery had not been completed, and that disputed facts rendered the motion inappropriate.

Review of the industrial commissioner's file reveals that claimant filed an original notice and petition on January 23, 1979 alleging the following: Section 85.27 benefits were being sought (according to the portion checked off on the top of the petition); the injury date is January 27, 1977 (paragraph 4); no weekly benefits have been paid (paragraph 17); the time disabled included January 31, 1977 to February 4, 1977 and February 15, 1977 to February 16, 1977 (paragraph 18); and the dispute in this case was that no benefits were forthcoming (paragraph 22). Claimant alone signed said petition. Then on February 21, 1979 claimant, represented by counsel, filed an application to amend original notice and petition and an amended petition. The amendment requests arbitration, changes the number of exemptions from 0 to 4, adds that claimant underwent surgery on February 7, 1979 and the prognosis is guarded, deletes the itemization of recent medical bills and notes that expenses are being gathered, and adds that petitioner will be ready for a hearing immediately.

On March 6, 1979 the defendants filed an answer and resistance to application to amend original notice and petition. Said pleading answers the allegations of both the original and amended petition and raises a notice defense. Said pleading specifically questions whether the petition could be amended to include an arbitration proceeding insofar as "the original petition requested benefits only under Sec. 85.27, and, presumptively, was filed within the period allowed by Sec. 85.26, The Code" (answer, paragraph 12) and "the amendment requests arbitration which involves substantial benefits in excess of those allowed by Sec. 85.27, The Code, and is an attempt to avoid the provisions of Sec. 85.26, The Code."

It is hereby found that the matter of whether the claimant's amendment of the original notice and petition to specifically state that an arbitration is being sought is barred by the statute of limitations, Code section 85.26(1), may be determined at this time pursuant to Iowa rule 105 of Civil Procedure.

According to Industrial Commissioner Rule 500-4.35, the rules of civil procedure govern contested case proceedings before the agency unless such rules conflict with the agency rules or with the statutory provisions of chapters 85, 85A, 86, 87 and 17A, or unless said rules are inapplicable to the agency. Thus, the Iowa Rules of Civil Procedure regarding amendment of a pleading apply in the present matter.

Iowa Rule 88 of Civil Procedure states in relevant part that "[a] party may amend a pleading once as a matter of course at any time before a responsive pleading is served . . ."; Iowa Rule 89 of Civil Procedure states in relevant part that "[w]henever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading."

THEREFORE, it is ruled that claimant's amendment to her original notice and petition must be allowed and that the date of the petition filed first -- that is, January 23, 1979 -- controls in this matter and renders the statute of limitations defense with regard to the arbitration claim to be without merit.

Signed and filed this 12th day of April, 1979.

LEE M. JACKWIG
Deputy Industrial Commissioner

No Appeal.

MAUREEN JOHNSON,

Claimant,

vs.

ALL-AMERICAN, INC.,

Employer,
Self-Insured,
Defendant.

Appeal Decision

Defendant has appealed from a proposed arbitration decision wherein claimant was awarded death benefits.

* * *

Claimant's decedent died in Minnesota while employed by defendant, a South Dakota firm. Decedent was domiciled in Iowa at the time of his death.

On August 26, 1977 claimant signed an agreement for

lump sum payment of death benefits in South Dakota, which was approved on September 19, 1977. Claimant, who is the surviving widow, received $11,128 and her two sons received $58,500 in trust to be paid at the rate of $50 per month per child. As part of the agreement, claimant executed a final receipt and release for any further claim under any workers' compensation law.

A ruling was filed on March 6, 1978 wherein defendant's special appearance was overruled. The deputy noted that "although an amount paid in compensation benefits in a foreign state may be credited against payments in Iowa, such payments made in a foreign state cannot divest Iowa of her jurisdiction.

Claimant sought a summary judgment in the arbitration proceeding. The deputy found that claimant failed to show the absence of a material fact and thereby was not entitled to a summary judgment. This issue was not raised on appeal so the deputy's ruling on summary judgment is adopted.

The issues presented on appeal are: (1) whether this agency has jurisdiction over a claim where the only contact with Iowa is the domicile of claimant's decedent, and (2) whether the commutation lump sum payment agreement and release, which were approved in South Dakota, is a bar to any further recovery in Iowa.

The resolution of the first issue involves an interpretation of Iowa Code section 85.71(1), which deals with employment outside of Iowa. Section 85.71 states in relevant 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 an injury occurred within this state, such an employee, or in the event of his death resulting from such injury, his dependents, shall be entitlted 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)

Defendant contends that domicile alone is not sufficient to invoke the jurisdiction of the Iowa Workers' Compensation Act. Defendant argues that the legislature intended that the domicile language of subsection one must be read with the entire subsection and does not provide a separate basis for jurisdiction. As the claimant points out in her brief, the domicile provision was written in the disjunctive and thereby the statute on its face permits domicle as an independent basis for jurisdiction. Since the meaning of the statute is plain on its face, there is no need to apply various rules of statutory construction. It is not necessary to construe the disjunctive in this statutory section as a conjunctive to arrive at the intent of the legislature. Therefore, this agency has jurisdiction over a claim where the only contact with the state of Iowa is the employee's domicile, and thereby has jurisdiction over the claim presented in this case.

The deputy held that the South Dakota lump sum payment agreement and release did not serve as a bar for a claim in Iowa. Defendant contends that the settlement agreement entered into in South Dakota specifically terminated claimant's rights in South Dakota and all other states and should serve as a bar in Iowa under the Full Faith and Credit clause of Article IV, section 1 of the United States Constitution. The claimant, however, contends that the constitutional requirement of full faith and credit is satisfied when credit is given to the amount paid to claimant under the South Dakota Act. Claimant notes that there is an exception to this rule when the workers' compensation statute or court decisions of another state preclude the filing of the claim with a sister state after an award is made in that jurisdiction. This exception was noted by Professor Larson in his treatise when he interpreted the supreme court decision of *Industrial Commissioner v. McCartin,* 330 U.S. 622 (1947). Larson, 4 *Workmen's Compensation Law,* §85.20 (1980).

Iowa has a sufficient governmental interest to apply its own laws when it has jurisdiction. The only limits are that credit be given for amounts previously paid and that there is no specific legislative preclusion in the sister state. Iowa allows credit for amounts previously paid and the South Dakota Worker's Compensation Act does not preclude biling a claim in a sister state. Thereby the constitutional requirement of full faith and credit is satisfied.

Since this agency has jurisdiction and is not precluded from acting on the claim by the Full Faith and Credit clause, the release signed in South Dakota is not binding in Iowa. This conclusion is supported by section 85.55 of the Iowa Code, which prevents waiver of provisions of the Iowa Workers' Compensation Act in regard to the amount of compensation which may be payable. The amount of benefits in Iowa which exceed those paid in South Dakota are "payable" within the meaning of section 85.55. Therefore claimant is prevented from waiving any benefits payable in Iowa which exceed those benefits paid in sister states.

* * *

Signed and filed this 15th day of May, 1980.

ROBERT C. LANDESS
Industrial Commissioner

Appealed to District Court: Pending.

MILDRED H. JOHNSON,

Claimant,

vs.

FRANKLIN MANUFACTURING CO.,

Employer,

and

THE TRAVELERS INSURANCE CO.,

Insurance Carrier,
Defendants.

Appeal Decision

Defendants appeal from a proposed review-reopening award of healing period, permanent partial disability and medical benefits.

* * *

Claimant went to work for defendant employer on October 4, 1970 and her duties varied from inspection of products to odd jobs on the assembly line. Claimant was laid off for a period but returned to work in October, 1971. Claimant was then assigned to a factory line where she used an air gun to put screws in back panels of washing machines. In January, 1972, while having trouble putting screws in a washing machine, claimant felt a snap in her arm. Claimant continued to work that day and the remainder of the week, but her pain increased throughout the period. On the advice of the employer's nurse, claimant went to see Dale Harding, M.D., the company doctor.

Claimant was then given an easier job of putting putty around wires. She did this from January to June of 1972 without much problem. In June claimant was assigned the job of placing water hoses on washers. The pain in her arm increased and she started to experience muscle spasms. On August 13, 1972 claimant reported her pain to her employer and went to see Dr. Harding. On August 26, 1972 claimant went to see Dr. Robert E. McCoy, M.D., in Mason City.

Although the record is not clear, it appears that claimant stopped working sometime between August 13 and August 26, 1972. She received compensation for the period that she was off work. Claimant returned to work on October 21, 1972 and did various jobs on the assembly line. Claimant was later assigned to the crating department where she glued labels. Claimant found that she was able to do this job without much pain.

In March of 1974 claimant was transferred back to the washington machine line and the job required the use of an air gun similar to the one she used in January 1972. Claimant stopped working on May 2, 1974 while under the care of Dr. Harding because of an alleged injury on April 24, 1974.

An employer's first report of injury was filed on May 16, 1974, which stated that the injury was to the right arm and shoulder with pain in the joint. Also, on May 16, 1974 a memorandum of agreement was filed in which the employer agreed to pay $90.75 per week in compensation. Claimant continued to receive compensation until February, 1975. On April 17, 1975 a form 5 was filed which noted that 42 weeks of temporary disability at $90.75 per week was paid to claimant.

On July 3, 1975 claimant was seen by Dr. Adams at the request of the insurance company. Dr. Adams, in testifying about the July 3 visit, stated the following:

> All seemed to be normal and free and painless. There seemed to be normal active and passive motion in both shoulders, with ninety degrees of abduction, ninety degrees of external rotation, ninety degrees of elevation.
>
> However, in the right shoulder it was necessary to coax her to get her to demonstrate this full range of active motion. There was no evidence of weakness or atrophy in the right upper extremity, and there was no evidence in either extremity of any neurological or circulatory disease.

Dr. Adams, by looking at some x-rays taken previously, conclùded that claimant had minimal degenerative arthritic changes in the right acromioclavicular joint and questionable very mild degree of disuse atrophy in the entire right shoulder region. Dr. Adams stated that the arthritis probably predated the 1972 injury, but was probably aggravated by the injuries she suffered. However, he also stated that arthritis might not even be a part of her current problem. Dr. Adams saw claimant again on May 14, 1976 and found that claimant's condition had improved. Dr. Adams testified that any weakness in May, 1976 was probably due to prolonged disuse and not because of any underlying pathology. He further stated that claimant could return to work but could not use vibratory tools or perform tasks which required raising her hands above her shoulders. On cross-examination Dr. Adams more fully enunciated his opinion about claimant's condition.

> A. * * * I think her major problem is that of a supraspinatus tendinitis or a sprain in one of the ligaments in her shoulder and resulting bursitis.
>
> * * * I don't quite think that running the pneumatic screwdriver caused the arthritis that I have described in the acromioclavicular joints, and I think I said that in direct testimony.
>
> Q. Okay. What did that cause then in your opinion, if anything?
>
> A. It caused a sprain of the shoulder. You mean, using the vibratory screwdriver. It was a sprain of the shoulder, which can be multiple things. It would probably [sic] primarily a strain in the supraspinatus tendon or the rotator cuff group of tendons. This led to secondary bursitis and the painful shoulder, so that any motions of the shoulder became painful and made it difficult for her to work. So that the -- in common terms you might say this started out as a sprain of the shoulder and ended up bursitis of the shoulder.

It should be noted that claimant's last visit to Dr. Adams was after the hearing before the deputy industrial commissioner and the deposition of Dr. Adams was taken after this last visit. Dr. Adams, based upon all of the problems associated with the shoulder, gave claimant a disability rating of 10% to the right upper extremity and 6% to the body as a whole. Dr. Adams' testimony in his deposition presents for the first time in the record the fact that claimant suffered from an occupational disease.

Dr. Harding wrote a letter on March 30, 1976 in which he gave her a minimum disability rating of 30% of the right arm and shoulder. Harding came to this conclusion after examining claimant in his office on March 18. 1976.

Although Dr. Harding mentioned that the problem is related to a January 19, 1972 injury, his disability rating appeared to be based on claimant's condition as of March 18, 1976. Dr. Harding noted that claimant's pain and discomfort seemed to get worse as time went on; however, it does not appear that Dr. Harding was aware of any injury in 1974.

On December 1, 1976 claimant filed an application for an order authorizing claimant to submit herself to a rehabilitation evaluation program at St. Luke's Methodist Hospital Rehabilitation Center in Cedar Rapids under the direction of Dr. Weir. A deputy industrial commissioner granted the order on January 14, 1977.

Dr. Weir saw claimant in January, 1977 and his diagnosis was chronic right subdeltoid bursitis with associated biceps tendinitis, supraspinatis tendinitis, and mild adhesive capsulitis. He further noted that claimant was moderately obese. Dr. Weir gave claimant a 19-20% disability rating, but stated that through rehabilitation this rating might drop to 10% within a few months. He concluded that claimant had a 50% industrial disability. On March 14, 1977, Dr. Weir noted that claimant was making some improvement under treatment; however, he further stated that it would be unlikely that claimant would be able to do strenuous, repetitive work with her right shoulder. Dr. Weir made no specific statement about whether claimant's employment with defendant was the cause of her tendinitis or bursitis, but in several of his reports he did note claimant's work history and claimant's problems with pain that were a result of her employment. On June 3, 1977, Dr. Weir indicated that claimant was doing well and did not schedule any further visits. Thus claimant is held to have achieved maximum recuperation on June 3, 1977.

Claimant has the burden of establishing by a preponderance of the evidence that her disability was caused by a personal injury and that her disability was one arising out of and in the course of her employment. *Lindahl v. Boggs,* 236 Iowa 296, 18 N.W.2d 607 (1945). A personal injury is an injury to the body, the impairment of health, or a disease which comes about because of a traumatic or other hurt or damage to the health or body of an employee. *Almquist v. Shenandoah Nurseries,* 218 Iowa 724, 254 N.W. 35 (1934). 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)

It is found that claimant has sustained her burden of proof that she incurred an occupational disease as a result of operating an air gun for the defendant employer. The defendants have admitted, through the filing of a memorandum of agreement and form 5, that claimant suffered an injury to her right shoulder. Drs. Adams and Weir have diagnosed the resultant problems from that injury as bursitis and tendinitis. Thus claimant has suffered an occupational disease as a consequence of her employment activities for the defendant employer. Also, since the trapezius muscle group was involved in the disability, it is found that claimant has a disability to the body as a whole and is entitled to have her disability evaluated industrially. The deputy's findings of 35% industrial disability is reasonable and is hereby adopted.

Furthermore, the defendants' contention that Hartford Accident & Indemnity Insurance Company be made a party is without merit in light of Iowa Code §85.10, which states that the employer in whose employment the employee was last injuriously exposed to the hazards of such disease is liable. This rule can be logically extended to cover the employer's insurance carrier at the time of the last injurious exposure. Thus the Travelers Insurance Company is liable for any award made to claimant in this proceeding, since they were the employer's insurance carrier in April and May of 1974.

* * *

Signed and filed this 30th day of August, 1978.

ROBERT C. LANDESS
Industrial Commissioner

Appealed to District Court: Affirmed.

ALFRED E. JONES,

Claimant,

vs.

L. A. STRUCTURAL,

Employer,

and

BITUMINOUS CASUALTY COMPANY,

Insurance Carrier,
Defendants.

Review-Reopening Decision

This matter came on for hearing at the Pottawattamie County Courthouse in Council Bluffs, Iowa on October 3, 1978, and the record was closed on November 17, 1978.

* * *

1) Is the claimant's back condition related to the injury of June 10, 1977?

2) Is the claimant to be allowed medical benefits which the defendants contend were unauthorized?

Claimant received an injury arising out of and in the course of his employment on June 10, 1977. He was unloading air and gas bottles for a torch when he felt something snap in his left leg. He laid down for about fifteen minutes; he continued to work; and on the following day, a Saturday, he presented himself at the Jennie Edmundson Memorial Hospital in Council Bluffs. The claimant returned home and was subsequently admitted to the hospital on June 13, 1977. Ronald K. Miller, M.D., an orthopedic surgeon performed an arthrotomy and a left medial meniscectomy on June 15, 1977. The claimant was released from the hospital on June 17, 1977. The claimant was on crutches and received physical therapy

after his release. He continued to see Dr. Miller and in late August, 1977 complained of pain in the back of the knee and in the back of the patella.

The claimant was readmitted to the hospital on August 29, 1977. On August 30, 1977, Dr. Miller performed an arthrotomy, a lateral meniscectomy and excised a popliteal cyst on the left knee. The claimant was released on crutches on September 2, 1977. The claimant continued to be seen by Dr. Miller and on November 16, 1977, a functional impairment rating of twenty percent (20%) of the left leg was given. Dr. Miller released the claimant to return to work about December 1, 1977.

Claimant testified that he had lower back pain during the course of his therapy and that his complaints in regard to back pain were related to his therapist, Leonard Woods. The testimony of Mr. Woods reveals that the first relation of any back complaints by the claimant was made just prior to the claimant's admission to the hospital in May, 1978. Dr. Miller does not recall any complaints voiced by the claimant in relation to back pain. He last saw the claimant professionally on November 16, 1977.

The claimant saw Dwight M. Frost, M.D., on December 1, 1977. He did not return to work as Dr. Miller had recommended. He complained that he had pain in the left knee and calf, hip and low back. Dr. Frost felt the claimant had a painful left knee, calf and hip secondary to his surgery. On March 30, 1978, Dr. Frost wrote a report in which he stated that the symptomatology of the back, left hip and leg, and the limitation of flexion for the left knee produced a thirteen percent (13%) impairment to the body as a whole and that the claimant was totally disabled from performing his previous duties. The record indicates that the claimant had Dr. Miller's approval to see Dr. Frost.

On March 13, 1978, claimant, who wished to be seen by Maurice P. Margules, M.D., a Council Bluffs neurosurgeon, called Dr. Miller's office. An appointment was made by staff members of Dr. Miller's office. Dr. Miller does not specifically recall referring the claimant to Dr. Margules.

On March 20, 1978, claimant saw Dr. Margules. The history given to Dr. Margules revealed his back pain dated to June 10, 1977. Dr. Margules admitted the claimant to Jennie Edmundson Memorial Hospital on March 26, 1978. Examination revealed weakness of dorsiflexion of the left foot and extension of the left toe, hypoalgesia of the left L5 distribution. A myelogram was conducted on March 27, 1978 and showed evidence of a defect at the L4-L5 interspace on the left side which was compatible with disc herniation at that level. The claimant was released from the hospital on March 28, 1978 and readmitted on May 7, 1978, at which time a lumbar laminectomy and excision of a herniated disc at the L4-L5 interspace was performed. The claimant was released from the hospital on May 22, 1978. The claimant has not yet been released to return to his former duties, But Dr. Margules would have a maximum permanent partial impairment of fifteen percent (15%). Dr. Margules causally connected the claimant's lumbar difficulties to the injury of June 10, 1977.

The claimant has the burden of proving by a preponderance of the evidence that the injury of June 10, 1977 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.

When an expert's opinion is based upon an incomplete history, it is not necessarily binding upon the commissioner or the court. It is then to be weighed, together with the other facts and circumstances, the ultimate conclusion being for the finder of fact. *Musselman v. Central Telephone Co.,* 261 Iowa 352, 154 N.W.2 128 (1967). Based on the foregoing principles, it is found that the claimant's back problems were not related to the injury of June 10, 1977. The testimony of the claimant was that the back problems started at the time of the injury. He stated that he received a heat treatment to the back from the physical therapist at Dr. Miller's prescription. He further testified that he told Mr. Woods of the situation. Dr. Miller and Mr. Woods' testimony are in direct conflict with the evidence of the claimant's testimony. Although Dr. Miller's testimony is somewhat vague, the testimony of Leonard Woods is of significant clarity and objectivity to rebut claimant's contentions that he did so inform them of his back problems. The records do not indicate that the claimant was suffering from the numbness which Dr. Margules refers to in his history. The history, therefore, is suspect, and an opinion based on such a history must be disregarded because the foundation upon which it lies is not supported by a preponderance of the evidence. The claimant will be permitted to recover for his injury to the left lower extremity. (See *Barton v. Nevada Poultry,* 253 Iowa 285, 110 N.W.2d 660). Dr. Miller's opinion with regard to permanent partial impairment will be followed.

The bills for services rendered by Dr. Frost will be allowed since the authorized physician, Dr. Miller, referred the claimant to Dr. Frost. Those charges incurred in December 1977 will be allowed.

Healing period compensation will be allowed from June 11, 1977 through December 28, 1977, when Dr. Miller saw claimant and released him. (Exhibit 12). This is a period of twenty eight and four-sevenths (28 4/7) weeks.

WHEREFORE, claimant has established that he sustained a twenty percent (20%) loss to his left lower extremity which was the result of an industrial injury and is entitled to healing period compensation, permanent partial disability compensation, and benefits pursuant to §85.27, Code of Iowa.

* * *

Signed and filed this 4th day of February, 1979.

JOSEPH M. BAUER
Deputy Industrial Commissioner

Appealed to Commissioner: Affirmed.

LYLE Z. JONES,

Claimant,

vs.

W. S. DICKEY MFG. CO.,

Employer,

and

THE TRAVELERS INSURANCE CO.,

Insurance Carrier,
Defendants.

Appeal Decision

This is a proceeding brought by claimant, Lyle Z. Jones, appealing a proposed review-reopening decision wherein he was denied benefits under the Iowa Workers' Compensation Act.

On reviewing the record, it is found that the deputy industrial commissioner's proposed findings of fact and conclusions of law are proper; however, the following points should be noted.

The filing of a memorandum of agreement establishes the employer-employee relationship and the fact that the injury arose out of and in the course of employment while " 'leaving the question with reference to extent of disability open for adjustment in accordance with the facts' . . ." *Tebbs v. Denmark Light & Telephone Corp.,* 230 Iowa 1173, 1176, 300 N.W.328 (1941).

The following statements from *Almquist v. Shenandoah Nurseries, Inc.,* 218 Iowa 724, 732, 254 N.W.35 (1934), should also be noted:

> The result 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 functions of the human body.

Claimant is not entitled to recover for the results of a preexisting injury or disease but only for an aggravation of such injury or disease which resulted in the disability found to exist. *Olson v. Goodyear Service Stores,* 255 Iowa 1112, 125 N.W.2d 251 (1963). If this condition is "more than slightly" aggravated, the resultant condition is considered a personal injury. *Ziegler v. U.S. Gypsum Co., Inc.,* 252 Iowa 613, 106 N.W.2d 591 (1961). When an employee has received a compensable injury which "materially" aggravates or accelerates a preexisting disease and leads to disability or death, a causal connection is established. *Yeager v. Firestone Tire & Rubber Co.,* 253 Iowa 369, 112 N.W.2d 312 (1961).

Based upon these authorities as applied to the facts of the case sub judice, the determination of the deputy industrial commissioner denying benefits to the claimant is found to be proper.

* * *

Signed and filed this 29th day of September, 1978.

ROBERT C. LANDESS
Industrial Commissioner

Appealed to District Court: Pending

MERLIN D. JONES, SR.

Claimant,

vs.

CLINTON CORN PROCESSING CO.

Employer,

and

COMMERCIAL UNION ASSURANCE CO.

Insurance Carrier,
Defendants.

Decision on Application for a Medical Examination

On June 13, 1979, this matter came on for a pre-hearing conference at the courthouse in Davenport, Iowa. At that time, the parties waived further hearing and requested the case be decided upon the pleadings.

The second unnumbered paragraph of §85.39, Code states:

> 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.

Defendants' resistance states that claimant, a resident of Clinton, Iowa, should be restricted to that area for the examination; the resistance further states that the physician requested for the examination, F. Dale, Wilson, M.D., is a general surgeon and implies that a more expert physician could be visited in Clinton.

Since there is a memorandum of agreement on file, and since it appeared at the pre-hearing conference that an evaluation of permanent disability had been made by a physician for the employer, it is clear claimant has a right to such an examination. Further the code section clearly states that the examination may be by "a physician of his own choice." Claimant chooses Dr. Wilson and that is his

right.

* * *

Signed and filed at Des Moines, Iowa this 21st day of June, 1979.

BARRY MORANVILLE
Deputy Industrial Commissioner

No Appeal.

ESTHER JUREK,

Claimant,

vs.

UNITED PACKING OF IOWA,

Employer,

and

ATLANTIC CENTENNIAL CO.,

Insurance Carrier,
Defendants.

Review-Reopening Decision

This is a proceeding in review-reopening brought by Esther Jurek, the claimant, against United Packing of Iowa, her employer, and Atlantic Centennial, the insurance carrier, to recover additional benefits under the Iowa Workmen's Compensation Act by virtue of an industrial injury that occurred on September 12, 1974.

* * *

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

Claimant, age 48, commenced her employment career in 1958 after her youngest child became a year old (trans. page 13, line 1). The claimant achieved an eighth-grade education and at the time of the hearing was involved in obtaining a G.E.D. Certificate through the Department of Public Instruction, Vocational Rehabilitation Division. (Trans page 42, Line 9).

Claimant testified that in the spring of 1974 she began to use a Wizard knife which is used to remove meat from neck bones. After having used this knife which is specifically designed fo the trimming of meat for a period of some five months the claimant found that she developed shoulder pain. After some initial difficulty with the defendant's medical department, the claimant became a patient of Albert D. Blenderman, M.D., who diagnosed the claimant's condition as bicipital groove tendonitis with accompanying subdeltoid bursitis of the right shoulder (Blenderman depo page 9, line 8).

This diagnosis was confirmed universally by all of the other attending physicians.

The initial issue requiring a determination is whether or not the claimant's shoulder injury is subject to the provisions of §85.34 (2) (M) or (U) which read as follows:

> The loss of two-thirds of that part of an arm between the shoulder joint and the elbow joint shall equal the loss of an arm and compensation therefore shall be weekly compensation during 250 weeks.
>
> In all cases permanent partial disability other than those herein above described and referred to in "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.

A similar problem was presented in the case of *Alm vs. Morris Barick Cattle Company* 240 Iowa 1174 38 N.W.2d 161 (1949). The court at Page 1177 said:

> "Moreover, it (the employer's contention) assumes an injury to the shoulder is an injury to the arm. This assumption is unwarranted. Subsection 13 (dealing with loss of an arm) does not apply to a shoulder injury, nor is such an injury scheduled in any other subsection of 85.35. (now 85.34)."

In applying these guidelines to the case at hand it is apparent that the claimant has sustained an injury to the shoulder which brings her within the purview of the latter subsection.

The claimant has a disability to the body as a whole. She is entitled to have her 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 she is fitted. *Olson vs. Goodyear Service Stores* 255 Iowa 1112, 125 N.W.2d 251 (1963). *Martin vs. Skelly Oil* 252 Iowa 128, 106 N.W.2d 95. It is the reduction of earning capacity which must be determined. *Martin vs. Nevada Poultry* 253 Iowa 285, 110 N.W.2d 660 (1961).

This claimant's work history indicates that she has had some experience in the restaurant business having managed a cafe in a small farming community. It is questionable that the claimant would be in a position to resume similar managerial duties in the restaurant business in Sioux City. The testimony of the vocational rehabilitation counselor, Roland Gunsch, while enlightening as to the testing that was done, fails to provide any affirmative program that will result in retraining and a reduction of the claimant's industrial disability. The claimant's disability is such that she will necessarily be required to find some sedentary occupation. The occupational disease of tenosynovitis as found by the attending physicians is in this case sufficiently severe so as to result in substantial discomfort upon any prolonged arm motion. It is concluded that based upon the claimant's lack of education, the particularly painful disease she suffers from, together with her age, results in an industrial disability of fifty percent (50%) of her body as a whole.

* * *

Signed and filed this 28th day of August, 1978.

HELMUT MUELLER
Deputy Industrial Commissioner

Appealed to Commissioner: Affirmed
Appealed to Distrct Court: Pending.

ESTHER JUREK,

Claimant,

vs.

UNITED PACKING OF IOWA,

Employer,

and

ATLANTIC CENTENNIAL CO.,

Insurance Carrier,
Defendants.

Appeal Decision

This is a proceeding brought by defendants appealing a proposed decision in review-reopening wherein claimant was awarded vocational benefits and permanent partial disability for a condition which became disabling on September 12, 1974.

* * *

The deputy found claimant to have sustained an industrial disability of fifty percent. While it is unclear from his decision what weight he gave to the various factors applied to determine industrial disability, this commissioner finds that the record as a whole supports the deputy's finding. *Porter v. Continental Bridge Co.,* 214 N.W.2d (Iowa 1976).

On reviewing the record, it is found that the deputy's findings of fact and conclusions of law are proper.

* * *

Signed and filed this 22nd day of August, 1979.

ROBERT C. LANDESS
Industrial Commissioner

Appealed to District Court: Pending.

JOHN KELLY,

Claimant,

vs.

B AND C FABRICATING CO.,

Employer,

and

FEDERATED INSURANCE COMPANY,

Insurance Carrier,
Defendants.

Motion To Dismiss

BE IT REMEMBERED that on May 7, 1979 defendants herein filed a motion to mismiss on the ground that the face of the original notice and petition clearly indicated claimant's action was barred by Code section 85.26: Claimant had alleged an injury date of January 12 through January 15, 1976, an injury occurring while lifting and carrying heavy steel, and an arbitration action because no weekly benefits had been made; and claimant filed his petition on April 18, 1979. On May 18, 1979 claimant herein filed a resistance to defendants' motion to dismiss alleging that claimant had been unrepresented by counsel prior to May 18, 1979, that certain equitable doctrines may effectively toll Code section 85.26 if the claimant could not have, in the exercise of due diligence, timely discovered his injury, and that additional time was needed to gather pertinent medical records. On May 18, 1979 claimant also filed a request for oral hearing.

* * *

At the hearing, counsel for the claimant argued that the motion to dismiss was premature, that claimant did not know about the work-relatedness of his injury until more than two years had passed, and that equitable principles should apply to the case. Counsel for defendants pointed out that the motion to dismiss was limited to the face of the petition, the type of injury was one a person would know occurred and would suspect as a causative factor if a physical problem arose soon thereafter, and the 1977 change in the language governing the statute of limitations in the Iowa Workers' Compensation Act was not to be applied retroactively.

The change in Code section 85.26 is discussed in claimant's brief. The version that controls in the present case requires an arbitration proceeding be brought "within two years from the date of the injury" causing the disability for which benefits are sought. The 1977 amendment now requires an arbitration proceeding be brought "within two years from the date of the occurrence of the injury" for which benefits are sought.

In rebuttal argument claimant maintained that the change in statute indicates the legislature felt the former statute of limitations was unfair. However, an enacted amendment does not indicate a construction of the original statute, further than that, as construed, it was deemed to need an amendment. *Jennings v. Mason City Sewer Pipe Co.,* 187 Iowa 967, 174 N.W.785 (1919).

Claimant has not supported his argument that the statutory change should be applied retroactively with case authority. The undersigned is not aware of any such authority. Hence, as noted by the Iowa Industrial Commissioner in *Elois Ewing v. Iowa Industrial Hydraulics* and *Aid Insurance Company (Mutual),* 33rd Biennial Report of the Iowa Industrial Commissioner, page 165 and in *Robert v. Connet,* as Conservator for Edwin *Albert Kray v. Farmers Mutual Cooperative Creamery Association* and *Iowa National Mutual Insurance Company,* 32nd Biennial Report of the Iowa Industrial Commissioner, page 46, the Iowa Supreme Court has strictly construed the statute of limitations herein under consideration. The "date of injury causing such death or disability" is the beginning date for

the limitation period--that is, the causal injury, not the compensable injury nor the state of facts or conditions which first entitled claimant to compensation. *Otis v. Parrott,* 233 Iowa 1039, 8 N.W.2d 708 (1943); *Mousel v. Bituminous Material and Supply,* 169 N.W.2d 763 (Iowa 1969).

In the past, the question of when a claimant acquires or should have acquired knowledge of a possible causal connection between a disability and an industrial injury was properly raised in the context of a "notice" issue under Iowa Code section 85.23 and not in the context of a "statute of limitations" issue under Iowa Code section 85.26. Code section 85.23 specifically refers to "the date of the occurrence of the injury" and the Iowa Supreme Court has held that "occurrence" indicates when the employee discovers the nature of his or her disability. *Jacques v. Farmers Lumbar Supply Company,* 242 Iowa 548, 47 N.W.2d 236 (1951). Although Professor Larson's analysis (§78.41) puts Iowa in the minority on the rule as to when the time period for a claim begins to run, the Iowa Supreme Court's language in *Otis v. Mousel* is clear, and the Iowa Industrial Commissioner is bound by it.

Although courts do not usually favor the defense of statute of limitations, the statute of limitations in a workers' compensation matter is special not general; that is, the limitation is an inherent part of the statute or agreement out of which the right in question arises so that there is no right of action independent of the limitation. *Secrest v. Galloway,* 239 Iowa 168, 30 2d 793 (1948); *Otis v. Parrott,* 233 Iowz 1039 8 N.W.2d 708 (1943). See and compare *Sprung v. Rasmussen,* 180 N.W.2d 430 (Iowa 1970), cited in *Vermeer v. Sneller,* 190 N.W.2d 389 (Iowa 1971).

WHEREFORE, IT IS HEREBY FOUND that claimant has not timely filed his petition for arbitration in accordance with section 85.26, Code of Iowa, 1975.

THEREFORE, defendants' motion to dismiss filed on May 7, 1979 is hereby sustained.

Signed and filed this 28th day of June 1979.

LEE M. JACKWIG
Deputy Industrial Commissioner

No Appeal.

JAMES J. KENNEDY,

Claimant,

vs.

JOHN DEERE DUBUQUE WORKS,

Employer,
Self-Insured,
Defendants.

Arbitration Decision

INTRODUCTION

This is a proceeding in arbitration brought by James Joseph Kennedy, claimant, against John Deere Dubuque Works, employer, self-insured, for benefits as a result of an injury on April 14.

* * *

ISSUES

The issues presented by the parties at the time of pre-hearing and the hearing are whether claimant received an injury arising out of and in the course of his employment; whether there is a causal relationship between the alleged injury and the disability on which he is now basing his claim; and the extent of healing period and permanent partial disability benefits he is entitled to.

FACTS

Claimant started working for defendant in April of 1972. In April of 1977 claimant was working in the position of crib attendant and occasionally worked as tool hauler. The job of tool hauler entails the taking of cutters weighing from 40 - 95 pounds from off a table, placing them on a delivery truck and delivering them to other departments throughout the plant. On April 15, 1977 claimant started working at 7:00 in the morning and was assigned as a tool hauler that day. Claimant testified that the heavy lifting caused his back to hurt and felt like it was tightening up. Claimant's testimony regarding his back hurting was supported by the testimony of James Hammel who testified he noticed something wrong about claimant early that morning and in response to his question, claimant stated his back hurt. Although claimant testified that his back continued to hurt up and through his coffee break, the testimony of Ronald Dillon Victor Fessler, Robert Rasque and Carl Ruff indicates that at least five to ten minutes prior to coffee break time, claimant was feeling good and expressed no signs of pain or distress.

Claimant testified that the coffee breaks lasted approximately 15 minutes. Claimant stated he was drinking a cup of coffee when the whistle blew indicating the end of break, he threw his empty cup to a garbage container and sneezed. As a result of claimant's sneeze, he started to fall to the floor but was caught by a fellow employee. Claimant was taken to his foreman's office, then the nurse's station and was finally taken to the hospital. At the hospital claimant was seen by Gerald L. Meester, M.D. and after about two hours was released. Claimant stated that as per Dr. Meester's orders he went home and stayed in bed. Claimant was seen again by Dr. Meester at Dr. Meester's office twice and was then referred by Dr. Meester to Eugene Herzberger, M.D. After seeing Dr. Herzberger claimant became dissatisfied with his treatment and saw his family physician, Donald C. Sharpe, M.D. Dr. Sharpe saw claimant in June of 1977 for an unrelated matter. Dr. Sharpe first saw claimant regarding claimant's back in August of 1977 and sent claimant to the hospital for a myelogram. Dr. Sharpe also consulted with James A. Pearson, M.D. In his deposition, Dr. Pearson stated:

> My examination was equivocal, not completely strongly indicative of a ruptured disk, but it did point to that direction. He had a positive straight leg test at about 45 degrees. A more positive one would probably

> be ten or fifteen degrees evaluation of the leg. Nerve function was normal as could be detected by strength tests, reflex tests, although his reflexes were slightly diminished on both sides, but they were equal. There was no atrophy present in either of his legs. His lumbar spine X-rays taken in April were viewed and they showed minimal degenerative arthritic changes, small bone spurs on the bottom of the fourth lumbar vertebra; otherwise, it was a negative exam. * * * *

On August 23, 1977 Dr. Pearson operated on claimant but failed to find a ruptured disc. Dr. Pearson did find a bone spur at L4 lumber disc that had been present for years. Claimant testified that four weeks following his operation, Dr. Pearson released him to go back to work and he returned to his former position.

APPLICABLE LAW

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. *McDowell v. Town of Clarksville,* 241 N.W.2d 904 (Iowa 1976); *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. *Crow 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). *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 is 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).

ANALYSIS

The medical evidence discloses that claimant had a pre-existing back condition that he was unaware of in April of 1977. On April 15, 1977 claimant had two aggravations of that pre-existing condition. The first aggravation to claimant's back was caused by the lifting which he was required to perform prior to his coffee break. Claimant is not entitled to recovery for this aggravation because it only slightly aggravated his condition. Claimant continued to work and although claimant testified he had not recovered from this pain prior to his sneezing episode, the greater weight of evidence indicates that five or ten minutes prior to his coffee break and during his coffee break he was feeling O.K. and exhibited no signs of pain. Such a determination of fact is supported by the testimony of Ronald Dillon, Victor Fessler, Robert Rasque and Carl Ruff. The second aggravation to claimant's back was the sneezing episode during claimant's coffee break. The aggravation caused by the sneeze was shown both in the fact that it made him fall and made him incapable of continuing his work. The problem claimant faces is that there is a lack of proof to show that claimant's sneeze "arose out of" his employment. There has been no evidence that the exertion of the employment or exposure occasioned by claimant's employment caused him to sneeze thereby aggravating his previous back condition.

Most of the medical testimony indicates that claimant's lifting had something to do with claimant's disability. However, Dr. Pearson stated a sneeze may have aggravated claimant's back condition and the testimony of claimant's co-employees indicates that right prior to the sneezing incident, he was happy and showed no signs of pain. Even by claimant's own testimony and the early medical histories, it was the sneeze which made it impossible for him to work.

* * *

Signed and filed this 29th day of January, 1980.

DAVID E. LINQUIST
Deputy Industrial Commissioner

No Appeal.

RUSSELL K. KILNESS,

Claimant,

vs.

EBASCO SERVICES, INC.,

Employer,

and

UNITED STATES FIDELITY AND GUARANTY COMPANY,

Insurance Carrier,
Defendants.

Order

BE IT REMEMBERED that on March 16, 1979 claimant herein filed a motion requesting order authorizing medical examination at employer's expense pursuant to Code section 85.39. On March 21, 1979 defendants herein filed a resistance. On March 29, 1979 the parties filed a Form 100A indicating that the claimant requested his independent examination be performed by Dr. Horst G. Blume of Sioux City, Iowa, and that the defendants resisted such request.

* * *

At the outset it is noted that at the hearing defendants presented a motion to strike and resistance to (claimant's) notice of service of medical documents to be offered as exhibits at April 19, 1979 hearing and request for complete set of employer's medical reports. One objection to the medical reports is that they were not timely exchanged by April 9, 1979 in accordance with the pre-hearing order of April 4, 1979. Said objection is overruled insofar as it appears from review of the file that claimant's attorneys received such medical reports from Dr. Mumford with a cover letter dated April 10, 1979 and hence would not have had them in their possession (to exchange) until some later date. The objection that these documents are self-serving and constitute hearsay is overruled for the limited purpose of ruling on the present matter. See Code section 17A.14(1). Additionally, it is noted by the undersigned that review of the file contents and discussion with counsel at the hearing suggests that, as of that point in time, all medical reports in the possession of each party had probably been exchanged, that Dr. Kilzer's September 15, 1978 report and bill may have been filed with this office by the doctor's office, and that the November 7, 1978 letter from Dr. Mumford to the defendants had already been filed with the resistance on March 21, 1979.

The record supports the following facts:

(1) On January 23, 1978 defendants filed a First Report of Injury regarding a January 17, 1978 injury claimant sustained to the right foot. On January 31, 1978 defendants filed a Memorandum of Agreement with respect to said injury, indicating that the rate of temporary total benefits was $247 per week. At the hearing defendants' counsel indicated that claimant had been paid temporary total benefits until he returned to work in mid-May of 1978 and that no permanent partial disability benefits have been paid. Yet, to date, no Form 5 has been filed with this office nor sufficient medical information in support of payments made. See Industrial Commissioner Rule 500-3.1(3). On January 31, 1979 the claimant filed an application for review-reopening and Code section 85.27 benefits.

(2) Claimant was originally treated by Dr. E. M. Mumford, M.D., of Sioux City. Defendants paid for such treatment. Claimant was last seen by Dr. Mumford in May 1978 at which time Dr. Mumford advised both the claimant and the defendants that claimant was released to return to work as of May 15, 1978, that claimant should not have much permanent disability as a result of the industrial injury, that the matter should not be settled for six months, and that the claimant should be reexamined in three months.

(3) Claimant moved to North Dakota sometime after the May examination indicated above and in August wrote to Dr. Mumford asking for the name of a doctor in North Dakota for treatment of his wife and himself. Dr. Mumford recommended Dr. R. L. Kilzer, M.D., of North Dakota. Claimant saw Dr. Kilzer in September and October of 1978 and apparently continues to be under the care of said doctor.

(4) On November 7, 1978 Dr. Mumford advised the defendants that he would have to examine the claimant again prior to determining a "final" rating. On November 21, 1978 the adjuster for defendant carrier advised claimant's counsel of said communication from Dr. Mumford and noted that the defendants would assume no obligation for travel expense incurred by the claimant in coming to Sioux City for such examination. On December 11, 1978 Dr. Mumford advised the defendants that there was no reason why Dr. Kilzer could not continue to follow the claimant's condition.

(5) On December 15, 1978 Dr. Kilzer, in response to a December 8, 1978 letter from claimant's counsel, indicated that the claimant had no disability because he had no restriction on range of motion of the injured member.

Code section 85.39 reads:

> *5.39 Examination of injured employees. After an injury, the employee, if so requested by his employer, shall 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, *without cost to the employee;* but if the employee requests, he shall, at his own cost, be entitled to have a physician or physicians of his own selection present to participate in such examination. *Whenever an employee is required to leave his work for which he is being paid wages to attend upon such requested examination, he shall be compensated at his regular rate for the time he shall have lost by reason thereof, and he shall be furnished transportation to and from the place of examination, or the employer may elect to pay him the reasonable cost of such transportation.* The refusal of the employee to submit to such examination shall deprive him of the right to any compensation for the period of such refusal. When a right of compensation is thus suspended, no compen-

sation shall be payable for the period of suspension.

When 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 employer the reason able 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. (emphasis added).

Claimant's motion presents the argument that since Dr. Mumford, the original treating physician who was paid solely by the defendants, referred the claimant to Dr. R. L. Kilzer and since the carrier had refused to assume the travel expense claimant would incur in coming to Sioux City for further evaluation by Dr. Mumford, Dr. Kilzer was in effect the defendants' doctor and his rating of no permanency satisfied the requirements of Code section 85.39. Accordingly, claimant requested plane fare or mileage to Sioux City, whichever is less, and all necessary meals and lodging incurred as a result of an independent exam by Dr. Blume.

Defendants' resistance is based on the argument that they paid Dr. Mumford for treating the claimant's industrial injury but that they had paid none of Dr. Kilzer's charges (despite claimant's suggestion that they had) and had not received any report from the latter doctor regarding the status of claimant's disability. The defendants appeared to rely heavily on the fact that claimant left the state of Iowa, sought further treatment on his own (though they admit the referral by Dr. Mumford), and had no permanent impairment according to Dr. Kilzer.

At the hearing the undersigned indicated that the reliance upon Dr. Kilzer's opinion as the decisional factor for granting or denying claimant's application seemed misplaced. From the face of the motion it appeared that claimant had sought Dr. Kilzer's assistance for purposes of an evaluation as though attempting to dispute Dr. Mumford's prognosis of not much permanency. In such a situation, it could be argued that claimant already had had an independent evaluation. Defendants, on the other hand, proceeded to argue the merits of Code sections 85.27 as they deemed it applied to Code section 85.39 -- that claimant had not communicated to the defendants any dissatisfaction with Dr. Mumford nor requested authorization to go to Dr. Kilzer, and therefore, Dr. Kilzer's opinion was not an extension of Dr. Mumford's evaluation process. Claimant's letters to Dr. Mumford, filed with this office in Des Moines on April 17, 1979, clearly indicate that claimant was seeking the services of Dr. Kilzer for treatment of his wife and himself. Whether any treatment of his industrial injury by Dr. Kilzer will be compensable pursuant to Code section 85.27 is not properly before the undersigned in this motion proceeding; however, from such evidence it is found that claimant has not obtained an independent evaluation via Dr. Kilzer's opinion nor is said opinion to be construed as an extension of Dr. Mumford's evaluation.

In the opinion of the undersigned the dispute revolves on whether Dr. Mumford has made an evaluation of permanent disability which the claimant disputes.

According to the record Dr. Mumford indicated to the claimant that he should not have much permanent partial disability as a result of the industrial injury. (See May 10, 1978 letter from Dr. Mumford to the defendants and September 9, 1978 letter from Dr. Mumford to Dr. Kilzer.) Defendants argue that Dr. Mumford indicated he would have to see the claimant again to determine a "final" rating (November 7, 1978 letter from Dr. Mumford to defendants) and that claimant did not return for such follow-up examination so no final rating could be given.

It is hereby found that under the facts of this case, Dr. Mumford's opinion, as expressed to the claimant -- that claimant should not have much permanent disability is enough of an evaluation for the claimant to dispute by means of seeking an independent examination pursuant to Code section 85.39. Clearly, if a finding of no permanency has been held by this office to satisfy said Code section, a prognosis of not much permanency will likewise be acceptable (though it is not a "final" rating in the doctor's mind) especially where the evidence shows that the employee did not refuse to submit to a follow-up exam by Dr. Mumford but that he was expected to do so at some cost to himself in contravention of Code Section 85.39 and Industrial Commissioner Rule 500-8.1.

* * *

Signed and filed this 30th day of April 1979.

LEE M. JACKWIG
Deputy Industrial Commissioner

No Appeal.

MARY LOU KIMBALL, as Surviving Spouse of GLENN VETTER, Deceased, and as Mother and Natural Guardian of JANETTE KAY VETTER, Minor, and KATHA MARIE VETTER KELCHEN, and R. W. NIEMAN, Clerk of the District Court, Delaware County, Iowa, as Workmen's Compensation Trustee,

Claimants,

vs.

SMITTY'S, INC.,

Employer,

and

EMPLOYERS MUTUAL CASUALTY CO.,

Insurance Carrier,
Defendants.

Appeal Decision

This is a proceeding brought by Smitty's, Inc., employer, and Employers Mutual Casualty Co., its insurance carrier, appealing a declaratory ruling wherein Katha Marie Vetter Kelchen was found to be entitled to compensation benefits subsequent to her marriage.

On March 13, 1974, claimant's decedent died as a result of injuries arising out of and in the course of his employment. He was survived by his spouse, Mary Lou, and two daughters, Katha Marie and Janette Kay, who received compensation payments. Mary Lou remarried. On August 22, 1975, an order of equitable apportionment was entered by a deputy industrial commissioner which required one-half of the $91 weekly payment to be paid to a trustee for Janette Kay Vetter and one-half to be paid to Katha "for her use and benefits so long as she continues as a full-time student in any accredited educational institution and is under twenty-five years of age." A similar clause was to apply to Janette after she reached eighteen. On August 6, 1977 Katha, who remained a full-time student, married and Employers Mutual Casualty Company ceased making payments to her.

On May 30, 1978 Smitty's, Inc., and Employers Mutual Casualty Company filed a petition for a declaratory ruling "concerning the claimant's, Katha Marie Kelchen, entitlement to worker's compensation benefits subsequent to her marriage . . . ."

Iowa Code §85.31(1)(b) provides for death benefits

> [t]o 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.

Under this statute Katha, as a full-time student, is, prima facie, actually dependent. Her marriage is not in and of itself sufficient to rebut the prima facie showing. Her actual dependency is a fact question and her entitlement to an award cannot be established without further facts.

The Texas Court of Civil Appeals in *Industrial Accident Board v. Lance,* 556 S.W.2d 101 (1977), dealt with the question of whether or not adult married children could receive death benefits. The court relied on stare decisis at 103 for the test: " 'Was the alleged beneficiary relying in whole or in part upon the labors of the deceased for support?' " This issue was resolved by examining the evidence presented. No such evidence has been presented in the case sub judice.

* * *

Signed and filed this 16th day of August, 1978.

ROBERT C. LANDESS
Industrial Commissioner

No Appeal.

LORENE T. KINDLE,

Claimant,

vs.

MAPCO, INC.,

Employer,

and

NATIONAL UNION FIRE INSURANCE COMPANY,

Insurance Carrier,
Defendants.

Appeal Decision

Defendants appeal a proposed decision in arbitration awarding death benefits.

* * *

Claimant's husband, Charles G. Kindle, was killed in a highway collision on March 9, 1978 while on his way to work to perform his normal duties at the Cantril terminal. The vehicle which Kindle was driving at the time of the collision was owned by his employer, MAPCO, Inc., and was being operated by Kindle with his employer's permission.

Kindle's normal working hours were from 6:30 a.m. to 4:00 p.m., but he was on call twenty-four hours a day. He was provided with a company vehicle to insure that he had reliable transportation at all times and to transport the company tools for which he was responsible and which he used in his duties. He was authorized to drive the vehicle back and forth between his residence and the terminal. Kindle had authority to maintain the vehicle and had fleet credit cards. Kindle was also required to perform services for his employer at places other than the Cantril terminal and was required to use the company vehicle in the performance of these services.

The issue on appeal is whether claimant's decedent was in the course of employment at the time of his death.

"In the course of employment" has been defined as "within the period of the employment at a place where the employee reasonably may be in the performance of his duties or engaged in doing something incidental thereto." It relates to time, place and circumstances of the injury. *Golay v. Keister Lumber Co.,* 175 N.W.2d 385, and cases cited therein.

When an employee has a place and hours of work, ordinarily he is not considered to be acting within his employment while he is on his way to his place of employment. *Halstead v. Johnson's Texaco,* 264 N.W.2d 757 (Iowa 1978).

An exception to the above general rule is when the journey to and from work is made in the employer's conveyance. The journey is in the course of employment. The risk of employment continues through the journey because the vehicle is under the control of the employer and the employees ride in the vehicle at the direction of the employer. The transportation duties are incidental to but

outside the regular duties. The Iowa court, by implication, supported this proposition in *Pribyl v. Standard Electric Co.*, 246 Iowa 333, 67 N.W.2d 438, when it compensated a union employee who was injured while riding to work. The employment contract between employer and employee specifically required the employer to provide transportation for employees when they were assigned jobs outside the employer's county. By a separate agreement employer agreed to pay eight cents a mile to the employee when he drove his own vehicle. It should be noted that the employee was not compensated for time spent in travel, but only for a predetermined mileage between home and the work site. The court said: "It must be conceded that there must be something more than the mere payment of such transportation cost." *Pribyl, supra,* p. 342. The "something more" was the fact that the employer had contracted to furnish transportation. See also *William E. Scharf v. Hewitt Masonry,* 32nd Biennial Report of the Industrial Commissioner, p. 96.

In applying the facts of this case to the rule set forth in *Pribyl, supra,* it is found that the deputy properly held that the decedent was in the course of his employment at the time of his death.

* * *

Signed and filed this 23rd day of January, 1980.

ROBERT C. LANDESS
Industrial Commissioner

Appealed to District Court: Pending.

JAMES KIRCHOFF,

Claimant,

vs.

DON HARTMAN & SONS,

Employer,
Defendant.

Ruling

BE IT REMEMBERED that on March 7, 1979 the claimant herein filed an application for employer paid physician examination. No resistance to the application has been filed to date.

Review of the file reveals that on October 4, 1978 claimant filed an arbitration proceeding against the defendant herein alleging that some voluntary payments have been made by the defendant (petition paragraph 17) and stating the dispute in this case as "[e]mployer refuses to make required payments. Claims he has no insurance and will break business if pays." (petition, paragraph 22). No answer has been filed. No official filings have been made.

It is hereby found that defendant in this action has admitted to injury arising out of and in the course of claimant's pursuant to Code section 85.39 is premature insofar as the defendant cannot be ordered to pay for an employee requested examination until liability is established either by the filing of a memorandum of agreement or by an adjudication of the essential elements admitted by the filing of such a memorandum of agreement. See *Michael R. Bjorklund v. Pittsburgh-Des Moines Steel Company* and *Employers Insurance of Wausau,* 33rd Biennial Report of the Industrial Commissioner, page 101.

THEREFORE, claimant's application for employer paid physician examination is denied at this time.

Signed and filed this 9th day of April, 1979.

LEE M. JACKWIG
Deputy Industrial Commissioner

No Appeal.

LINDA KITTRELL,

Claimant,

vs.

ALLEN MEMORIAL HOSPITAL,

Employer,

and

BITUMINOUS CASUALTY CORPORATION,

Insurance Carrier,
Defendants.

Review-Reopening Decision

This is a proceeding in Review-Reopening brought by Linda Kittrell, the claimant, against Allen Memorial Hospital, the defendant-employer, and Bituminous Casualty Corporation, the insurance carrier, to recover additional benefits under the Iowa Workers' Compensation Act as the result of an admitted industrial injury which occurred on march 25, 1977.

* * *

The primary issue in this matter is the nature and extent of claimant's disability, if any.

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

Claimant, single, age 28, and a registered nurse began her duties for the defendant-employer in 1976 as a floor nurse. On March 25, 1977 the claimant, while carrying items in both hands, slipped and fell heavily on a wet floor as she was alighting from an elevator, resulting in an acute lumbosacral strain (defendants' exhibit A). J. D. Kothari, M.D., admitted the claimant into the defendant-employer's hospital. Claimant remained unable to perform acts of gainful employment for a period of 40 weeks and 4 days, until January 3, 1978 and was paid temporary total disability benefits during that period of time. Surgery in the form of a hemilaminotomy L4/5 and L5/S1 left was performed by Stuart R. Winston, M.D., on October 4, 1977. In 1978, claimant became a patient of A. B. Cameron, M.D., and J. R. Moes, M.D. who recommended

the use of a transcutaneous stimulator in July, 1978, following one of three visits to the Mayo Clinic, in Rochester, Minnesota.

Claimant had been involved in a motor vehicle accident which occurred in Tennessee in July, 1972, resluting in a cervical strain from which the claimant appeared to have made a normal recovery.

In 1967 and 1974 the claimant had had a limited amount of psychiatric care based upon claimant's ill feelings concerning her father.

On August 17, 1977, at the request of claimant's attending physician, claimant was seen by Philip R. Hastings, M.D., a psychiatrist, who "formed an opinion that she was suffering from psyco-physiologic musculo-skeletal reaction based on the fact that there was no real evidence of significant organic pathology. Yet she had disabling amount of pain" (deposition, page 6, line 23). Dr. Hastings defined a psycho-physiologic musculo-skeletal reaction as follows, to wit (deposition page 7, line 16):

> Well, it's a group of socalled psychophysiologic disorders and these are conditions in which emotional conflicts are detoured away from conscious awareness and expressed through some organ system in the body producing organic symptoms and in this case happens to be the musculo-skeletal system, pain in the back muscles being produced by nervous impulses from the brain which arise from emotional conflict and are being channeled into the back muscles instead of to the individual.

Dr. Hastings also testified that the fall of March 25, 1977 was the "triggering event" which brought about the condition (deposition page 8, line 4). At the time of his testimony, March 27, 1979, Dr. Hastings indicated that the claimant was receiving antidepressant medication and was still under his care with every expectation that she would remain as a patient for a year or two.

After concluding that the claimant had a 30% functional impairment of the body, taking into account the 5% resultant disability as the result of the surgery performed by Dr. Winston, Dr. Hastings concluded that 15% of the claimant's current disability was preexisting this March 25, 1977 episode (deposition, page 28, line 4).

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 pre-existing 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. *Nicks v. Davenport Produce Co.*, 254 Iowa 130, 115 N.W.2d 812 (1962). *Yeager v. Firestone Tire & Rubber Company*, 253 Iowa 369, 112 N.W.2d 299 (1961).

Supervisory personnel testified on behalf of the defendants that the claimant demonstrates the physical capability necessary and seems to be able to handle her assigned duties. The claimant concurs that she has improved since surgery and the treatments of Dr. Hastings.

While a patient at the Mayo Clinic, Dr. Bahram Mokri, an orthopedic surgeon, concluded on October 31, 1978 that the claimant had a 10% functional impairment of the body as a whole.

Parenthetically it should be noted that the visits to the Mayo Clinic were authorized by John R. Moes, M.D. the treating physician whose services were suggested by the defendant-employer. Section 85.27, Code of Iowa, (1977) requires an employer to provide the reasonable care necessary to treat the injury. It follows then that when such a designated physician sees fit to refer a patient to another physician, he acts as the defendant-employer's agent, and permission for such referral from the defendants is not necessary. Defendants' exhibit 4 indicates to the undersigned that the defendants were not aware of the foregoing rule and some guidance appeares necessary.

Functional disability is an element to be considered in determining industrial disability which is the reduction of earning capacity, but consideration must also be given to the injured employee's age, education, qualifications, experience and inability to engage in employment for which he is fitted. *Olson v. Goodyear Service Stores,* 255 Iowa 1112, 125 N.W.2d 251 (1963). *Barton v. Nevada Poultry,* 253 Iowa 285, 110 N.W.2d 660 (1961).

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.2d 899 (1935), 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 Martin, supra,] . In determining industrial disability, consideration may be given to the injured employee's age, education, qualifications, experience and his inability, because of the injury, to engage in employment for which he is fitted. * * * *

In applying the foregoing legal principles to the case at hand it is concluded that the claimant has sustained an industrial disability of 25% of the body as a whole.

This single, 28-year-old, registered nurse is in the beginning of her career. It is clear from the medical evidence that she sustained an aggravation of a pre-existing emotional condition for which she is currently receiving treatment. It is further clear that she has a residium of functional impairment of the body as a whole as a result of Dr. Winston's surgery. It is also clear that the claimant is currently in a lesser position to carry out her duties as

opposed to her ability prior to the incident under review.

The medical, meal and transportation expenses incurred by the claimant were reasonable and necessary to treat the injury.

THEREFORE, after having seen and heard the witnesses and taking all of the creditable evidence contained in this record into account, the following findings of fact are made, to wit:

1. That the claimant sustained an admitted industrial injury on March 25, 1977 which resulted in a healing period of forty (40) weeks, four (4) days for which the claimant has been paid her weekly benefits of one hundred thirty and 35/100 dollars ($130.35).

2. That the claimant was unable to attend her assigned duties while an out-patient at the Mayo Clinic and is entitled to additional healing period benefits of two (2) weeks, three (3) days.

3. That the claimant had a pre-existing latent emotional condition which was aggravated by the industrial incident under consideration.

4. That, by reason thereof, the Claimant has sustained an industrial disability of twenty-five percent (25%) of the body as a whole.

* * *

Signed and filed this 1st day of November, 1979.

HELMUT MUELLER
Deputy Industrial Commissioner

Appealed to Commissioner: Affirmed.

CRAIG J. KLINE, SR.,

Claimant,

vs.

K-MART DIVISION,
S.S. KRESGE CO.,

Employer,
Self-Insured,
Defendant.

Appeal Decision

Claimant has appealed from a proposed arbitration decision wherein he was awarded two weeks of temporary total disability compensation.

* * *

The issues on appeal are whether claimant is entitled to healing period or additional temporary total compensation; whether claimant is entitled to reimbursement for a certain medical expense; whether defendant should be ordered to pay claimant for three hours of pay; and the rate of compensation to which claimant is entitled.

On June 15, 1977 claimant was helping stack cases of oil when a co-employee standing above claimant dropped a case. Claimant attempted to throw the case to his side but it landed in his hands and pulled him over double. Claimant continued to work and about ten minutes later his back started to hurt. Claimant told his supervisor, Frank Mason, that his back was hurting and that he thought it was caused by catching the case of oil. Claimant finished his shift that day, which was Wednesday, and worked the remainder of the week through Saturday. At 4:45 p.m. on Saturday, claimant was discharged from his employment.

Defendant-employer sent claimant to Mercy Hospital where he was examined by Ronald Abbott, M.D. X-rays revealed minimal degenerative changes at the L3-4 interspace where the disc was slightly narrowed and osteophytes were observed at the margins of the articular surfaces. Dr. Abbott concluded that claimant had sustained a low back strain but did not think permanency would result. Dr. Abbott indicated that the degenerative changes were due to aging but the strain was the result of the work activity. Dr. Abbott prescribed Emperin No. 3 and estimated the length of treatment to be one to two weeks. In response to a question from claimant, Dr. Abbott agreed that a back sprain could take some length of time to heal.

On September 9, 1977, claimant saw his family physician, William Province, M.D., who noted that claimant was suffering from low back strain which might be related to both the June 15, 1977 incident and obesity.

On January 30, 1978 claimant was involved in a car accident. As a result claimant went to a chiropractor for pain in his neck, back and right hip. Claimant testified that, although his low back pain was improving up to the time of the car accident, he was still having some trouble. Claimant saw Steve McAreavy, D.C., who, according to claimant's testimony, told him that the car injury was worse because of the back injury.

The first issue is whether claimant is entitled to healing period compensation. For claimant to be entitled to healing period compensation, his work related injury must cause permanent disability.

Dr. Abbott did not think permanency would result from claimant's back strain. Claimant even testified that he did not think his injury was permanent. Thus there is no dispute that claimant's condition is non-permanent and therefore claimant is not entitled to healing period compensation. *Auxier v. Woodward State Hospital-School,* 266 N.W.2d 139 (Iowa 1978).

Since claimant is not entitled to healing period benefits, the question arises whether he is entitled to temporary total disability compensation. The deputy awarded claimant two weeks of temporary total disability compensation based on a June 28, 1977 report from Dr. Abbott. Dr. Abbott wrote that the length of treatment for claimant's condition would be one to two weeks. The deputy also considered the fact that claimant continued to work after receiving the injury and did not seek medical attention until after his employment was terminated.

Claimant must prove by a preponderance of the evidence that the work-related injury is the cause of his disability on which he now bases his claim. See *Bodish v. Fischer, Inc.,* 257 Iowa 516, 133 N.W.2d 867 (1965). A possibility is insufficient to establish causal connection; 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).

Claimant contests the deputy's finding and cites to a question he propounded to Dr. Abbott. In Dr. Abbott's deposition, claimant asked:

> Q. Under normal conditions, living conditions, is it possible from this to take an extended period of time like, say, over a five- or six-month period to heal?

Dr. Abbott responded:

> A. It could take a long time depending on the area of the body. It is possible that it could take some considerable period of time to heal. I can't give you an exact period of time, because like a sprained ankle, some people will be better in a week, and others will have a sore ankle still two weeks later. But postulating, certainly, I would have to agree that it could take a length of time, yes.

Claimant's question was phrased in a hypothetical and general sense and Dr. Abbott's response was not directed to claimant's specific injury but rather to strains and sprains in general.

To state that Dr. Abbott's response refers specifically to claimant's condition would amount to speculation and conjecture, and the law requires more than mere surmise. *Burt v. John Deere Tractor Works, supra.* Therefore, Dr. Abbott's response does not establish that claimant was temporarily and totally disabled for five or six months.

An October 28, 1977 report from Dr. Province also does not establish a causal connection between claimant's alledged disability and the June 15, 1977 incident. Dr. Province stated in his report:

> It is my opinion that he [claimant] was suffering from low back strain, perhaps related to his injury previously mentioned and exogeneous obesity.
>
> I am sure you can get a more thorough evaluation of Mr. Kline from the doctor [Dr. Abbott] who cared for Mr. Kline in the out-patient department initially following his back injury.

Dr. Province's opinion must be given little weight because it only raises a possibility that the back strain was related to the work incident, and the doctor seemed rather unfamiliar with the circumstances of this case.

Claimant testified that he worked for two weeks for Midas Muffler in Dubuque since his June 15 injury. This indicates that he was not totally disabled.

Therefore, claimant has failed to establish by a preponderance of the evidence that he was temporarily and totally disabled for any extended period of time.

However, the deputy's finding that claimant was temporarily and totally disabled for two weeks is well founded. Dr. Abbott noted that the treatment for claimant's work-related injury would be one to two weeks. It appears that claimant was off work and in pain during this two-week period. Temporary total disability does not necessarily contemplate that all residuals from an injury must be completely healed and returned to normal. It is only when the evidence shows that because of the effects of the injury gainful employment cannot be pursued. For example, bruises and lacerations quite often result in no "temporary disability," although they may take some time to "heal." When Dr. Abbott's opinion is viewed in light of the lay and circumstantial evidence for this period, it is found that claimant's disability during this two-week period was total and temporary and related to the June 15, 1977 incident. *Burt v. John Deere Waterloo Tractor Works, Supra; Meade v. Cecil Smith Trucking Co.,* Appeal Decision (Industrial Commissioner September 19, 1978).

The next issue is whether claimant is entitled to reimbursement for a ten dollar bill of Dr. Province. The deputy ordered defendant to reimburse claimant for this bill. Defendant has not challenged this order on appeal, so therefore the order is sustained.

Claimant contends that he is entitled to three hours of pay because of the time spent in the hospital on the Saturday after the work incident and for returning company property on the following Monday. The workers' compensation statutes of Iowa do not contemplate payments of this type and therefore it is beyond the power of this agency to render such an order.

The final issue is the rate of compensation to which claimant is entitled for the two weeks of temporary total compensation. In the proposed arbitration decision the deputy "ordered that the parties either stipulate as to the rate of compensation or provide actual information regarding wages . . . so that the proper rate may be determined . . . ." On August 1, 1979 defendant filed information on claimant's wages. The information indicates that claimant was making $3.77 per hour, with an average weekly wage of $151. Defendant concluded that claimant's rate of compensation should be $102.06 per week. Claimant contends that his gross wage per week was $171 and his net pay was $151 per week. Claimant apparently is basing his calculation of gross wage on a work week in excess of forty hours, while defendant is basing their calculation on a forty-hour work week. A first report of injury filed September 2, 1977 indicates claimant worked forty hours per week. Claimant has presented no evidence which would indicate that he worked more than forty hours per week. Since the hourly wage of $3.77 has been agreed upon by both parties, the gross wage of $151 based on a forty-hour work week must be accepted. Claimant is married and has one dependent child. Using the 1977 benefit schedule, claimant's weekly compensation rate is $102.06.

* * *

Signed and filed this 19th day of October, 1979.

ROBERT C. LANDESS
Industrial Commissioner

No Appeal.

GREGORY KARL KLINKER,

Claimant,

vs.

WILSON FOODS CORPORATION,

Employer,
Self-Insured,
Defendant.

Appeal Decision

This is a proceeding brought by defendant seeking review of a proposed decision in arbitration wherein claimant was awarded temporary total and medical benefits.

* * *

Single, twenty-four-year-old claimant has been employed by defendant since May 11, 1976 and was at the time of hearing in the boning room on the 4:30 p.m. to 12:30 a.m. shift. On April 21, 1978 about 7:50 p.m. claimant was returning to his work area after sharpening several knives when he was struck in the right side of the head and ear by a piece of meat or fat. Claimant accused Dennis Kraft of striking him, but Kraft indicated it was Gary Borcherding. Claimant asserted he completed the shift, although he said that his ears were ringing and that he started getting a headache. Claimant testified he worked a five-hour shift on Saturday; on Sunday he had a headache; and on Monday he went to the doctor, who gave him muscle relaxants and referred claimant to another physician who put him in a neck brace for six weeks. Claimant complained of nausea, dizziness, headaches and inability to sleep. He reported that he was released to return to work on August 21, 1978, but he did not in fact return until September 18, 1978.

Claimant claimed that meat was thrown at people in the plant and that he himself had thrown meat. Throwing meat was against company policy, and sanctions, including suspension, could be imposed on wrongdoers. Claimant testified that while he had not thrown meat on this particular night, meat had been thrown before he was hit.

Dennis Kraft, claimant's coemployee, said that Gary Borcherding threw a piece of meat the size of a golf ball which hit claimant on the head. He was unsure of any hard feelings between claimant and Borcherding. He did not recall claimant's complaining of being hurt.

Jeffrey James Triplett, another coemployee, also declared that Gary Borcherding threw something that hit claimant. He had no personal knowledge of Borcherding's having a grudge against claimant. He remembered claimant told him he had a headache.

Walter W. Eckman, M.D., neurological surgeon, who issued a return to work slip for claimant on August 21, 1978, saw claimant because of his persistent right occipital headache. Claimant claimed not to have had headaches until he was hit in the fat-throwing incident. Eckman recorded that claimant's pain was worse at night and aggravated by some activities. The doctor's impression in his report dictated May 29, 1978 was: "Right occipital pain, possible soft tissue injury cervical spine with radiation to occipital area."

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). Defendant asserts the applicability of *Ford v. Barcus,* 155 N.W.2d 507, 261 Iowa 616 (1968) to this matter. The opinion of the Iowa Supreme Court in that case at 511-12, stated, "Horseplay which an employee voluntarily instigates and aggressively participates in does not arise out of and in the course of his employment and therefore is not compensable."

Ford, supra, dictates that in order for an employee to be found not within the course of employment, that employee must voluntarily instigate and aggressively participate in horseplay. In the case *sub judice* there is no indication claimant was the aggressor. TIthough claimant may have participated in fat or meat-throwing incidents in the past, nothing in the record here presented shows that he was other than an innocent bystander in this instance.

Defendant's further assertion is that "there is not adequate or proper medical testimony to support the fact being hit by such a small piece of fat could disable an employee for four months."

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.* The Iowa Supreme Court in *Becker v. D. & E Distributing,* 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.

While the evidence of medical causation presented by claimant is weak, there is reasonable inference that the diagnosis contained in claimant's exhibit one is intended to relate to the history obtained. Claimant's own testimony was that he did not have headaches until he was hit in the fat-throwing incident.

WHEREFORE, it is found:

That claimant sustained his burden of proving that he suffered an injury arising out of and in the course of his employment on April 21, 1978.

* * *

Signed and filed this 27th day of July, 1979.

ROBERT C. LANDESS
Industrial Commissioner

No Appeal.

SYLVESTER KOCKLER,

Claimant,

vs.

ARTSWAY & ELECTRONICS,

Employer,

and

THE HARTFORD INSURANCE GROUP,

Insurance Carrier,
Defendants.

Ruling

BE IT REMEMBERED that on March 19, 1979 defendants herein filed a motion to dismiss. No resistance has been filed.

Review of the industrial commissioner's file corroborates the reasons given in support of the motion to dismiss: that claimant filed a review-reopening on July 13, 1977; that the trial on the merits, originally scheduled for December 8, 1977, did not take place because on November 29, 1977, the claimant informed this office that settlement was being negotiated; claimant was paid an additional three weeks and two days of compensation; the defendants filed a Form 5 reflecting a last weekly compensation payment made on December 1, 1977; claimant failed to send a letter to this office indicating that the matter had been resolved; on July 26, 1978 another deputy industrial commissioner entered an order granting the claimant twenty days to show cause why his petition for review-reopening should not be dismissed pursuant to Industrial Commissioner Rule 500-4.36; on August 14, 1978 claimant filed a response to court order indicating that he felt he had not been fully compensated for his continued disability and additional medical bills; subsequently the matter has been scheduled and continued more than once (claimant has apparently had difficulty securing an attorney for financial reasons.)

Industrial Commissioner Rule 500-4.36 states in relevant part that "[i]f any party to a contested case . . . shall fail to comply with these rules or any order of a deputy commissioner or the industrial commissioner, the deputy commissioner or industrial commissioner may dismiss the action. Such dismissal shall be without prejudice." In the opinion of the undersigned, the claimant who has acted pro se throughout most of this proceeding has not failed to comply with the rules or directives of this office in such a manner so as to necessitate dismissing his action pursuant to Rule 4.36. Defendants do mention in paragraph 7 that claimant did not appear at the March 13, 1979 pre-trial; however, they note in the same paragraph that claimant's attorney filed a withdrawal of appearance the day before the pre-hearing. It may be that claimant was under the impression that before withdrawing, said attorney would seek a continuance of the matter.

Industrial Commissioner Rule 500-4.34, concerning dismissal for lack of prosecution, controls this present matter and reads in its entirety as follows:

> "It is the declared policy that in the exercise of reasonable diligence, all contested cases before the industrial commissioner, except under unusual circumstances, shall be brought to issue and heard at the earliest possible time. To accomplish such purpose the industrial commissioner shall take the following action:
>
> "4.34(1) When a first continuance of an assigned hearing under 4.23 or an extension prior to assignment under 4.23 is granted, the matter shall be heard within six months after the expiration of one year from the date of the order of continuance or extension. The industrial commissioner shall, within thirty days of the expiration of one year from the date of the order of continuance or extension give notice of certified mail, return receipt requested, to counsel of record or a party, if unrepresented, of:
>
> a. The names of the parties;
> b. The date or dates of injury involved in the contested case or appeal proceeding;
> c. Counsel appearing;
> d. Date of filing of the petition or appeal;
> e. Date of order of continuance or extension.
>
> 4.34(2) The notice shall state that the case will be heard and subject to dismissal if not heard within six months after the expiration of one year from the date of the continuance or extension. All such cases shall be assigned and heard or dismissed without prejudice unless satisfactory reasons for want of prosecution of grounds for continuance be shown by application and ruling thereon after notice and not ex parte. This rule shall not apply to cases (a) under judicial review by a court; (b) in which proceedings subsequent to decision, ruling or order are pending except as provided in 4.23 and this rule concerning bringing cases to hearing on appeal to or review on motion of the commissioner; (c) which have been filed but in which the claimant has been unable by due diligence to obtain service of original notice.
>
> 4.34(3) Any continuance under this rule must be by order of the industrial commissioner after written application. Where appropriate, the order of continuance shall be to a date certain.
>
> 4.34(4) The action or actions dismissed may at the discretion of the industrial commissioner and shall

> upon a showing that such dismissal was the result of oversight, mistake or other reasonable cause, be reinstated. Applications for such reinstatement, setting forth the grounds, shall be filed within three months from the date of dismissal."

Since this matter was first assigned for trial in December 1977 and, due to the unsuccessful attempt at settling the matter, was next assigned a trial date of November 29, 1978 by this office on September 29, 1978, the undersigned determines that the "first" continuance should be deemed to have occurred on December 12, 1977 when a deputy industrial commissioner acknowledged by letter addressed to both parties that because it was understood the matter had been settled the case would be removed from the hearing schedule.

Accordingly, the matter should be heard within six months after the expiration of one year from December 12, 1977 or by June 12, 1979. Since the notice of assignment for hearing sets forth Industrial Commissioner Rule 500-4.23 which concerns requests for continuances and which indicates that any continuance thereunder granted does not affect Industrial Commissioner Rule 4.34 and since said notice was sent to the parties on September 29, 1978 and February 16, 1979, the provisions of Rule 4.34 have been substantially complied with under the circumstances of this case.

WHEREFORE, IT IS RULED that claimant has until June 12, 1979 to bring this matter to a hearing. If this matter has not been heard by that date, unless other cogent reason appears to continue the matter as allowed for an Industrial Commissioner Rule 500-4.34, claimant's application for review-reopening shall be dismissed without prejudice. Pursuant to Code section 85.26(2) claimant will have three years from the date of last weekly compensation payments, which was December 1, 1977, to reopen his case before this agency.

Signed and filed this 24th day of April, 1979.

LEE M. JACKWIG
Deputy Industrial Commissioner

No Appeal.

SCOTT D. KRAUSE,

Claimant,

vs.

FOSTER'S, INC.,

Employer,

and

BITUMINOUS INSURANCE COMPANY,

Insurance Carrier,
Defendants.

Arbitration Decision

INTRODUCTION

This is a proceeding in arbitration brought by the claimant, Scott D. Krause, against Foster's, Inc., employer, and Bituminous Insurance Company, insurance carrier, for benefits as a result of an injury on or about May 29, 1978.

* * *

FACTS

Claimant, who is 24 years old and married, started working for defendant on December 5, 1977. Defendant is in business as a wholesale garden supply company and operates out of a 4,000-square-foot warehouse. Claimant works in shipping and receiving which requires him to move bags of fertilizer, bird food, bundles of shovels, bundles of wire, bamboo sticks and other miscellaneous items. Some items which claimant is required to move weigh over 100 pounds. Many items are placed on pallets and moved around by use of the pallet truck. In his work, claimant also uses a two-wheel cart, four-wheel cart and forklift.

On May 27, 1978 while claimant was drying after a shower at his parents' condominium in Clear Lake, Iowa, he noticed a bulge on his stomach which was quite small and protruded approximately a quarter of an inch. Claimant testified that he had not done any heavy lifting or straining on May 27, 1978. Claimant worked the following week. The bulge would pop out and he would push it back in with his fingers. Claimant tried to talk with a doctor Andres Smith. At the suggestion of his father, claimant on June 6, saw Dr. Zager who informed claimant that the bulge was a hernia and scheduled an operation for June 10. Claimant told three of his fellow employees about his hernia and told his foreman that he was going to the hospital for a hernia operation. On June 14 claimant was released from the hospital and saw Dr. Zager twice subsequent thereto. On July 31 claimant returned to work for the defendant.

ISSUES

The issues presented by the parties at the time of hearing were (1) whether or not claimant gave proper notice to the defendants of his injury; (2) whether or not the injury arose out of and in the course of claimant's employment; (3) whether or not there is a causal relationship between the alleged injury and the disability; and (4) the extent of temporary disability.

APPLICABLE LAW

A claimant is required to notify his employer of any injury which arises out of and in the course of his employment.

Section 85.23 of the 1977 Code of Iowa states:

> 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.

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. *McDowell v. Town of Clarksville,* 241 N.W.2d 904 (Iowa 1976); *Musselman v. Central Telephone Co.,* 261 Iowa 352, 154 N.W.2d 128 (1967). "Arising out of" suggest 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).

The claimant also has the burden of proving by a preponderance of the evidence that the injury is the cause of his disability on which he now bases his claim. *Bodish v. Fischer, Inc.,* 257 Iowa 516, 133 N.W.2d 867 (1965). *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,* supra. 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). There must be direct causal connection between the exertion of the employment and the injury. *Almquist v. Shenandoah Nurseries, Inc.,* 218 Iowa 724, 254 N.W.35 (1934).

ANALYSIS

The record clearly shows that on June 14, 1978, nineteen days after claimant became aware of his hernia, claimant's supervisor, Victor H. Foster, had actual notice that there was going to be a claim for workers' compensation because of the injury sustained to claimant. This actual knowledge was well within the ninety days of the occurrence of the injury.

However, it is found claimant has failed to establish his claim. Although Dr. Zager in his letter of July 18, 1978 stated, "This was a work incurred injury due to lifting . . ." and in his report of October 3, 1978 stated, "In view of the fact that this hernia was of very recent origin and Mr. Krause had been doing heavy work at Fosters, Inc. of Waterloo, I am certain that this hernia should [sic] be considered compensable through Workman's compensation of the insurance carrier for Fosters Inc.," Dr. Zager's deposition made it quite clear that he could not tell or state opinions as to whether or not what the claimant did while working for defendant caused the hernia. Furthermore, claimant's testimony as well as his statement made June 21, 1978 and statements made by claimant in defendants' exhibit A show that claimant knew of no specific occurrence or accident which brought about the hernia or pain. Other than claimant's assumption that his ernia was caused by the lifting at work and Dr. Zager's letter of July 18, 1978 and a report of October 3, 1978 which lack complete histories on claimant, no evidence supports the claimant's allegation that this injury arose out of and in the course of claimant's employment.

* * *

Signed and filed this 19th day of April, 1979.

DAVID E. LINDQUIST
Deputy Industrial Commissioner

No Appeal.

ROXINE KRUGER AND CHARLENE BABB,

Claimants,

vs.

EMPLOYERS MUTUAL CASUALTY COMPANY AND THE FIDELITY AND CASUALTY COMPANY OF NEW YORK,

Defendants.

Appeal Decision and Declaratory Ruling

Due to the complex nature of this matter a brief history of what has transpired prior to this time is appropriate.

Claimant Babb's spouse was killed on January 24, 1974 as he drove a company car to his home after making a business call. A lump sum settlement was granted. Then in June of 1977 a stipulation was entered declaring the prior commutation null and void and weekly benefit payments were commenced with claimant Babb receiving $91 per week from Fidelity and Casualty Company of New York (F and C). Claimant Kruger's spouse was electrocuted on November 10, 1975. She is paid $160 per week by the Employers Mutual Casualty Company (Employers).

Kruger and Babb filed a petition for a declaratory ruling on July 27, 1977 seeking a declaration of their rights under Iowa Code §85.31. Both defendants filed motions to dismiss. In addition defendant Employers filed a motion to drop parties and a motion to sever actions. Defendant F and C later joined in the motion to sever. Claimants resisted both the motion to dismiss and the motion to drop parties and sever action. On November 3, 1977 a deputy industrial commissioner sustained F and C's motion to dismiss and overruled its motion to sever action. He also overruled Employer's motion to dismiss, to drop parties and to sever action. Claimant appealed that ruling on November 14, 1977 and subsequently amended that appeal.

Defendant Employers asked for a rehearing on November 23, 1977 and that application was granted by the deputy. On December 22, 1977 Pat Paplow, whose spouse died on April 3, 1975 from injuries sustained in a fall in a welding case and who is paid $97 per week by Aetna Life and Casualty Company, filed a petition of intervention. In an April 28, 1978 ruling, the deputy ordered that the claim against Employers be severed and that claimant recast pleadings to provide for one spurious class action.

Defendant Employers again sought a rehearing and additionally filed an appeal from the April 28 ruling. The rehearing was denied on May 24, 1978. A number of filings have ensued, including briefs on appeal.

Petitioners requested a declaratory ruling declaring their rights under Iowa Code §85.31(1) which provides:

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:
* * *

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, except if at the time of his injury his earnings are 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. * * * *

More specifically, petitioners seek to know whether or not they are entitled to periodic increases in death benefits as the maximum weekly benefit amount is revised as provided in that section. The purpose of a declaratory ruling is to afford petitioners a speedy and inexpensive resolution of the issues. Because of the many filings, hearings and double appeal in this matter, no prompt disposition has been forthcoming. To prevent further delay, this commissioner will rule on the merits of this matter.

A number of jurisdictions have addressed this issue. In *Liberty Mutual Insurance Co. v. O. K. Starnes,* ____ Tenn. ____, 563 S.W.2d 178, 179 (1978), the court stated:

> Absent some indication of a contrary intent on the part of the legislature, the statute that determines the rights of the parties under the workmen's compensation law is that in effect on the date of the accident or injury that provides the basis for the employee's claim.

In an Arkansas case where a grandson was held to be entitled to benefits until the age of eighteen as a result of his grandfather's death, a statutory change extending benefits beyond this age mad eight months before his eighteenth birthday was held to be inapplicable to him. *Park v. Weyerhauser Company,* ____ Ark. ____, 560 S.W.2d 226 (1978). The court at 227 cited 99 C.J.S., Workmen's Compensation §21 for the general rule:

> that the law in force at the time of the injury or accident governs the right to, or liability for, compensation, and that compensation acts on amendments thereto are not applicable to injuries sustained before their enactment or effective dates.

The Maryland Supreme Court further noted in *Cooper v. Wilomilo County, Department of Public Works,* 278 Md. 596, ____, 366 A.2d 55, 58 (1976);

> A number of courts throughout the country have held that to give effect to a legislative enactment increasing the amount payable to an employee to a sum greater than that payable at the time of the injury would impermissably alter a substantial term of an existing contract between the employer and employee (and derivatively as to an insurer). [Citing authorities]

In Delaware, the supreme court stated:

> We conclude that the present Statute does not provide for periodic adjustment; rather, like the prior Statute, it contemplates only a fixed benefit determined as of the date of injury.

Graffagnino v. Amoco Chemical Co., ____ Del. ____, 389 A.2d 1302, 1304 (1978). *See also, Thomas v. Burroughs Corporation,* 269 N.W.2d 685 (Mich. 1978); *Drayon v. Orleans Parish School Board,* 347 So.2d 306 (La. Ct. of App. 1977); *Sanders v. General Motors Corp., Oldsmobile Division,* 80 Mich. App. 190, 263 N.W.2d 329 (1977); *Ellis v. Department of Labor & Industries,* 88 Wash. 2d 844, 567 P.2d 224 (1977); *Homrighouse v. Cornell University,* 54 App. Div. 2d 798, 387 N.Y.S.2d 726 (1976); *Smith v. Industrial Commission,* 549 P.2d 443 (Utah 1976); *Robidoux v. Uniroyal, Inc.,* 359 A.2d 45 (R.I. 1976); *Riverside of Marks v. Russell,* 324 So.2d 759 (Miss. 1975).

The opinion of the Iowa Supreme Court in *Kramer v. Tone Brothers,* 198 Iowa 1140, 199 N.W. 985 (1924) in discussing the right of a spouse and of children to receive compensation benefits stated at 1145, ____, that "[w]hile . . . neither the children nor the widow may have had a vested right in the compensation, . . . the basis of the award of compensation and its classification and the status of the parties became fixed at the death of the employee." This older ruling seems to be in line with the more recent decisions in other jurisdictions.

Iowa Code §85.31 contains the language "in effect at the time of the injury." Inclusion of this phrase reflects clear intent on the part of the legislature to delimit the rights of the parties at that time. To allow periodic increases as requested by claimants in this case would create a series of ripples within this agency, the insurance industry and self-insured employers not unlike that produced by a pebble thrown into a placid pool. Writers of workers' compensation policies have not written policies with clauses allowing for an escalation in rates. Premiums have not been collected based upon an escalating increase in maximum benefits. It would be unfair to direct those payments now. To rule otherwise would create an uncontemplated financial burden on insurers and employers that in many instances could result in bankruptcy.

As a caveat, it should be noted that Iowa Code §85.34(2) and (3) and §85.37 contain parallel language; and therefore,

the same rationale would be applied if an adjustment in benefits were to be sought under any of those sections.

THEREFORE, it is found:

That claimants' spouses herein are entitled to death benefits at the rate applicable at the time of their respective spouses' deaths.

That because of the ruling on the merits it is unnecessary to rule on the matters which were the subject of the appeals.

Signed and filed this 8th day of November, 1978.

ROBERT C. LANDESS
Industrial Commissioner

No Appeal.

ROXINE KRUGER and CHARLENE BABB,

Claimants

vs.

EMPLOYERS MUTUAL CASUALTY COMPANY and THE FIDELITY AND CASUALTY COMPANY OF NEW YORK,

Defendants,

and

PAT PAPLOW,

Claimant-Intervenor,

vs.

AETNA LIFE & CASUALTY COMPANY,

Defendant.

Order

Claimants Kruger and Babb and claimant-intervenor Paplow filed a request for ruling in this matter. Specifically, they ask for "a ruling upon the class action status of this case, . . . the declaratory judgment issue" and a ruling on Paplow's status as an intervenor. That request has been resisted by defendant Employers Mutual Casualty Company.

As defendant properly alleges, the rights of the claimants here involved have been determined and those of future claimants have not been prejudiced. As noted in the Ruling filed November 8, 1978 ruling on the matter of the class action in this proceeding is not necessary as the ruling on the merits of the declaratory ruling proceeding is contrary to the position of the petitioners whether as members of a class or as individuals. If the court on judicial review should hold otherwise, then they could also rule on the appropriateness of a class action.

THEREFORE, claimant's and claimant-intervenor's request for ruling is denied.

Signed and filed this 19th day of December, 1978.

ROBERT C. LANDESS
Industrial Commissioner

Appealed to District Court: Dismissed
Appealed to Supreme Court: Pending.

JOSEPH J. KURIMSKI,

Claimant,

vs.

LOVILIA COAL COMPANY,

Employer,

and

BITUMINOUS INSURANCE COMPANY,

Insurance Carrier,
Defendants.

Appeal Decision

Defendants have appealed from a proposed review-reopening decision wherein claimant was found to be 40% industrially disabled to the body as a whole.

The issue on appeal is the extent of claimant's industrial disability.

On September 25, 1975 claimant was operating a coal cutting machine in defendant employer's coal mine when chunks of slate fell on him. Claimant was taken to Monroe County Hospital where he was seen by a Dr. Cunningham and x-rays were taken. The x-rays revealed:

1. Degenerative disc disease C-4 C-5, C-5 C-6 with spurring. Remainder of cervical spine is essentially normal. No bony injury is seen.
2. Compression fractures of T-11 T-12 involving superior plates of T-11 T-12 with slight gibbus formation at this level. Remainder of thoracic spine is within normal limits.
3. Degenerative disc disease L-2 L-3 with arthritic spurring and questionable bony injury of the right transverse process L-3.
4. Remainder of lumbar spine is essentially normal.
5. Fractures of left 5th and 6th ribs mid axillary [sic] line with no displacement.
6. No bony injury of left shoulder is seen.

Claimant was then taken by ambulance to Mercy Hospital in Des Moines where he was placed under the care of John T. Bakody, M.D. and Robert C. Jones, M.D. Claimant remained at Mercy Hospital from September 25 to October 13, 1975. In a report dated November 1, 1975 Dr. Bakody noted that x-rays were taken twice during the hospitalization. The first x-rays showed a compression

fracture of the D-12, but additional x-rays did not reveal the fracture. Laboratory studies and an electrocardiogram were all normal. Claimant was fitted with a brace which he continued to wear after his discharge.

Dr. Bakody saw claimant on October 29, 1975 and reported that claimant stated he had pain in his back with radiation of the pain into his hips. Tylenol No. 4 and Valium were prescribed.

Claimant saw Dr. Misol on June 9, 1976. Dr. Misol noted that claimant reported he had pain in his neck, along the dorsal spine and at the end of the lumbar spine. Discomfort running down both legs and headaches were also noted. Dr. Misol conducted an examination and found claimant's reflexes to be normal with no evidence of muscle atrophy or sensory loss. Restricted motion was observed in claimant's neck and dorsal and lumbar spine, and straight leg raising was uncomfortable bilaterally at about 65 degrees. Dr. Misol took x-rays of the dorsal-lumbar spine and the only abnormality found was a questionable compression of the T-12. Dr. Misol concluded that claimant was suffering from a ligamentous muscle type of strain and thought claimant could return to light work immediately and regular work in eight weeks.

Claimant continued to see Dr. Bakody on a regular basis and in a report dated August 28, 1976, the doctor noted that claimant continued to have discomfort. During an August visit claimant complained of severe pains in the low back with popping sensations in the joints. Neurologic findings were normal, but some tightness of the paraspinal muscles was noted. Dr. Bakody wrote that claimant was still disabled from work because of the pain.

Claimant saw Donald D. Berg, M.D., on September 2, 1976. Dr. Berg conducted an examination and reported that claimant moved very slowly, but had full range of motion, negative straight leg raising and full neurologic function in the lower and upper extremities. Slight tenderness in the dorsal spine was noted. Dr. Berg's impression was that claimant had a minimal compression fracture of the T-12 which was adequately healed and some ligamentous strain in the dorsal spine area. Dr. Berg thought the pain would continue until the ligamentous strain healed. Dr. Berg questioned claimant's desire to return to any type of employment, but thought claimant could do sedentary or light work.

Claimant was readmitted to Mercy Hospital under the care of Dr. Bakody on November 11, 1976 because of continued spinal discomfort. Claimant was treated conservatively with moist heat, massage and intermittent traction. Claimant was discharged on November 24, 1976 with a diagnosis of spinal syndrome with compression fracture of the D-12. In a report dated December 27, 1976 Dr. Bakody noted that claimant continued to have pain and could not return to work because of the pain.

Claimant saw Dr. Misol on February 17, 1977. Dr. Misol examined claimant and found no neurological deficit and no evidence of muscle atrophy. An x-ray of the dorsal lumbar area was taken and failed to reveal a fracture dislocation or any arthritis. Dr. Misol reaffirmed his previous diagnosis of a strain of the muscles and ligaments.

In March, 1977 claimant had some additional x-rays taken at the Monroe County Hospital. R. A. Hastings, M.D., compared these x-rays with ones taken on September 25, 1975 and recorded the following impressions: "1. Healed fractures of left ribs 5, 6 and 9. 2. Healed compression fractures of T-11 T-12. 3. Degenerative disc changes L-1 L-2, L-2 L-3 with osteoarthritic spurring. 4. Remainder of lumbar spine is noted. Conclude no evidence of bony injury of the right transverse process L-3 as questioned before."

On May 9, 1977 claimant was admitted to the University of Nebraska Pain Center in Omaha, Nebraska under the care of Dr. Berman. On admission Dr. Berman noted that claimant lacked physical flexibility and had stiff awkward movements. Also noted was a limited range of motion in the neck, a stiff back and mild thoracic muscle spasm. Dr. Berman reported complaints of constant and dull pain in the back with some pain extending into the upper shoulders and neck and occasional headaches. Dr. Berman testified that claimant had problems bending, lifting and twisting. Therapy at the pain clinic included stretching and limbering exercises, whirlpool treatments, massage, transcutaneous electrical stimulation, disguised medication, relaxation training and increased physical training. Through the disguised medicine program claimant stopped using codeine. At discharge Dr. Berman thought claimant could control his pain to a great extent in day-to-day physical activities, but was not certain about claimant's tolerance if the physical activity required great effort.

Dr. Misol arrived at a disability rating for claimant in a letter dated July 8, 1977, which reads:

> As you probably well know the determination of physical impairment is mainly done according to the AMA physical impairment tables that take into consideration the limitation of movement or stiffness or the lack of a part that the person may have after a particular injury.
>
> As I reviewed the case of Mr. Kurimski you were going mainly by his symptoms i.e.: pain and this is not something that can be measured objectively of course. Any amount of physical impairment that we give him would be something based on his symptomatology.
>
> As there is no way tht [sic] I can measure pain I don't think that I am qualified to give him that particular rating. In the past I have estimated the physical impairment of a person that has a ruptured disc and surgery in his back to be about 30 to 40% of a normal back impairment. The above patient in my opinion had nothing but a strain of the muscles and the ligaments and if we want to believe his symptomatology I think 10% impairment of the back would be in order.

Claimant saw John R. Scheibe, M.D. on September 20, 1977 for an evaluation of claimant's present physical status. Dr. Scheibe observed some tenderness over the T-7 spinous process area with some tenderness traveling into the right upper extremity and a few parasthesias in that region. Percussion of the T-11 T-12 area caused some mild discomfort. Dr. Scheibe concluded that claimant had:

> . . . Residuals of fracture of T11-12 sustained in a mine accident in September, 1975, characterized by constant pain in the mid back region and traveling of pain from the upper portion of the dorsal spine into the right upper extremity. There is some traveling of pain from the mid back region toward the buttocks. The patient is permanently disabled for the performance of heavy lifting and occupations of this nature. On the other hand, he is capable of doing light occupational activity. I would classify him as a Category IV which includes light work, lifting 20 pounds maximum with frequent lifting about two-thirds of the time and carrying objects weighing up to ten pounds during a normal day's work; please see enclosure. This patient is 100% disabled to do his former occupation of heavy lifting and work but still carries a functional permanent disability of 45%.

Claimant also saw C. W. Carlson, D.O. and Peter D. Wirtz, M.D.

Claimant started working at the Rathbun fish hatchery under the CETA program in July 1977. Claimant earns $3.50 per hour and works forty hours per week. Claimant performs janitorial work and truck driving. Although claimant only drives a truck occasionally, he did take one trip to Arkansas. Also, claimant must drive 28 miles to work each day. Claimant testified that he can lift a maximum of fifty and seventy pounds.

The claimant has the burden of proving by a preponderance of the evidence that the injury of September 25, 1975 is the cause of the disability upon which he now 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)

Claimant sustained his burden of proof that his injury of September 25, 1975 arose out of and in the course of his employment and that the condition upon which he bases his claim was caused by the work-related injury. All the medical evidence in the record attributes claimant's condition to the September 25, 1975 injury.

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 also 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 (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).

This forty-three-year-old claimant has a high school education and a work history which includes farming, bridge constructor, laborer and operating engineer. Most of the doctors agree that claimant cannot return to heavy duty work until the pain problems resolve. Claimant seems quite satisfied with his work at the fish hatchery, but that job apparently only continues as long as CETA funds are available.

Claimant has not sought out other employment. If a worker is required to change occupations because of his injury and receives a reduced wage for his services, it does not necessarily indicate a great loss of earning capacity. All the circumstances presented in the record which might affect earning capacity must be considered.

The physical disability or functional ratings given by medical experts are considered as a factor when arriving at an industrial disability rating. The weight given to a particular physician's rating depends on various considerations, such as whether the physician was treating the claimant on a regular basis or whether the physician only examined the claimant once for the purpose of a disability evaluation. Normally, the treating physician's opinion is given greater weight but other factors must also be considered. A physician's credentials and the reasoning behind his disability rating are also included when making a determination as to the weight to be given to the expert opinion.

In the case sub judice, Dr. Scheibe gave claimant a permanent functional disability rating of 45%. Dr. Scheibe's rating must be given little weight for several reasons. First, he based his rating on one examination, which was conducted for the purpose of arriving at a disability rating. Second, Dr. Scheibe's twenty-pound lifting limitation is in contradiction to claimant's own testimony where claimant stated he could lift fifty to seventy pounds. Finally, there are not sufficient physical criteria to support a rating of 45%. The only objective finding is a residual compression fracture at the T-11 T-12. Subjective findings of constant pain are not sufficient in and of themselves to support a rating of 45%. This should be considered in light of claimant's testimony that he is able to drive 28 miles to work each day and was able to take a trip to Arkansas. Also, claimant had a rather successful visit at the University of Nebraska Pain Clinic and Dr. Berman thought claimant would be able to handle day-to-day activities. Therefore, Dr. Scheibe's disability rating must be given little weight.

However, claimant has suffered a reduction in his earning capacity. Claimant's field of possible occupations has been reduced because of his work-related injury and this in turn has reduced his earning capacity. It is thereby found that claimant has suffered an industrial disability of 25% to the body as a whole.

* * *

Signed and filed this 27th day of December, 1979.

ROBERT C. LANDESS
Industrial Commissioner

Appealed to Distrct Court: Pending.

JULIE ANN LaVELLE,

Claimant,

vs.

EBASCO SERVICES, INC.

Employer,

and

U.S. FIDELITY & GUARANTY CO.,

Insurance Carrier,
Defendants.

Appeal Decision

Defendants have appealed from a proposed review-reopening decision wherein it was ordered that defendants provide to claimant certain medical care and a list of three neurosurgeons of which claimant was to choose one for surgery. Claimant was awarded a running healing period.

* * *

There are several issues presented on appeal. The first is whether or not claimant is entitled to a running healing period award commencing on September 9, 1976. The second is whether or not defendants should furnish a list of three qualified neurosurgeons in the Omaha-Council Bluffs area to claimant for the purpose of choosing one for surgery. The third is whether or not a determination of claimant's permanent disability can be made.

Claimant started working for defendant employer on July 7, 1976. On Friday, August 20, 1976 claimant was lifting heavy iron bars when her back started bothering her. Claimant worked the rest of her shift that day. Over the ensuing weekend the pain in claimant's back continued to worsen and restricted her movement. When claimant returned to work on Monday, she requested to see a nurse. Claimant was then taken to see a Dr. Gerred, the company doctor, who told her not to do any heavy lifting for five days. Claimant then went to a Dr. Smith, a chiropractor who had treated her several times in the past. Shortly thereafter, claimant returned to work and was given some light duty tasks. On September 9, 1976 claimant was reassigned to the same heavy lifting duties that she was performing when she was injured in August. Claimant was unable to do the work and was told she could not return to work until she got a release from her doctor. Claimant continued to see Dr. Smith until March 1977.

On March 14, 1977 claimant, at the request of the insurance company, went to see John J. Dougherty, M.D. On April 14, 1977 Dr. Dougherty put claimant in the St. Vincent's Hospital for traction, physiotherapy and cortisone injection. On May 10, 1977 Dr. Dougherty told claimant she could return to work or see a Dr. Blume about a rhizotomy. Dr. Dougherty thought that claimant did not need a myelogram and that she had no permanent disability. However, Dr. Dougherty did not think claimant could return to iron work. Claimant did not return to Dr. Dougherty because her back was still hurting and she wanted to see another doctor.

On July 11, 1977 claimant filed a petition for change of doctors and an original notice and petition. On August 9, 1977, a deputy issued an order requesting defendants to furnish a list of three qualified orthopedic surgeons or neurosurgeons from which claimant was to choose one for treatment. Defendants supplied a list of three doctors on August 11, 1977. One doctor would not see claimant and another was unacceptable to her. Claimant expressed a willingness to see the third doctor, Kenneth M. Keane, M.D.; but when Dr. Keane was contacted, he refused to see claimant. On October 17, 1977, another deputy filed an order requiring defendants to pay for a diagnostic examination of claimant by Maurice P. Margules, M.D.

Dr. Margules conducted a myelogram and epidural venography on claimant and found that claimant's condition was compatible with disc herniation at the L-5 interspace. Dr. Margules stated that this herniation was a result of the August 20, 1976 injury. He further noted that claimant cannot be employed as an ironworker and must have sedentary work. Dr. Margules gave claimant a permanent partial disability rating of 15% of the body as a whole. Dr. Dougherty, whose diagnosis was lumbosacral sprain with trochanteric bursitis on the right and questionable herniated disc at the L-4-5, questioned the findings of Dr. Margules and thought claimant had a permanent partial disability of 5-10%.

Under Iowa Code §85.34(1) a claimant who has received an injury causing permanent partial disability is entitled to healing period benefits for the following period of time: "[From] the date of injury, and until he has returned to work or competent medical evidence indicates that recuperation from said injury has been accomplished, whichever comes first."

On review of the record, it appears that it is medically indicated that no further improvement is anticipated, excluding any possible future surgery. Thus the second test of Iowa Code §85.34(1) is met in that claimant appears to have reached maximum recuperation. *See* Industrial Commissioner Rule 500-8.3(85) Claimant may be entitled to additional healing period compensation in the event she elects to have surgery.

A question remains as to when claimant did achieve maximum recuperation. Both Dr. Dougherty and Dr. Margules agree that claimant is able to return to work although she is unable to return to iron work. Dr. Dougherty examined claimant and suggested she could return to work on May 10, 1977. There is no evidence in the record to indicate that claimant's condition changed after this date. Thus claimant achieved maximum recuperation on May 10, 1977.

On the second issue, which is the provision of a list of doctors to claimant, the deputy's order must be modified insofar as it may be construed as ordering surgery for claimant. As claimant's August 20, 1976 injury is compensable, she is entitled under Iowa Code §85.27 to reasonable medical and surgical services. Allowing claimant to choose from a list of three orthopedic surgeons or neurosurgeons in the Omaha-Council Bluffs area is not an unreasonable approach to providing claimant with reasonable medical service. Nothing herein should be interpreted as ordering claimant to have surgery. However, if she elects to have an operation, she is entitled to reasonable expenses incurred for that surgery.

Finally, since the claimant's injury was to the back, any

permanent partial disability will be rated industrially. Dr. Margules rated claimant's disability at 15% while Dr. Dougherty gave claimant a rating of 5-10%. Despite these ratings the record is not sufficient to determine claimant's industrial disability. Therefore this portion of the proceeding is remanded to the deputy for proper determination.

* * *

Signed and filed this 6th day of December, 1978.

ROBERT C. LANDESS
Industrial Commissioner

No Appeal.

MARK B. LADD, JR.,

Claimant,

vs.

FORD BROTHERS VAN & STORAGE COMPANY,

Employer,

and

FIREMAN'S FUND INSURANCE COMPANY,

Insurance Carrier,
Defendants.

Review-Reopening Decision

This is a proceeding in review-reopening brought by Mark B. Ladd, Jr., the claimant, against his employer, Ford Brothers Van & Storage Company, and the insurance carrier, Fireman's Fund Insurance Company, to recover additional benefits under the Iowa Workers' Compensation Act on account of an injury he sustained on January 19, 1978.

* * *

The issues to be determined are whether the correct rate of compensation was used in paying benefits and whether the claimant is entitled to additional healing period.

Claimant was hired by defendant employer to load a truck on January 19, 1978. Before the spot labor job was completed, claimant had broken his left wrist in the course of carrying furniture. The working day began at 8 a.m. Claimant was injured at 2 p.m. He was earning $5.50 per hour.

Claimant was originally treated with application of a cast. Later he pursued therapy including whirlpool and hand exercises. Although the treating physician released claimant to return to work on April 23, 1978, the claimant complained that he had loss of strength and pain in the left hand that would prevent him from carrying heavy objects. Claimant recalled his left wrist giving out when he carried a small box of books and when he carried a bucket of plaster.

From the beginning of 1977 until around Labor Day of the same year, claimant was unemployed and received $124 a week in out of work benefits. Then from the beginning of September to mid-December of 1977 claimant worked for Eby Construction. He dealt with round reinforcement rods for concrete and earned, according to his testimony, $10.12 an hour. His usual work week contained around 32 hours. He was laid off and "took it easy" from mid-December until the date of injury when he decided to do some spot labor. In August or September of 1978 he worked as a laborer for a plasterer. He mixed plaster and cleaned up. He earned $4.00 an hour. In 1979 he worked one job that lasted about a week and consisted of opening and closing doors on machines.

Claimant did not think the therapy recommended by Dr. Grundberg and which he participated in from September 19, 1978 until November 16, 1978 improved the strength of his left hand--he testified that the difference in strength between his two hands had remained the same. Thus, he has not attempted to return to iron work because he is concerned about dropping iron pieces on co-workers, and, being afraid of heights anyway, he is anxious about relying on his left hand when doing the climbing involved in such work.

Arnis B. Grundberg, M.D., diagnosed fracture of distal radius of the left wrist. After a routine examination of the injury on April 21, 1978, Dr. Grundberg released claimant to return to work and indicated that the next examination would be as needed in the future. In a brief report dated August 3, 1978, Dr. Grundberg stated:

> He has pain over the wrist and distal radial ulnar joint on motion. He lacks 10% of supination and has complete pronation. He has 20% limitation of wrist extension and 10% limitation of wrist flexion. He can grip 45 on the left and 120 on the right. His permanent physical impairment is 10% of the left hand. I have asked him to return as needed in the future.

He advised the claimant to seek physical therapy. After the claimant had tried some weeks of therapy, he returned to Dr. Grundberg who, in a report dated November 3, 1978, states:

> Mark Ladd is here today to see if he cannot get more disability than 10% of his hand. His wrist extension is 48, his flexion is 40. Left wrist grip is 55, right is 100. The pinch on the right is 9 1/2 and on the left is 8. He lacks 10% of pronation as compared to the other side, supination is full. X-rays of the left wrist show that it is solidily (sic) healed with some dorsal angulation. I do not think he qualifies for more than 10% permanent physical impairment.

Healing period is defined in Code section 85.34(1) and Industrial Commissioner Rule 500-8.3. Though not clearly stated, claimant's argument appears to be that he does not feel his wrist has healed to the point where he is able to return to lifting iron or carrying furniture. Even if the doctor's release to return to work did not mean to employment substantially similar to that the claimant was engaged in at the time of the injury (no finding is hereby made with regard to the meaning of Dr. Grundberg's release

in light of the legal terminology), clearly, claimant's condition had reached maximum medical improvement as of the date of the release. Even after pursuing weeks of therapy, claimant testified that he noticed no improvement. Accordingly, healing period terminated as of April 23, 1978, the date of Dr. Grundberg's release.

From the memorandum of agreement it appears that defendants have compensated claimant pursuant to Code section 85.36(10). Under that section the rate has apparently been derived by taking the claimant's earnings the year before when employed as an iron worker plus his earnings from defendants prior to the injury. Parenthetically, it is noted that defendants have not clarified the discrepancy between the $5,329.01 amount they show as "total earnings from all earnings prior 12 mos." and the evidence which shows that claimant earned $4,822.18 as an ironworker plus presumably 6 hours worth of wages from defendants or $33. The defendants have divided $5,329.01 by 50 which produced a weekly gross wage of $106.58 or a compensation rate of $69.55.

Claimant does not specify which subsection of Code section 85.36 should be used in computing his rate. From the tenor of the record viewed as a whole, it is presumed claimant wishes his compensation to be computed pursuant to Code section 85.36(7). His regular wages could be deemed to be $5.50 x 13 x 40, or $2,860, divided by 13, which produces a weekly gross wage of $220, or a compensation rate of $130.35. Parenthetically, it is noted that the reason behind claimant's offer of exhibit 1 and 2 is unclear. As indicated above, exhibit 1 shows prior yearly earnings to be less than what the memorandum of agreement reflects, even when the 6-hour earnings from defendants are taken into consideration. Exhibit 2 reflects a straight time hourly rate of $9.62 which seemingly conflicts with claimant's testimony that he earned $10.12 an hour as an ironworker.

Section 85.36, Code of Iowa, states in pertinent part:

> Basis of computation. 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:
>
> * * *
>
> 6) In the case of an employee who is paid on a daily, or hourly basis, or by the output of the employee, the weekly earnings shall be computed by dividing by thirteen the earnings not including overtime or premium pay, of said employee earned in the employ of the employer in the last completed period of thirteen consecutive calendar weeks immediately preceding the injury.
>
> 7) In the case of an employee who has been in the employ of the employer less than thirteen calendar weeks immediately preceding the injury, his weekly earnings shall be computed under subsection 6, taking the earnings, not including overtime or premium pay, for such purpose to be the amount he would have earned had he been so employed by the employer the full thirteen calendar weeks immediately preceding the injury and had worked, when work was available to other employees in a similar occupation.
>
> * * *
>
> 10) 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-fifieth 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 Department of Job Service under the provisions of Section 96.3 and in effect at the time of the injury.

Although claimant was paid on an hourly basis and claimant was in the employ of defendant employer less than 13 weeks, it is clear that he was hired only to load a truck and that his employment with defendant employer would have been terminated when the job was finished.

It would appear that claimant was a part-time laborer and that Code section 85.36(10) applies to this situation. However, with regard to said section, it is questioned whether claimant's "line of industry" would be spot labor or truck loader. No evidence was presented regarding what would be considered "full-time" for either employment nor what would be considered "usual weekly earnings" for either employment. With regard to Code section 85.36(7), the question of what claimant's "line of industry" may be is important when considering "when work was available to other employees in a similar occupation." Sufficient evidence was not presented which would enable a finding with regard to the foregoing matter.

* * *

Signed and filed this 30th day of July, 1979.

LEE M. JACKWIG
Deputy Industrial Commissioner

No Appeal.

MARK B. LADD, JR.,

Claimant,

vs.

FORD BROTHERS VAN & STORAGE COMPANY,

Employer,

and

FIREMAN'S FUND INSURANCE COMPANY,

Insurance Carrier,
Defendants.

Review-Reopening Decision

This matter came on for hearing before the undersigned at the Iowa Industrial Commissioner's Office in Des Moines, Iowa, on August 31, 1979 pursuant to a Review-Reopening Decision filed in the above-entitled case on July 30, 1979 wherein it was provided that:

> In the event the parties cannot resolve the rate dispute in light of the comments made above, additional evidence is to be presented and briefs and arguments submitted at a hearing to be held on August 7, 1979 at 1:00 p.m. at the office of the Iowa Industrial Commissioner in Des Moines and to be limited to the rate issue.

Neither party filed briefs and arguments at the time of the hearing. The claimant was unable to articulate his position. The record was left open one week for the submission of letter briefs by the parties regarding their respective positions. The matter was considered fully submitted on September 7, 1979.

* * *

The present decision hereby incorporates, by reference, those portions of the previous decision which discuss the rate issue. The following analysis of the rate dispute is quoted from page 4 of the previous decision:

> Although claimant was paid on an hourly basis and claimant was in the employ of defendant employer less than 13 weeks, it is clear that he was hired only to load a truck and that his employment with defendant employer would have been terminated when the job was finished.
>
> It would appear that claimant was a part-time laborer and that Code section 85.36(10) applies to this situation. However, with regard to said section, it is questioned whether claimant's "line of industry" would be spot labor or truck loader. No evidence was presented regarding what would be considered "full-time" for either employment nor what would be considered "usual weekly earnings" for either employment. With regard to Code section 85.36(7), the question of what claiment's "line of industry" may be is important when considering "when work was available to other employees in a similar occupation." Sufficient evidence was not presented which would enable a finding with regard to the foregoing matter.

The only additional testimony given by the claimant which was generally relevant to the rate dispute was that he had been employed as a spot laborer on January 18, 1978, the day before the injury, and perhaps on infrequent occasions before that time.

The affidavit of Steven Patrick, one of defendant-employer's employees who hired the claimant, states that the claimant was hired solely to load one truck with furniture. Patrick further states that he is "familiar with the usual weekly earnings of the regular full-time adult laborer in the line of industry in which he (the claimant) was injured in that locality." According to Patrick, the claimant's earnings were substantially less that [sic] such usual weekly earnings."

WHEREFORE, it is hereby found that claimant was a part-time laborer and that Code section 85.36(10) applies to this situation.

* * *

Signed and filed this 24th day of September, 1979.

LEE M. JACKWIG
Deputy Industrial Commissioner

No Appeal.

JEFFREY D. LANGREHR,

Claimant,

vs.

WARREN PACKAGING CORPORATION,

Employer,

and

KEMPER INSURANCE COMPANIES

Insurance Carrier,
Defendants.

Review-Reopening Decision

This is a proceeding in review-reopening brought by Jeffrey D. Langrehr, the claimant, against his employer, Warren Packaging Corporation, and the insurance carrier, Kemper Insurance Company, to recover additional benefits under the Iowa Workers' Compensation Act as a result of an injury he sustained on November 1, 1978.

* * *

The only issue for determination is the extent of disability to the second, third and fourth fingers of claimant's left hand.

Claimant, Jeffrey D. Langrehr, age 19, was an employee of the defendant Warren Packaging Corporation on the date of his injury, November 1, 1978. His position was that of a dye cutter trainee. His duties included setting up his machine, checking with his foreman to see if the "job" is set up correctly and upon receiving clearance from his foreman, proceeding with the manufacturing run.

On the date of injury, claimant was having a problem with the particular "job" he was running. The paper would not run through claimant's machine properly and eventually became wedged between the dye and the chase bar. Claimant testified he had a tool to clear the machine, but instead of using the tool, he put his left hand in to pull out the jammed paper.

The machine engaged and crushed the second, third and fourth fingers of his left hand.

Claimant was treated by Richard L. Kreiter, M.D. and was off work approximately three months. He returned to work on January 16, 1979. Claimant noted improvement in his fingers as a result of treatment and his condition has now stabilized.

Claimant testified he has difficulty extending and curling his fingers and believes he has a loss of strength in his left hand.

The undersigned deputy closely observed claimant's left hand at the time of hearing and noted the difficulties claimant is having with extending and curling his injured fingers.

Claimant has returned to work for the defendant-employer doing the same job.

Claimant testified he is right-handed.

Claimant testified that he now has difficulty using various wrenches on his machine. The wrenches are used several times per day. Sometimes claimant is required to use two wrenches at once to adjust the machine for different "runs". Claimant finds it almost impossible to close his left hand tightly in the wrench. Claimant also has difficulty grasping shovels and brooms.

Cold temperature irritate the injured area. Also, if claimant would bump his hand, he experiences pain. If he does not bump his hand, he has no pain.

Claimant, prior to the injury played baseball, which he can not do now. However, he does play softball. He can partially grip the ball and bat. He also was able to swim last summer.

Claimant is able to run his machine now with his fingers in their present condition.

Claimant has no problem with his left index finger or left thumb.

Claimant testified that his left third and fourth fingers do not operate well and only a portion of his third finger operates correctly.

Claimant must do some lifting on his job and has difficulty with this.

He has a friend at the next machine who helps him.

Dr. Kreiter, in his report of September 5, 1979, notes:

> At the present time he has no problems with his thumb and index fingers and his main problem involves the long, ring, and small fingers. He is having very minimal discomfort and is able to do most activity with the main problem a loss of motion in some of the joints of the long, ring, and small fingers as a result of the crushing injuries.
>
> At the present time I would estimate that he has at least a 75 percent permanent physical impairment and loss of physical function to each individual finger including the long, ring, and small fingers. In regard to any proposed surgery in the future, he may need an osteotomy of the proximal phalanx of the small finger to get a better positioning of that digit. I plan to see him back in November for a final evaluation which will then be one year from the time of his injury.

In his report of November 12, 1979, Dr. Kreiter finds the claimant's condition to be the same as noted in his report of September 5, 1979.

The claimant has the burden of proving by a preponderance of the evidence that the injury of November 1, 1978 is the cause of his disability on which he now bases his claim. *Bodish v. Fischer, Inc.,* 257 Iowa 516, 133 N.W.2d 867 (1965). *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 testimony. *Bradshaw v. Iowa Methodist Hospital,* 251 Iowa 375, 101 N.W.2d 167 (1960).

The Iowa Supreme Court in *Barton v. Nevada Poultry Co.,* 253 Iowa 285, stated the following concerning scheduled injuries: ". . . where, as a result of an injury the claimant has sustained the loss of specified parts of his body, such loss shall be compensable only to the extent herein provided."

Claimant has clearly sustained a severe injury to the second, third and fourth fingers of his left hand and has sustained his burden of proof.

Based upon personal observation of the claimant and his injured fingers, and based upon Dr. Kreiter's finding of at least 75 percent permanent impairment to each finger in question, it is found that claimant has sustained an 85 percent permanent partial disability to the second, third and fourth fingers of the left hand.

The determination of 85 percent permanent partial disability to the second, third and fourth fingers of claimant's left hand is based, not only on Dr. Kreiter's report and the undersigned's personal observation of the claimant's fingers, but also on claimant's testimony concerning the loss of function of the fingers in question.

Specifically, the undersigned's decision is based upon the difficulty and limitations claimant experiences in extending and curling the fingers and the effects of cold temperatures on the injured area.

* * *

Signed and filed this 22nd day of January, 1980

E. J. KELLY
Deputy Industrial Commissioner

No Appeal

MAGDALEN LARSEN,

Claimant,

vs.

HAAG DRUG COMPANY,

Employer,

and

U. S. FIRE INSURANCE COMPANY,

Insurance Carrier,
Defendants.

Arbitration Decision

This is a proceeding in arbitration brought by Magdalen Larsen, the claimant, against her employer, Haag Drug Company, and the insurance carrier, U. S. Fire Insurance Company, to recover benefits under the Iowa Workers' Compensation Act as a result of an injury she sustained on September 1, 1977.

* * *

The issues for determination are whether the claimant suffered a heart block which arose out of and in the course of her employment with defendant, whether there is a causal connection between the heart block and claimant's resulting disability and, if so, the nature and extent of that disability.

There is sufficient credible evidence in the record to support the following findings of fact:

Claimant, age 78, testified that she had been employed by defendant or its predecessor for 27 years. Her duties were those of check-out girl, marking and shelving merchandise, cleaning out the candy counter area, re-ordering and re-stocking candy and organizing and stacking the magazine rack. Claimant testified that in the normal course of her work for defendant she would, among other things, lift boxes of candy, boxes of magazines and lift and stack 12 packs of beer.

The date of injury in this litigation is September 1, 1977 at which time claimant was 76 years old. On that date claimant was employed by defendant, Haag Drug Company.

Claimant testified that she was required to be at work by 8:30 a.m. On September 1, 1977 her daughter, Barbara Locke, drove her to work and she arrived before 8:30 a.m. and entered through the front door of defendant-employer's place of business. The floors had been scrubbed the night before and the floor mats had not been put back down. Claimant testified the pharmacist had entered the store prior to claimant and had tracked in some water. Claimant testified that as she entered the store she turned to pick up a newly-delivered stack of magazines, as was one of her duties, and slipped and fell, striking her right knee.

Claimant testified she had had no dizzy spells prior to the fall.

Claimant was in pain and attempted to work as the pain seemed to subside. At approximately 11:00 a.m. claimant went to the store manager complaining of pain and was directed by him to go to the hospital.

Claimant was seen by Dennis L. Miller, M.D., at St. Luke's Hospital. X-rays were taken and claimant was found to have a fractured tibia. At this time Dr. James R. Gilson, a cardiologist, was called in by Dr. Miller (deposition of Dr. Gilson, page 5) as claimant's electrocardiogram, taken upon admission to St. Luke's Hospital, showed claimant "to be in heart block, third degree with a heart rate of 30" (Gilson deposition, page 5). Dr. Gilson saw claimant in order to evaluate her for possible pacemaker insertion (Gilson deposition, page 5).

Claimant immediately underwent surgery and a pacemaker was inserted initially by the transvenous route.

Claimant testified she never felt well after the initial pacemaker was inserted and stated she felt like she had the flu. Towards the end on January 1978 claimant testified she fainted. It appeared this pacemaker system was not attaining the desired results so claimant underwent a second operation and the pacemaker electrodes were attached directly to the heart (Gilson deposition, page 12). Franklin J. DeRusso, M.D., performed the operation.

Claimant testified that prior to September 1, 1977 she was in good health and was able to work all day for defendant with no restrictions or limitations. She lived alone and could also work in her garden, do canning, do her own housework and drive an automobile.

Claimant testified at one time she had eye surgery for a cataract with no resulting difficulties. She regularly saw a physician for a checkup and her doctor told her to continue working. Claimant was also active in a church group prior to her injury. Claimant stated that on occasion, weather permitting, she would walk to work, a distance of one mile. She would also walk three blocks to church and to the store. Claimant also testified she loved to work.

After the September 1, 1977 incident claimant testified she cannot do any of the things she once did. She has no strength and must continuously rest. Claimant relies on her family to keep her house up and help her as needed. Claimant describes herself now as "just well enough to get by."

Claimant continues to see Dr. Gilson and her pacemaker is checked regularly.

In January 1978 it was suggested by Dr. Gilson that claimant might try to go back to light work. It was suggested that claimant could sit on a stool by the cash register and do checkout work. However, claimant indicated that her job required more than just sitting on a stool and that it could not properly be done that way, so she did not work.

Claimant testified her leg is weak and her right knee gives out. On cross-examination claimant testified that her last appointment with Dr. Miller for her leg was March 9, 1978.

It was shortly after Dr. Gilson and Dr. Miller suggested "light work" that claimant underwent the second operation to correct the pacemaker difficulties she was experiencing, and she did not return to work.

Prior to claimant's fall she had been seeing a Dr. Donahue and he prescribed some high blood pressure medicine for her. Claimant testified she had been taking this medication for 2 to 3 years prior to September 1977. Claimant presently considers Y. M. S. Bushan, M.D., her family physician as Dr. Donahue has left his private practice.

Claimant's daughter, Barbara Locke, testified on behalf of the claimant. This witness worked for defendant in the post office area for 11½ years but quit some four months prior to this hearing. There is presently a suit pending between this witness and the defendant.

This witness corroborates the claimant's testimony concerning her active life style prior to September 1, 1977 and her present inability to do the things she once did. This witness testified there is no light duty work at defendant-employer's place of business and claimant cannot work the way she once did.

Delcie VanDorpe then testified on behalf of claimant.

This witness worked at Haag Drug Company with claimant for twenty years and testified she knows her well. She saw claimant on a daily basis. She corroborated claimant's testimony as to her lack of physical restriction prior to September 1, 1977. This witness also corroborated the claimant's testimony as to her ability to actively work. This witness testified that claimant's job required bending, lifting and movement and could not be carried out sitting on a stool. This witness corroborates claimant's testimony as to her inability to actively function after September 1, 1977.

A clinical summary from W. Hoffmann, M.D. (employer's exhibit 9) was offered and admitted into evidence. This brief summary relates to claimant's cataract surgery in 1973 and contains a relevant sentence which states, "an EKG was reported as abnormal with nonspecific changes." Dr. Gilson considered this element of the patient's previous history when opining in his deposition. No other testimony was offered from Dr. Hoffmann. Employer's exhibits 10 and 11 are letters from Dr. Gilson written in 1977 and 1978, and were prepared substantially prior to his deposition taken in November 1979. Hence, Dr. Gilson's deposition will be given the greater weight as it is more recent and more thorough and all inclusive. Some bills are submitted from Dr. Dippel, but he provided no reports or testimony. The names of Drs. Bushan and Donahue were mentioned in testimony but neither of these physicians submitted any reports or testified.

Employer's exhibit 4 is a brief two sentence letter from Franklin J. DeRusso, M.D., which adds nothing to the substantive testimony in this case and is given little weight.

Employer's exhibit 1 is the admitting notes of Dr. Miller, an orthopedic surgeon made September 1, 1977 which corroborates claimant's testimony as to her good health. Dr. Miller did not submit any reports and did not testify.

Dr. James Gilson's testimony by deposition, is considered by the undersigned, as uncontroverted and will be quoted at length.

Dr. Gilson testified via deposition as follows concerning the causal connection between claimant's falling at work, fracturing her tibia and the subsequent heart block:

> Q. Let me ask you this, Doctor: Is it possible for a fracture of the tibia to cause damage to the heart?
>
> A. In cardiology, and shock, be it a fracture, be it emotional, be it physical, be it whatever, can produce rhythm disturbances which then can continue on, hypothetically, yes.
>
> Q. How is the rhythm disturbance created from a fracture of the tibia?
>
> A. I think that kind of question, you know, is irrelevant, because if you take every fracture of the tibia, they are not going to develop heart block. It requires a set of circumstances, an older patient, preexisting heart disease and some form of shock which alters either the blood pressure, which alters the level of consciousness, which alters possibly the rhythm of the heart, causing it to go very slow, go very fast. Heart attacks can do the same thing as a coincidence to the thing, so just fracturing the tibia may not do it. But a constellation of problems that could have occurred at the time can do it. Every little old lady who breaks her leg doesn't go into a heart block, is what I'm saying.
>
> Q. So all of these factors placed together, including Mrs. Larsen's age of 76 at the time of the fall, might produce --
>
> A. Right.
>
> Q. --an irregularity in the rhythm of her heart?
>
> A. That's correct.
>
> Q. Now, Doctor, do you have an opinion based upon a reasonable degree of medical certainty whether the heart block of Mrs. Larsen, as you've described it, was caused by her fall on September 21, 1977?
>
> A. She didn't have it before and she had it immediately upon entering the hospital. The question is, did the sudden heart block cause her to fall, which it can do. So did she have the heart block and then fall and fracture, or did she trip and then fracture and then develop the heart block? That's a very difficult question to answer, except that she was an asymptomatic, highly active lady, and one would presume that she didn't develop it first and then fall. It was probably the other way around, but it's unprovable.
>
> Q. Is it your opinion that the heart block was probably caused by the fall?
>
> A. At that time and to this day, yes.

On cross-examination he testified further concerning causal connection:

> Q. Doctor, as I understand your opinion, you were somewhat hesitant, at least at first, to say that the fall caused the heart block or the heart block caused the fall, but that your final opinion, your feeling was that the fall came first and then the heart block, based upon your examination of this patient?
>
> A. Correct.
>
> Q. In that regard, Doctor, what factors -- perhaps I was unclear, but what factors did lead you to arrive at the conclusion or opinion that the block was subsequent to the fall which produced a fractured tibia?
>
> A. Statistically, to have heart block suddenly develop in an individual who does not have cardiac disease of a serious type, who's active, whose previous medical doctor was unaware of any major cardiac disease, to suddenly develop it is unusual. Statistically, to develop cardiac dysrhythmia after trauma in the elderly is not uncommon.

On cross-examination there were some questions raised about an abnormal EKG taken two years earlier. Dr. Gilson testifies with regard to that as follows:

> Q. Doctor, based upon that situation where we know of this earlier EKG, did that in any way change

your opinion as to the facts that you've earlier given, that you believe that the fall precipitated the heart block?

A. No.

Q. All right. And why are you of that opinion?

A. Because usually when people develop heart block and they have preexisting disease of the conducting system, they have system dizzy speels. She sought no regular attention. She took a blood pressure pill, generally felt fairly well, worked actively well past her years. She denies -- and we went over this with her -- any feelings of dizziness. She said she tripped. People who have heart block and fall usually have an amnesic period because the heart rate suddenly slows, and what they do is basically faint. She was alert when she went down. She knew what she hit and she was alert immediately at that point.

The claimant has the burden of proving by a preponderance of the evidence that the injury of September 1, 1977 is the cause of her disability on which she now bases her claim. *Bodish v. Fischer, Inc.,* 257 Iowa 516, 133 N.W.2d 867 (1965). *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 testimony. *Bradshaw v. Iowa Methodist Hospital,* 251 Iowa 375, 101 N.W.2d 167 (1960).

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. * * * *

Claimant has sustained her burden of proof and established that on September 1, 1977 she was an employee of the defendant and on that date, suffered a heart block as a result of falling at defendant-employer's place of business and fracturing her right tibia.

This burden has been sustained through the claimant's testimony and the testimony of Dr. James R. Gilson wherein he establishes a causal relationship between the trauma experienced when claimant fractured her tibia and the resulting heart block.

Claimant was, at the time of injury, 76 years of age and may have been affected with many of the same types of disease any person that age would have. However, the evidence clearly establishes that claimant was basically healthy prior to September 1, 1977. The evidence further establishes that claimant led an active life prior to September 1, 1977 and in fact was able at the age of 76 to continue working for defendant as she described.

According to Dr. Gilson's testimony, claimant's heart block was a trauma induced incident and as the supreme court pointed out in *Almquist, supra,* the mere fact that she might somehow be more susceptible to this type of injury than a younger person does not prevent recovery.

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.2d 899 (1935), 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 *Martin, 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. * * * *

Dr. Gilson testified in his deposition concerning the extent of claimant's disability as follows:

> Q. Doctor, do you have an opinion based upon a reasonable degree of medical certainty as to Magdalen Larsen's ability to work, and whether or not there would be any restrictions upon her ability to work?
>
> MR. SHIELDS: Just a minute. I'm going to object to the form of the question, unless that question is tied down as to the last time the doctor saw Mrs. Larsen.
>
> Q. All right. With that qualification, based upon your last examination?
>
> A. She was unable to work at the time of the last examination.
>
> Q. Well, from what I'm asking, do you have an opinion as to whether or not she could work?
>
> A. She could not.
>
> Q. Okay. Is this opinion based upon anything other than what she has told you?

A. Symptoms that she's expressed and physical exam.

Q. What kind of work could she do?

A. Now?

Q. Yes.

A. At the moment, minor housework.

Q. Do you find that consistent with the surgery that she experienced and her age?

A. Compared to others of a similar age, it's inconsistent.

Q. In what respect?

A. When she first started out, she was extremely energetic and over a rather short period of time, she's come to the point where she is strictly limited by the pacemaker.

Q. What then do you relate it to?

A. She has problems with her leg, ambulation, memory, dizzy spells.

Q. By her problems with her leg, that would be related to the fracture?

A. Yes.

Q. Do you have an opinion, based upon a reasonable degree of medical certainty, as to what percentage, if any, of physical impairment she has as a result of her condition?

A. Physical impairment in what fashion? You mean as opposed to ambulation with the leg, or mentation because she's changed, or both? Her job required no ambulation, but required mentation.

Q. Yes?

A. And she's imcapable of that level of mentation at this point.

Q. By "mentation," you mean thinking?

A. Thinking, calculation, change-making, memory.

Q. And she cannot do that at this time?

A. No.

Q. Is that a result of the heart block?

A. Not a result of the heart block.

Q. What is it a result of, if you know?

A. Multifaceted, I would imagine.

Q. Is the heart block a cause of the present inability to think and calculate?

A. Heart block specifically doesn't cause it. Slow heart rates can cause it. Pacemaker-induced rhythms, when you bring it back up again, prevent it. So as far as the speed of the heart being the cause of it, no. And she was not in that area of slow heart rate long enough that it could have produced any stroke-like damage.

Q. So are you saying it's because of her age, then, that --

A. I think it's multifaceted. It's age, it's known hardening of the arteries. She's no longer stimulated by working. She's become sedentary. Therefore, she is not using capacities.

Q. Well, are you able to trace at all her present physical condition and her inability to work to the heart block as a factor, along with her age?

A. I can trace it back to the time that she came in the hospital, from that point on she has deteriorated. She's deteriorated for a variety of reasons. She was in heart block when she came in the hospital. She fell and the problems with the leg bothered her. She had problems with the pacemaker that bothered her. She's now incapable of working for a variety of reasons. Tracing it back to the heart block, I think it was a causative part of it, but not the cause.

Q. It was a cause, as well as the fracture of the leg?

A. As well as the fracture, as well as her own known age chronologically, and physiologically, with the hardening of the arteries.

On cross examination Dr. Gilson testified, as follows:

Q. So, Doctor, is it a fair statement to say that her inabilities to work as you found them, due to her problems with mentation and her physical ability, in fact, cannot be directly attributed to either the fractured tibia or the third-degree block?

A. I think her inability to work, that is a part of it. I don't think that part of it can be ignored. I think if she had not done the same, I think she may still be working, or at least be better off than she is now for both the heart block and the fracture. So I can't negate that with what's happened to her. She had a definite quantum change in her ability to think and perform, and if you take the slope of the curve of her aging at that time which she had demonstrated on out, she'd be in better performance than she is now. I think there's a definite change. So is she like other people her age? Yes. Is she like other people of her age, comparing her before? No, she is definitely different. There are people 76 who are still out running around and very active, of which she was one.

Defendants, in their brief, have cited the undersigned to two decisions concerning the question of "age."

The supreme court has repeatedly stated that age is one of the considerations for industrial disability. The case of *Percy G. McSpadden v. Big Ben Coal Co.,* Supreme Court of Iowa, filed January 23, 1980, stated, in part:

> Important factors in the decision were that claimant was fifty-nine years of age, that he had little or no education and that his injury kept him from performing all kinds of physical work. Similar factors supported a finding of permanent total disability in *Dailey v. Pooley Lumber Co.,* 233 Iowa 758, 765-66, 10 N.W.2d 569, 573-74 (1943) (considering claimant's

functional disability of seventy-five to one hundred per cent, his age of sixty-five, his limited education and training and his nonperformance of physical labor since date of injury). *See also Martin v. Skelly Oil Co.,* 252 Iowa 128, 133-35, 106 N.W.2d 95, 98-99 (1960) (considering claimant's employment history and earnings since date of accident).

Claimant's age, under the facts in this particular case, increases the industrial disability. The effect this injury had on a 78-year-old former wage earner is devastating and the industrial disability or loss of earning capacity resulting therefrom is total.

Claimant testified at length about her inability to be active now and her inability to do many of the things she did before, including work. Claimant testified she could not work because of lack of strength and energy. Claimant is permanently totally disabled as a result of the trauma induced heart block she suffered on September 1, 1977.

The case of *Sondag v. Ferris Hardware,* 220 N.W.2d 903, is not applicable because the factual situations are different and we are dealing with a trauma induced heart block.

* * *

Signed and filed this 20th day of March, 1980.

E. J. KELLY
Deputy Industrial Commissioner

No Appeal.

DENNIS LAWRENCE,

Claimant,

vs.

HEYL TRUCK LINES, INC.,

Employer,

and

GREAT WESTERN CASUALTY COMPANY,

Insurance
Defendants.

Appeal Decision

Defendants, Heyl Truck Line, Inc., and its insurance carrier, Great Western Casualty Company, have appealed from a proposed arbitration decision wherein claimant was awarded temporary total disability for two different periods of time.

* * *

On review of the record, the deputy's proposed findings of fact and conclusions of law are proper with the following modification.

The deputy found that claimant was entitled to temporary total disability compensation for the period of January 21, 1977 through April 1, 1977 and a running award commencing on January 9, 1978 and continuing until the terms of section 85.34(1) are met. Iowa Code section 85.34(1) does not apply in this case because no permanent disability was found. Rather, Iowa Code section 85.33 is applicable because an award of temporary total disability compensation is involved. *Auxier v. Woodward State Hospital-School,* 266 N.W. 2d 139 (Iowa 1978).

* * *

Signed and filed this 11th day of May, 1979.

ROBERT C. LANDESS
Industrial Commissioner

Appealed to District Court: 6/11/79

W. L. LEE,

Claimant,

vs.

JOHN DEERE WATERLOO TRACTOR WORKS,

Employer,
Self-Insured,
Defendant.

Appeal Order

Attorney for claimant, John E. Behnke, has appealed from an order granting him attorney's fees amounting to 30% of the difference between an award of 42% permanent partial disability to the hand and 42% permanent partial disability to the arm.

* * *

The issue presented on appeal is whether the deputy's award of attorney's fees was proper.

On May 2, 1978 a deputy filed an order granting claimant's attorney $1,354.91 for fees. To arrive at this award the deputy made the following findings. First, based on the rating of 42% of the left hand by its physician, H. J. Hursh, M.D., defendant was willing to pay claimant permanent partial disability. Second, claimant had a 42% permanent partial disability of the arm. Third, claimant's attorney was entitled to a fee based on the increase of the award due to the difference in compensation for a hand and an arm. The deputy's computation of the award is as follows:

(1) 42 percent of the hand —
42% x 175 weeks x $117.14 = $8,609

(2) 42 percent of the arm —
42% x 230 weeks x $117.14 = $11,315.72

(3) Difference in compensation —
$11,315.72 - $8,609.79 = $2,705.93

(4) Interest on the award —
$113.61

(5) Attorney's fee —
$2,705.93 + $113.61 = $2,819.54

then
30% x $2,819.54 = $845.86 plus expenses
$845.86 + $509.05 = $1,354.91

Claimant received an industrial injury on August 29, 1975. He was off work as a result of the injury from August 30, 1975 through November 30, 1975 and a second period from July 26, 1976 through August 30, 1976. Claimant received benefits amounting to 18 3/7 weeks at $117.14 per week. Claimant's medical expenses during these periods were paid by defendant.

Claimant first contacted attorney Behnke on September 13, 1975. At this time claimant asked Behnke to represent him but he did not want to bring suit against his employer.

Sometime around November 30, 1975 Dr. Hursh, the employer's physician, asked claimant if he would like some money for Christmas (1975) for his injury. In January, 1976 claimant asked Dr. Hursh why he had not received any money. Dr. Hursh then asked the defendant employer the same question. The defendant employer responded by stating that Behnke represented claimant and claimant would be contacted through Behnke. There was no further discussion of a settlement at this time.

After claimant missed his second period of work in the summer of 1976, defendant employer filed a form 5 on October 25, 1976. The form indicated that no other weekly or medical benefits were anticipated. A copy of this form was sent to the claimant.

In Dr. Hursh's notes of November 22, 1976 she stated that a permanent restriction was given to claimant. This restriction included a forty-pound lifting limitation and a warning against contact with hot or sharp objects.

On November 23, 1976, Behnke wrote to Dr. Hursh requesting claimant's medical report. On December 1, 1976 Dr. Hursh noted the receipt of Behnke's request. It was on this date that Dr. Hursh first mentioned a disability rating of 42% in her notes. Defendant claims in its response to the June 22, 1978 questionnaire that on December 3, 1976 an offer of permanent disability benefits was made to claimant. It was further contended that the offer was based on 42% of the left arm. These contentions must be given little weight for they were made solely on the basis of interpretation of written records and not on personal knowledge. As noted, a form 5 previously filed indicated no further payments were contemplated. Furthermore, even if such an offer was in fact conveyed to claimant at this time, it was improper because defendant employer was aware that claimant was being represented by Behnke. Thus the offer should have been made to claimant through Behnke.

Behnke filed an original notice and petition for the claimant on December 8, 1977. The petition stated that the subject of the dispute was the extent of permanent partial disability and the part of the body so disabled. In answer to this petition, the defendant employer specifically denied that claimant had suffered any disability in excess of that already paid to claimant. Defendant employer restated this denial in a brief filed November 7, 1977.

Behnke contends that he commenced settlement negotiations on March 25, 1977. He further contends that defendant did not make a settlement offer based on Dr. Hursh's findings until August 15, 1977, two days before the hearing was held in this proceeding. The truth of these allegations, however, is not crucial to this order. The defendant employer's resistance to any permanent partial disability compensation is evident from its answer to the original petition and its brief.

It is clear from the record that claimant's attorney was instrumental in obtaining the entire permanent partial disability award for claimant. Therefore the attorney fee should be based on the total recovery.

The determination of reasonable attorney's fees rests with this commissioner. In making this determination the following factors are considered: (1) the time spent by the attorney in the proceeding; (2) the nature and extent of the services rendered; (3) the amount of the award that is involved; (4) the difficulty of handling and the importance of the issues presented; (5) the responsibility assumed and the results obtained by the attorney; (6) the professional standing and experience of the attorney; and (7) any other element which may have a bearing on attorney fees. *Kirkpatrick v. Patterson*, 172 N.W.2d 259, 261 (Iowa 1969) On review of the file and affidavits, 20% of the gross award would appear to be adequate compensation.

WHEREFORE, it is found:

That claimant's attorney was instrumental in obtaining the total amount of permanent partial compensation awarded in this proceeding.

That the total amount of permanent partial compensation awarded is eleven thousand three hundred fifteen and 72/100 dollars ($11,315.72) plus one hundred thirteen and 16/100 dollars ($113.16) interest.

That claimant's attorney is entitled to a fee of two thousand two hundred eighty-five and 78/100 dollars ($2,285.78).

That claimant's attorney incurred expenses amounting to five hundred nine and 05/100 dollars ($509.05), which appear to be appropriate.

THEREFORE, it is ordered:

That claimant's attorney, John Behnke, is entitled to attorney's fees amounting to two thousand two hundred eighty-five and 78/100 dollars ($2,285.78) in addition to incurred expenses.

Signed and filed this 8th day of November, 1978.

ROBERT C. LANDESS
Industrial Commissioner

No Appeal.

DORIS LEEPER,

Claimant,

vs.

AMF LAWN AND GARDEN,

Employer,

and

FIREMAN'S FUND INSURANCE COMPANIES,

Insurance Carrier,
Defendants.

Appeal for Review

NOW on this day the matter of defendants' appeal to the commissioner and petition for review and claimant's resistance thereto come on for determination.

On October 2, 1978 claimant filed an original notice and petition. Defendants responded with an answer. After a number of other filings, a motion to amend was filed by claimant.

Prior to the filing of that motion, claimant's original attorney withdrew and claimant's present attorney appeared. In essence the motion to amend alleged a possible claim under Iowa Code chapter 85A because of carpal tunnel syndrome. Defendants resisted by asserting that claimant had failed to provide proper notice. An order was entered by a deputy industrial commissioner ordering defendants to answer or to otherwise plead.

Defendants appealed the ruling of the deputy, again maintaining that the deputy's ruling "is contrary to the statutory provisions involved, namely Section 85A.18, the Code." Claimant resisted.

The general rule regarding appeals which has been propounded by the Iowa Supreme Court on many occasions is found in *Crowe v. DeSoto Consolidated School District,* 246 Iowa 38, 66 N.W.2d 859 (1954). After pointing out that an appeal is proper only after a final judgment has been granted, the court then held that "[a] final judgment or decision is one that finally adjudicates the rights of the parties, and it must put it beyond the power of the court which made it to place the parties in their original positions."

It is noted that defendants' resistance to claimant's motion to amend is more in the nature of an affirmative defense rather than a resistance to the amendment.

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 before the commissioner. As there is no specific rule of the industrial commissioner concerning amendments, the rules of civil procedure apply. Iowa Code section 17A.22. Industrial Commissioner's Rule 500-4.35.

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).

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, 503 (Iowa 1975).

At no point have defendants alleged that the amendment will materially change the issue involved. The only contention is that claimant failed to give proper notice and that her claim is therefore barred. This is not appropriate matter in a resistance to a motion to amend and the alleged grounds for this appeal are without merit. In any event, the general rule regarding appeals applies in this case. Defendants' appeal of a ruling ordering them to answer or to otherwise plead is interlocutory in nature.

THEREFORE, it is ordered:

That defendants' appeal be and is hereby dismissed.

Signed and filed this 7th day of March, 1979.

ROBERT C. LANDESS
Industrial Commissioner

No Appeal

ROBERT D. LEONHARD,

Claimant,

vs.

FRUEHAUF CORPORATION,

Employer,

and

CNA INSURANCE,

Insurance Carrier,
Defendants.

Appeal Decision

This is an appeal by the defendants from a review-reopening wherein claimant was awarded healing period, permanent partial disability and medical expenses.

* * *

The defendants' notice of appeal from the review-reopening decision states only that the decision was contrary to the evidence and the law applicable to this case. They fail to expound upon which evidence and what applicable law. Pursuant to §17A.15 of the Administrative Procedure Act, the opportunity was provided to the appellant to file exceptions or to present a brief on the appeal of this matter. There has been no response to this opportunity. In light of the course of action taken by the appellant in this appeal, it is difficult to ascertain upon what, if any, basis the appellant has been aggrieved by the decision from which they are appealing.

On reviewing the record, it is found that the deputy's

findings of fact and conclusions of law are proper.

* * *

Signed and filed this 26th day of march, 1980.

ROBERT C. LANDESS
Industrial Commissioner

No Appeal.

STEVE EARL LEWIS,

Claimant,

vs.

MICH COAL COMPANY,

Employer,

and

TRAVELERS INSURANCE COMPANY,

Insurance Carrier,

and

SECOND INJURY FUND,
STATE OF IOWA,

Defendants.

Appeal Decision

Both claimant and defendant, Second Injury Fund, appeal a proposed decision in review-reopening awarding claimant 80 percent permanent partial disability and ordering the Second Injury Fund to pay 182 weeks permanent partial disability. Interest was awarded from the date of the decision. A proposed review-reopening decision was originally filed in this case on November 10, 1976 which was appealed to the district court and later the supreme court. The supreme court remanded the case for further findings which resulted in the proposed decision which is now being appealed.

* * *

On September 13, 1963 the claimant broke his left leg above the knee while working in a mining operation for defendant-employer. As a result of that injury, he lost 40 percent flexibility of the leg. It was repaired by use of a plate that made the left leg one-quarter of an inch longer than the right leg. He received 108 weeks of compensation based on 54 percent loss of use of the left leg. He returned to work full-time on November 29, 1964 and performed essentially the same work he had been doing prior to the injury.

On March 25, 1972 claimant sustained another compensable injury for which he received 110 weeks of compensation based on 55 percent permanent partial disability to the right leg. This subsequent work injury entailed soft tissue injuries to both lower extremities and a fracture to his right leg resulting in an angulation to his leg which in turn shortened his right leg one and one-quarter inches. In addition, the fracture resulted in poor venous circulation, which in turn resulted in metatarsal plantar ulcers on both feet. The shortening of the leg also caused a rotoscoliosis of the spine with accompany back pain.

Claimant testified that he returned to work on September 4, 1973 but was only able to work for approximately five months due to the development of ulcers over the metatarsal heads of both feet. He has not been able to work full-time since the winter of 1974 because of the ulcers. Claimant further testified that he did not develop any ulcers on his feet until after the 1972 injury and that these ulcers repeatedly broke out whenever he resumed activity.

Claimant was examined by Stephan Fox, M.D., on October 9, 1974. His report states that claimant sustained a 55 percent permanent partial disability to the right knee.

John R. Scheibe, M.D., an orthopedic surgeon, examined claimant on October 30, 1975. In a letter to claimant's attorney dated October 31, 1975, Dr. Scheibe described:

> 1. Traumatic arthritis of the right knee with 15 degrees of genu varus and shortening of 4 cm. of length and decreased muscle mass above and below the knee. These are secondary to trauma sustained in 1972.
>
> 2. Degenerative arthritis of the left knee associated with old supracondylar fracture.
>
> 3. Thrombophlebitis of the lower extremity, remote, and residuals thereof.
>
> 4. Scars on both lower extremities associated with recent trauma in 1972.
>
> 5. Rotoscoliosis of the spine with degenerative arthritis of the lumbosacral spine.
>
> 6. Ulcers of the plantar surfaces of the feet secondary to pressure from the metatarsal heads.
>
> 7. Bilateral hallus valgus.
>
> 8. Peripheral vascular disease characterized by decreased hair growth, decreased volume of pulses in the lower extremities, and ruboron dependency.
>
> 9. Diabetes mellitus.

This patient is permanently 100% disabled.

Robert M. Collison, M.D., claimant's family physician since 1951, testified that he treated the claimant in September 1965 for ulcerations in claimant's left foot. He had to treat the claimant for the condition periodically after that time. In 1968 he treated claimant for a blood clot in the left leg which he stated developed because claimant could not walk properly on the left leg. Dr. Collison did not treat claimant for right foot ulcers until sometime after the 1972 injury. The doctor testified that the 1972 fracture caused an angulation in claimant's right leg which disturbed his ability to bear weight, placing pressure upon the bottom of his feet. He also related that claimant was discovered to have diabetes in 1975. Dr. Collison explained that the fracture as well as the diabetes complicated claimant's circulatory problems. Taking all of these factors together

caused claimant to develop the ulcers on the bottom of his feet. The doctor further elaborated by stating that the 1963 injury plus the 1972 injury along with the diabetes led to claimant's total disability. He went on to say, "[t]he three things were --- and I can't tell you exactly what proportions each added to his problem, except that I know that up until '72 he was able to function to a certain degree, but after '72 he seemed unable to function." (Collison deposition, page 22.) In an April 23, 1979 letter addressed to claimant's counsel, Dr. Collison wrote that in his opinion claimant's present disability is largely the result of the 1972 injury.

Donald W. Blair, M.D., orthopedic surgeon, examined claimant on November 21, 1975 and again on April 5, 1976. Dr. Blair testified that the combination of one and one-quarter inch shortening of the right leg as well as the limited motion and varus deformity would be equivalent to 49 percent of the leg, or 20 percent of the body as a whole. He further testified that the persistent vascular changes would increase the percentage of disability resulting in an additional 25 percent of the body as a whole, or a total of 45 percent disability to the whole man. When asked to give a rating to include both legs, Dr. Blair stated, "I did not attempt to assess this man's left leg disability. Basically, he had a healed fracture with some limitation of motion, and certainly his primary disability would be the result of his more recent injury." (Blair deposition, page 7.)

Iowa Code section 85.64 which discusses the Second Injury Compensation Act reads as follows:

> 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. [Emphasis supplied.]

The Second Injury Fund liability arises when the total combined effect of a prior and subsequent injury to separate specified members is greater in terms of relative weeks of compensation than the sum of the scheduled allowances for the parts. See *Irish v. McCreary Saw Mill,* 175 N.W.2d 364 (Iowa 1970) and *Anderson v. Second Injury Fund,* 262 N.W.2d 789 (Iowa 1978). In the case sub judice, it was previously determined that the claimant's total industrial disability was 80 percent to the body as a whole or equal to 400 weeks of compensation. This rating is not in dispute. The issue is whether the employer or the Second Injury Fund is liable for the resulting industrial disability. Although the Second Injury Compensation Act provides that the employer shall not be liable for the combined effect of a prior loss or loss of use of a specified member and a compensable subsequent loss or loss of use of another such member, Iowa Code section 85.64 does contemplate that the employer is liable for the full amount of disability attributable to the subsequent compensable injury.

Accordingly, the employer is to be held liable for the full degree of disability attributable to the 1972 injury. What appears at first glance to be a scheduled injury is, upon review of the medical and lay testimony, a disability that affected the soles of the feet, the circulatory system and the back.

In *Blacksmith v. All-American, Inc.,* 290 N.W.2d 348 (Iowa 1980), the claimant sustained an injury to the left leg causing phlebitis. In an order filed April 16, 1980 denying a rehearing in the *Blacksmith* case, *supra,* the court stated that the injury was not limited to a scheduled member but affected the body as a whole because it involved the vascular system.

Therefore, the record viewed as a whole in the case sub judice reveals that the 1972 injury is responsible for claimant's present industrial disability. The claimant's testimony that he was able to return to full-time work after the 1963 injury and that he continued to work until the 1972 injury occurred, indicates that the 1963 injury did not add anything to claimant's final disability, nor did it tend to act as a hindrance to his ability to obtain or retain effective employment. The medical testimony reveals that claimant's 1972 injury extended beyond the leg, that it affected the circulatory system as well as the back. Accordingly, the 80 percent industrial disability sustained by claimant was caused by the 1972 injury. Therefore, defendant-employer is liable for the full amount of claimant's disability.

Claimant contends that interest on unpaid compensation should be computed from the date of maturity rather than from the date of the decision. Iowa Code section 85.30 reads as follows:

> 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 the date of maturity.

In *Farmers Elevator Co., Kingsley v. Manning,* 286 N.W.2d 174 (Iowa 1979), the court expressly stated that interest on unpaid compensation is to be computed from the date each payment comes due, starting with the eleventh day after the injury.

WHEREFORE, it is found:

That as a result of the 1972 injury, claimant sustained an industrial disability of eighty (80) percent of the body as a whole.

* * *

Signed and filed this 3rd day of June, 1980.

ROBERT C. LANDESS
Industrial Commissioner

Appealed to District Court.

WILLIAM R. LINVOLLE,

Claimant,

vs.

SEARS MANUFACTURING COMPANY,

Employer,

and

BITUMINOUS INSURANCE COMPANY,

Insurance Carrier,
Defendants.

Review-Reopening Decision

This is a proceeding in review-reopening brought by William R. Linvolle, the claimant, against his employer, Sears Manufacturing Company, and the insurance carrier, Bituminous Insurance Company, to recover additional benefits under the Iowa Workers' Compensation Act on account of an injury he sustained in November of 1977.

* * *

The issue to be determined is the nature and extent of claimant's disability. Defendants stipulated that disability is due and owing for those days claimant was off work since November of 1977 and while he was employed with defendant-employer (evidenced by claimant's exhibit 6) minus the one week and one day of compensation paid as shown on the Form 5. In their letter of August 23, 1979 defendants have indicated that the corrected rate of compensation is $180.18. Claimant has not registered any objection to such determination as was provided for in the post-hearing order. Accordingly, the undersigned will assume said corrected rate is stipulated to by the parties. Additionally, claimant's counsel raised a sub-issue concerning not the hourly rate but "the earnings capacity as a result of the incentive provisions provided at the place of employment."

Twenty-one-year-old claimant began working for defendant-employer in mid-June of 1976 in foam labor which entailed mixing Toluene Diisocyanate (TDI) and resin to make polyurethane. Claimant testified that in the fall of 1977 he began coughing quite a bit, had continual colds and experienced tightness in his chest. In January of 1978 he went to his family doctor, John F. Collins, M.D., who at first treated him with medication and then hospitalized him for a few days in March of 1978 with an initial diagnosis of walking pneumonia. Claimant stated that Dr. Collins referred him to Rollin M. Perkins, M.D., who determined that claimant's problems were related to his working environment.

Claimant related that after the hospitalization and a subsequent couple weeks off work, he returned to his job. The symptoms returned as of May of 1978, and he began missing days at a time. He explained that this was when he first contacted a lawyer and hence May of 1978 rather then November of 1977 was inadvertently indicated as the date of injury on the official filings.

Upon his doctor's advice to avoid TDI, claimant testified he switched from foam labor to a lead inspector position in late May or early June of 1978. He received the same hourly rate of $6.74 but no longer was entitled to incentive pay which had been based on the number of pieces he put out a day. He thought his average hourly bonus rate as a foam laborer had been approximately $7 to $7.50 ($280 to $300 per week).

Claimant quit working for defendant-employer on October 13, 1978 pursuant to his doctor's orders. He described how his health would improve and his lungs clear when he was away from the plant a few days and how after a half day back his lungs would be congested and he would be short of breath.

Claimant stated he received unemployment benefits from the time he quit working for defendant-employer until approximately November 17, 1978 when he secured employment as a warehouse person and prep mechanic for Deutz Tractor at $4.30 per hour. (An earlier attempt to obtain employment with Alcoa failed.) Then around May 1, 1979 defendant changed jobs and became employed as a floor inspector with Red Jacket, a machine shop, for $6.74 per hour. He testified that he told this employer that he had no previous work-related physical problems. Neither job included incentive pay. Neither job entailed exposure to a TDI-type environment.

On cross-examination claimant stated that the gross amount he indicated he earned as a foam laborer included one-half hour overtime per day. Overtime rate was time and a half. Claimant testified that he has averaged eight hours of overtime a week at Red Jacket. Overtime rate is time and a half. However, he added that the Red Jacket employees were recently cut back to regular hours.

John F. Collins, M.D., P.C., is of the opinion that claimant's "respiratory condition is due to irritation by Toluene Diisocyanate with which he came in contact while at work." (Claimant's exhibit 2). Dr. Collins also comments that claimant's exposure to such substance "has caused a permanent type of allergy to this particular substance. He did not have an allergy prior to this time that could have been triggered by this exposure." (Claimant's exhibit 3).

Rollin M. Perkins, M.D., an allergist, saw the claimant at Dr. Collin's request. He found that claimant's history was consistent with a finding that claimant's "problems were due to exposure to T.D.I. at work." (Claimant's exhibit 1). Accordingly, he advised the claimant to avoid exposure to

such fumes. Dr. Perkins added that claimant "apparently has some mild excersise (sic) induced asthma and I have suggested he try Bricanyl prior to exertion to see if this will control the symptoms." (Claimant's exhibit 2).

George N. Bedell, M.D., a staff member of the Division of Pulmonary Diseases at the University of Iowa Hospitals and Clinics, examined the claimant on June 21, 1979 at the defendants' request. (Defendants' exhibit A). In a letter dated June 25, 1979 and addressed to Dr. Collins, Dr. Bedell explains why claimant, who had worked with defendant-employer since June of 1976, was not bothered with respiratory problems until the fall of 1977:

> * * * In the fall of 1977, plant expansion was begun and this resulted in changes in the ventilation set up in the part of the plant where the patient was employed. Soon after these changes were made, he began to be bothered by fumes from the manufacturing process. Chemicals to which he was exposed included TDI, polyurethrane, (sic) a resin and an unknown type of cleansing agent. He began to notice a tightness in his chest and shortness of breath which progressively worsened and was accompained (sic) by wheezing. The symptoms worsened throughout a work day. By noon, the patient often found it necessary to leave the building and go to the parking lot to escape the fumes and try to catch his breath. Soon he found it sometimes necessary to take off work on Thursdays and Fridays. He found that his symptoms would improve over the weekend, but would soon return again on Monday morning. * * * *

Dr. Bedell discussed claimant's more recent history as related to him by the claimant:

> He quit his job on October 13, 1978 and 6 weeks later, noted that most of his symptoms had abated. He still notes occasional shortness of breath, particularly with exertion, as when he recently attempted to push a motorcycle 2 blocks. The patient has never smoked. He now works at Red Jacket and Manufacturing, where he is exposed to oils which do not bother him. He is currently on no medications and has no allergies to medications. * * * *

In the letter dated June 27, 1979 and addressed to defendants' counsel, Dr. Bedell finds that claimant has a TDI induced asthma related to his work at Sears. He opined that claimant's hospitalization and medical expenses from the fall of 1977 through six weeks after claimant quit working with defendant-employer were secondary to the TDI induced asthma. He likewise causally connects the illness which claimant related as beginning in the fall of 1977 and extending to six weeks after he left defendant-employer with "the TDI induced asthma or complications thereof." Dr. Bedell noted no permanent damage to claimant's lungs but warned that claimant "must be very meticulous to avoid further exposure to TDI as this chemical even in small concentrations can produce problems in the way of asthma."

The claimant has the burden of proving by a preponderance of the evidence that the injury of November of 1977 is the cause of his disability on which he now bases his claim. *Bodish v. Fischer, Inc.*, 257 Iowa 516, 133 N.W.2d 867 (1965). *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).

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).

Functional disability is an element to be considered in determining industrial disability which is the reduction of earning capacity, but consideration must also be given to the injured employee's age, education, qualifications, experience and inability to engage in employment for which he is fitted. *Olson v. Goodyear Service Stores,* 255 Iowa 1112, 125 N.W.2d 251 (1963); *Barton v. Nevada Poultry,* 253 Iowa 285, 110 N.W.2d 660 (1961).

In *Christopher B. Becke vs. Turner-Bush, Inc. and American Mutual Liability Insurance Company,* Appeal Decision filed January 31, 1979, the industrial commissioner pointed out:

> Numerous attempts have been made by the industrial commissioner's office in seminars and symposiums to educate concerning the factors considered in determining industrial disability. These factors include the employee's medical condition prior to the injury, after the injury and present condition; the situs of the injury, its severity and the length of healing period; the work experience of the employee prior to the injury, after the injury and potential for rehabilitation; the employee's qualifications intellectually, emotionally and physically; earnings prior and subsequent to the injury; age, education, motivation, functional impairment as a result of the injury and inability because of the injury to engage in employment for which the employee is fitted. These are matters which the finder of fact considers collectively in arriving at the determination of the degree of industrial disability.

It should be noted that industrial disability relates to a reduction in earnings capacity rather than a change in actual earnings. *Carl Michael vs. Harrison County,* Appeal Decision filed January 30, 1979.

Although the medical experts do not specify a percentage of permanent impairment to the body as a whole that claimant sustained as a result of the exposure to TDI, they agree that claimant has suffered (as Dr. Collins phrased it) "a permanent type of allergy." Dr. Perkins' suggestion that claimant has apparently some independent mild exercise induced asthma does not mandate a finding that claimant's allergy only results in temporary disability when he is exposed to TDI and subsequently his asthma is affected. Unlike the case where an individual has a pre-existing condition that is aggravated temporarily by exposure to a

certain substance and then clears up when such exposure is taken away, the medical evidence indicates that claimant's allergic condition originated in the exposure, affects his body as a whole and requires constant avoidance of further exposure to TDI lest claimant's condition be aggravated again to the point of interfering with his activities.

Thus, the question that controls a determination of claimant's industrial disability is "how does the permanent allergy condition affect claimant's earning capacity?" No evidence was presented regarding claimant's education, work experience, or qualifications. He is in his early twenties and appeared well motivated. He is unable to engage in the employment he was in at the time of the injury. As indicated by defendant's wage statement filed August 27, 1979, claimant sustained a loss in weekly earnings when he became a lead inspector despite a raise in his hourly rate as of June 29, 1978. Since quitting his work with defendant-employer, claimant has been able to secure two other jobs neither of which from the claimant's testimony appear to have paid him quite as much as what he was making with defendant-employer in either the position of foam laborer or of lead inspector. Neither the lead inspector job nor the subsequent jobs with other employers paid incentive pay. All these jobs entailed some degree of overtime.

The undersigned is not convinced that claimant has sustained any noticeable degree of industrial disability as a result of no longer receiving incentive pay as he had done when he was a foam laborer. There was no showing that incentive pay is peculiar to that type of work. Furthermore, claimant has shown himself to be potentially adaptive to other areas of work as indicated by the two jobs he secured and maintained since leaving his work with defendant-employer. However, because he is unable to pursue the area of industry he had been working in since June of 1976 and has sustained some loss of earnings, a finding of a small degree of industrial disability can be supported by the record as a whole.

Healing period is determined by claimant's return to work or medical indication that he has recuperated. Code section 85.34(1). There is no clear medical evidence regarding recuperation. Although claimant quit working with defendant-employer per doctor's instructions, he testified that he thereafter went on unemployment benefits and hence held himself out as being employable. Accordingly, Dr. Bedell's comment about claimant's recovery period lasting six weeks after October 13, 1978 is not found determinative of the healing period. However, the history Dr. Bedell took from the claimant and claimant's testimony support a finding that claimant's condition would take a few days to clear after exposure even in a lead supervisor position.

WHEREFORE, based on the medical reports, claimant's testimony and the wage statement filed August 27, 1979, it is hereby found that claimant sustained a four (4) percent disability to the body as a whole as a result of the exposure to TDI which resulted in a permanent allergic condition.

It is further found, based on the medical reports, claimant's testimony and claimant's 1978 absenteeism report, that claimant is entitled to healing period from the inception of his allergic condition until one (1) week following his voluntary termination of employment with the defendant-employer, minus those days he actually worked or was off work for reasons unrelated to said condition. The defendants indicated they agreed to compensate claimant for such amount of time as indicated on claimant's exhibit 6.

* * *

Signed and filed this 31st day of October, 1979.

LEE M. JACKWIG
Deputy Industrial Commissioner

No Appeal.

MAURICE BURTON LITTON,

Claimant,

vs.

WEAN CHEVROLET-OLDS, INC.,

Employer,

and

I.A.D.A. INSURANCE COMPANY,

Insurance Carrier,
Defendants.

Appeal Decision

Defendants appeal from a proposed arbitration decision wherein claimant was found to have sustained an injury arising out of and in the course of his employment resulting in 25% permanent partial disability to the body as a whole and 76 weeks, 3 days, of healing period.

* * *

On review of the record the deputy's proposed findings of fact and conclusions are proper with the following modifications.

The deputy awarded healing period benefits from May 3, 1977 until October 21, 1978. On review of Dr. Hayne's deposition, claimant's condition did not change between the first examination of September 21, 1978 and the second examination on October 21, 1978. Therefore, there is no reason to extend the healing period beyond the date of Dr. Hayne's first examination on September 21, 1978.

The deputy awarded attorney fees to claimant's attorneys with respect to the payments made by Federated Mutual Insurance Company. Payments made by Federated Mutual are covered by Iowa Code §85.38, which does not contemplate awards of attorneys' fees. Therefore, the deputy had no authority to award attorneys' fees with respect to payments made by the Federated Mutual Insurance Company.

* * *

Signed and filed this 4th day of March, 1980.

ROBERT C. LANDESS
Industrial Commissioner

No Appeal.

ROBERT LUNDEEN,

Claimant,

vs.

QUAD-CITY CONSTRUCTION COMPANY,

Employer,

and

LIBERTY MUTUAL INSURANCE COMPANY,

Insurance Carrier,
Defendants.

Appeal Decision

This is an appeal by the defendants from a proposed arbitration decision wherein claimant was awarded healing period, permanent partial disability and medical expenses.

* * *

On reviewing the record, it is found that the deputy's findings of fact and conclusions of law are proper.

There is correspondence in the file which indicates that the claimant in this matter died on March 26, 1979 from causes not related to the injury upon which claimant had based his claim. However, claimant's death is not a matter of evidential record for the purposes of this appeal. Therefore, claimant's death does not bear upon the final dispostion of this appeal.

Iowa Code section 85.31(4) states:

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

In light of the purpose and principles served by the Iowa Workers' Compensation Act, it cannot be said that an employer is released from all liability incurred and owing prior to a claimant's untimely death. A fair interpretation of Iowa Code section 85.31(4) indicates that any portion of an award which has not accrued as of the date of a claimant's non-related death will abate along with any liability on the part of the employer. However, any award which has accrued prior to a claimant's demise that is still owing upon the date of claimant's death does not abate.

* * *

Signed and filed this 31st day of March, 1980.

ROBERT C. LANDESS
Industrial Commissioner

No Appeal.

ROBERT LUNDEEN,

Claimant,

vs.

QUAD-CITY CONSTRUCTION COMPANY,

Employer,

and

LIBERTY MUTUAL INSURANCE COMPANY,

Insurance Carrier,
Defendants.

Appeal Decision

This is a rehearing of an appeal by the defendants from a proposed arbitration decision wherein claimant was awarded healing period, permanent partial disability and medical expenses. Additional evidence was allowed by stipulation of the parties.

* * *

The findings of fact and conclusions of law of the appeal decision filed March 31, 1980 are incorporated with the following expansion and modification.

On March 26, 1979 the claimant died of causes not related to the injury for which claimant is entitled to compensation benefits in this case. Iowa Code section 85.31(4) is controlling in this matter, and it states:

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

In light of the purpose and principles served by the Iowa Workers' Compensation Act, it cannot be said that an employer is released from all liability incurred and owing prior to a claimant's untimely death. A fair interpretation of Iowa Code section 85.31(4) indicates that any portion of an award which has not accrued as of the date of a claimant's non-related death will abate along with any further liability on the part of the employer. However, any award which was due prior to a claimant's demise that is still owing upon the date of claimant's death does not abate.

Applying the foregoing to the record in this matter, it is clear that the amount of compensation which had accrued prior to March 26, 1979 is still owing. On March 26, 1979 the unaccrued compensation benefits abated along with any further liability on the part of the defendants.

* * *

Signed and filed this 4th day of June, 1980.

ROBERT C. LANDESS
Industrial Commissioner

CECIL McCOMBS,

Claimant,

vs.

MERCY HOSPITAL,

Employer,

and

ST. PAUL COMPANIES,

Insurance Carrier,
Defendants.

Appeal Decision

Claimant, Cecil McCombs, and defendants, Mercy Hospital and its insurance carrier, have appealed from a proposed review-reopening decision wherein claimant was awarded permanent partial disability compensation along with healing period benefits, mileage, hospital visits, and rehabilitation payments.

* * *

The issues presented on appeal are the duration of the healing period and the extent of permanent partial disability.

In 1966 claimant went to work for defendant-employer as a janitor. Claimant's duties included general cleaning; moving chairs, beds, and mattresses; waxing floors, and emptying garbage cans. On January 5, 1971 claimant underwent a lumbar laminectomy at the L-4, L-5 on the left. Claimant made a good recovery from this surgery and had no residual pain or numbness. Claimant had prior to this time two hernioplasties, a hemorrhoidectomy, an appendectomy and ulcer surgery, and again there had been no residual pain or numbness.

On July 23, 1973 claimant was pushing a barrel at work when he slipped on a wet substance on the floor. Claimant, who did not completely fall but did twist his back in trying to recover his balance, experienced sharp pains in his lower back during the incident.

On July 24, 1973 claimant visited the emergency room of Mercy Hospital and was given a prescription for Norgesic. On July 27, claimant saw Dr. Robinow, who noted that claimant was complaining of pain in both legs and in the low back area. An x-ray examination showed some hypertrophic degenerative changes of the L-4, L-5 area and a narrowing of the L-5, S-1 interspace. Dr. Robinow prescribed physical therapy consisting of heat, massage and diathermy and concluded that claimant had an acute myofascial strain.

On August 6, 1973 claimant was admitted to Mercy Hospital for conservative treatment. Claimant did not show any signs of improvement; therefore, a lumbar myelogram was performed which disclosed a defect at the L4-5 on the right. A lumbar laminectomy was performed and a partially extruded herniated disc was removed at L4-5 on the right.

Claimant testified that the pain from the July 23, 1973 incident did not subside after this second surgery. Claimant complained about a pain in the abdomen and groin and claimed there was a lump on his side. Dr. Robinow could not find the lump or the source of the abdominal pain, although he did find a small ridge. Dr. Robinow speculated that it might be a recurrence of a hernia. On October 1, 1973 Dr. Robinow noted that the area where surgery had been performed was clearing up but the abdominal problem was a new development. Claimant was taking Empirin and Valium during this period.

On February 28, 1974 Dr. Robinow wrote that claimant had a 20 percent disability to the body as a whole. Dr. Robinow thought claimant could go to work if the job entailed no lifting and there was a balance between standing and sitting.

On March 18, 1974 Dr. Robinow noted that claimant was still suffering from pain in the back, right hip and right lower quadrant. On April 16, 1974 claimant was admitted to Mercy Hospital for conservative treatment of the right low back and right lower extremity. Claimant was seen by Dr. Clemens about the abdominal problem but no solution was found.

After discharge claimant saw John T. Bakody, M.D., about a possible rhizotomy. Bakody had claimant admitted to Mercy Hospital on June 2, 1974. A rhizotomy was performed but no additional relief was achieved by this procedure.

On August 22, 1974 Dr. Robinow admitted claimant to Mercy Hospital because of continued pain in the right lower extremity. A lumbar myelogram was performed but no definite defect was found. Dr. Bakody saw claimant again but was unable to discover any beneficial treatment.

Claimant saw Dr. Robinow on December 9, 1974 at which time claimant's condition remained unchanged. Dr. Robinow noted that claimant still had low back and right lower extremity pain, and observed that claimant was depressed from the persistent pain and prescribed Fiorinal and Elavil.

Claimant saw Martin T. Krakauer, Ph.D., a clinical psychologist, sometime during the spring or early part of the summer of 1975. Although Dr. Krakauer did not come up with any conclusive diagnosis, he did note that there were no findings that claimant's pain had a neurotic basis nor represented malingering. However, Marvin H. Dubansky, M.D., an associate of Dr. Robinow, wrote on September 4, 1975 that he thought claimant's pain might have some psychological basis which might be due in part to some drug problems. Dubansky, like the other doctors, was unable to come up with a solution.

Claimant started vocational rehabilitation on January 12, 1976 in Des Moines. Claimant was given a series of aptitude tests and eventually was sent to Goodwill Industries. Claimant worked at Goodwill for two short periods of time, but he found the job required too much stooping, bending and lifting. Such activity aggravated claimant's pain so he quit the Goodwill job. No one has talked to claimant about the possibility of any additional vocational training.

Claimant saw Dr. Wirtz, an orthopedic surgeon, on June 3, 1976. Dr. Wirtz diagnosed claimant's problem as chronic musculoskeletal strain of the lower back area and gave

claimant a functional disability rating of 10 percent. Claimant saw Dr. Wirtz again in early November 1977. Dr. Wirtz noted that claimant's condition had not changed since June, although he did state that x-rays showed a continuation of the degeneration at the L4-5 and L5-S1 disc spaces. Dr. Wirtz found claimant's physical disability to still be 10 percent. Dr. Wirtz, who testified that did not think claimant would be physically prevented from engaging in housekeeping duties, gave claimant a weight lifting limit of forty pounds. Dr. Wirtz did not think a pain clinic would be beneficial for claimant.

In June 1977 Margaret DeRuyscher, who is a job placement officer with Job Service of Iowa, interviewed claimant about possible job opportunities. Nothing resulted from the interview and apparently claimant was unable to secure any employment. On November 24, 1977 DeRuyscher interviewed claimant again. DeRuyscher testified that there were no jobs available, especially because claimant was limited to public transportation. DeRuyscher thought claimant was sincere about finding a job, but she doubted whether permanent employment would be feasible. In addition to his attempts to find employment through Job Service of Iowa, claimant contacted defendant employer several times about possible jobs but had no success.

The requirements for healing period benefits are set forth in Iowa Code §85.34(1) which states in part:

> If an employee has suffered a personal injury causing permanent partial disability for which compensation is payable . . . the employer shall pay to the employee compensation for a healting period . . . beginning on the date of the injury, and until he has returned to work or competent medical evidence indicates that recuperation from said injury has been accomplished, whichever comes first.

The word recuperation has been interpreted in Industrial Commissioner Rule 500-8.3(85) which states: "Recuperation occurs when it is medically indicated that either no further improvement is anticipated from the injury or that the employee is capable of returning to employment substantially similar to that in which the employee was engaged at the time of the injury, whichever occurs first."

The deputy awarded healing period benefits from the date of the injury, July 23, 1973, through November 6, 1973. Claimant contends on appeal that he has not returned to work or recuperated from the injury and is entitled to a running healing period award. Claimant has presented three brief points on appeal. The first brief point contains eight parts.

First, claimant challenges the deputy's finding that claimant has a tendency to exaggerate. This finding was based upon claimant's testimony about a bulge in the right lower quadrant area. Dr. Robinow evidently found a ridge in the same area but it is not clear whether the bulge and the ridge were the same thing. However, this is irrelevant for no reasonable connection can be made between claimant's testimony about the bulge and any possible tendency to exaggerate. It should be noted that Dr. Krakauer made no mention of claimant having a tendency to exaggerate in his psychological report.

Second, claimant attacks the deputy's finding that he was not well motivated to work. Both Dr. Krakauer and Margaret DeRuyscher stated that claimant was sincere in obtaining employment within his limitations. Dr. Krakauer did mention that claimant was a relatively unmotivated person in his report. However, in the context of the report, Dr. Krakauer was not speaking about claimant's desire to find employment but rather about a lack of desire to be successful. The deputy mentioned claimant might be able to solve his transportation problem with a "little ingenuity," but offered no solution. Margaret DeRuyscher thought that limited transportation posed a considerable problem for claimant. She, as an expert in job placement, was unable to pose a solution to this problem. Thus, claimant's inability to find alternatives in this area cannot be counted against him.

Third, claimant contends that disregarding the opinions of Margaret DeRuyscher was unreasonable. DeRuyscher's opinions were confined to those areas in which her job requires a certain amount of expertise. This expertise is in the area of job placement and DeRuyscher was certainly qualified to comment on claimant's employment possibilities. Therefore, DeRuyscher's opinions should be and are considered.

Fourth, claimant challenges the deputy's comment about Dr. Krakauer's finding about his motivation. As mentioned above, Dr. Krakauer's notes on claimant's motivation concerned traits in claimant's personality that are different from his desire to obtain work, and should be considered in that manner.

Fifth, claimant contends the deputy should set out facts regarding his observations of the claimant's demeanor regarding lack of motivation. This was an observation the deputy made regarding his interpretation of claimant's attitude and based on an interpretation of attitude and not upon any specific fact. The deputy's observations of claimant's demeanor cannot be assessed on appeal, so that such observations can only be weighed in light of other testimony and evidence in the record.

Sixth, claimant challenges the deputy's finding that claimant did not have a work history of heavy labor. The controversy centers around the definition of heavy labor. An exact definition of what constitutes heavy labor is irrelevant to the outcome of this decision. Rather, this claimant's abilities and limitations are considered in light of the work claimant has done and the effect it has had upon him.

Seventh, claimant contends that the deputy's emphasis on the transportation problem was unfounded and should not have counted against claimant. This contention was specifically addressed in the second point above in which it was found that this should not count against the claimant.

Eighth, the claimant contests the deputy's finding that the healing period ran from the date of the injury until November 6, 1973. Defendants filed a Form 5 on December 8, 1977 which disclosed that temporary or healing period benefits had been paid through June 28, 1976. Since claimant has not returned to similar work, the relevant test

for termination of healing period benefits under Iowa Code §85.34(1) and Industrial Commissioner Rule 500-8.3(85) is whether the medical evidence indicates that no further improvement is anticipated from the injury. Although it may appear from the record that this test may have been satisfied prior to June 28, 1978, the defendants have voluntarily paid healing period benefits to this point. The law does not specifically provide for credit for overpayment of healing period benefits against permanent partial disability benefits. Since the legislature specifically provided for such a credit when a permanent total disability is involved, it must be assumed that such a credit was not intended for permanent partial disability. Thus, the defendants are not entitled to a credit for any overpayment of healing period benefits.

Claimant's condition apparently had stabilized by November 1973 as indicated by the testimony of Dr. Robinow. However, claimant did enter Mercy Hospital twice in the summer of 1974 in an effort to improving his condition. During these two hospital stays claimant underwent a rhizotomy and myelogram. Thus, the actual healing period as contemplated by Iowa Code §85.34(1) extended through the summer of 1974 but no further. Beyond this point claimant underwent nothing more than maintenance treatment. Therefore, claimant is not entitled to any additional healing period benefits than what has already been paid.

Claimant contends in his second major point that he has a high degree of permanent partial disability. The deputy found that claimant had an industrial disability of 50 percent of the body as a whole. Dr. Robinow gave claimant a physical disability rating of 20 percent while Dr. Wirtz gave a 10 percent rating. Dr. Robinow's rating must be given greater weight since he treated claimant throughout the period in controversy.

Functional disability is an element to be considered in determining industrial disability which is the reduction of earning capacity, but consideration must also be given to the injured employee's age, education, qualifications, experience and inability to engage in employment for which he is fitted. *Olson v. Goodyear Service Stores,* 255 Iowa 1112, 125 N.W.2d 251 (1963). There is ample evidence in the record to support the deputy's finding of 50 percent industrial disability based on the physical impairment rating and other factors such as claimant's limited work experience.

In his third major point, claimant contends that he is entitled to healing period compensation paid to the date of the review-reopening decision. As discussed above, claimant met the test for termination of healing period benefits even prior to when defendants stopped paying such benefits. Thus, claimant is not entitled to healing period benefits beyond those which have already been paid.

Claimant further contends that he is entitled as a matter of law to healing period compensation to the date of the review-reopening decision. Claimant relies on *Auxier v. Woodward State Hospital-School,* 266 N.W.2d 139 (1978) for the proposition that he is entitled to notice of and reasons for termination of healing period benefits. There is no evidence in the record that claimant received such notice. However, the notice requirements stated in *Auxier* do not apply in the present case because benefits were terminated prior to May 17, 1978. *Gaddy v. Iowa Beer and Liquor Control Commission* (industrial commissioner filed October 11, 1978). This commissioner held in *Gaddy* that the notice requirement in *Auxier* did not apply retroactively. Therefore, claimant is not entitled to healing period benefits to the date of the review-reopening decision as a matter of law.

* * *

Signed and filed this 31st day of January, 1979.

ROBERT C. LANDESS
Industrial Commissioner

Appealed to District Court: Dismissed.

KENNETH A. McCOY,

Claimant,

vs.

DEPARTMENT OF TRANSPORTATION,

Employer,

and

STATE OF IOWA,

Insurance Carrier,
Defendants.

Ruling

NOW on this day the matter of defendants' motion to dismiss claimant's appeal comes on for determination. No resistance has been filed.

A proposed decision in review-reopening was filed in this matter on January 24, 1980. Claimant's notice of appeal was filed on February 18, 1980.

Defendants assert, as a basis for their motion, that claimant's appeal was not timely filed. Industrial Commissioner Rule 500-4.27(86,17A) states:

> Except as provided in 4.2 and 4.25, an appeal to the commissioner from a decision, order or ruling of a deputy commissioner in 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. (Emphasis supplied.)

This rule adopted pursuant to the Iowa Code clearly states that the appealing party has twenty days in which to file a

notice of appeal with the commissioner following the date on which the deputy commissioner's decision, order or ruling is filed.

Iowa Code section 4.1(22) provides the method for computing time in applying rule 500-4.27. It states in part:

> In computing time, the first day shall be excluded and the last included, unless the last falls on Sunday, in which case the time prescribed shall be extended so as to include the whole of the following Monday . . . .

Thus, under rule 500-4.27, the last day on which an appeal could be filed from the January 24, 1980 decision of the deputy industrial commissioner was February 13, 1980.

The Iowa Supreme Court in *Barlow v. Midwest Roofing Co.,* 249 Iowa 1358, 1360, 92 N.W.2d 406, 407 (1958) announced:

> 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 commissoner. It must be conceded that the commissioner himself cannot extend or diminish his jurisdiction to act under this law.

Thus, Code of Iowa section 86.24 and rule 500-4.27 are jurisdictional in nature. When the time prescribed for filing an appeal has passed, the commissioner no longer has jurisdiction to hear the appeal. In other words, the commissioner no longer has the power to act on the matter. As noted previously, the commissioner is limited to the exercise of those powers prescribed in workers' compensation law and cannot extend his jurisdiction to include matters expressly excluded by this law. *Barlow, supra.*

Claimant's notice of appeal was not received by this office until February 18, 1980 and was, therefore, not filed within twenty days of the deputy's January 24, 1980 decision as required by rule 500-4.27. Based upon these considerations, claimant's request for an appeal must fail.

In the case sub judice, the deputy industrial commissioner also filed a nunc pro tunc order on January 28, 1980 amending the decision to allow credit for healing period and permanent partial disability benefits previously paid. The courts possess the inherent power to correct the record and enter a 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). In *Jersild v. Sarcone,* 163 N.W.2d 81 (1968), the Iowa Supreme Court stated that the purpose of a nunc pro tunc order or judgment is "to correct an obvious mistake or to make the record conform to an adjudication actually or inferentially made but which by oversight or evident mistake was omitted from the record." Thus, the use of the order assumes the existence of a prior judgment. Generally, notice is not 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).

More recently in *State v. Onstot,* 268 N.W.2d 219, 220, the Iowa Supreme Court stated:

> An order nunc pro tunc is allowed on a limited basis for the retroactive correction of errors or omissions in the form of prior orders. We explained such orders in *Ruth v. Clark, Inc. v. Emery,* 235 Iowa 131, 134, 15 N.W.2d 896, 898 (1944):
>
> "It is true that a court may make orders nunc pro tunc, but this is only done to *show now* what was actually *done then,* and its function is not to change but to show what took place. The application for an order to correct the record to show an application which was not made cannot be entertained. [Authorities]." (Emphasis added.)
>
> It is generally held an order nunc pro tunc cannot furnish the basis of extending the time in which to file an appeal. 5B C.J.S. Appeal & Error §1956, p. 522; 4 Am. Jur.2d, Appeal & Error, §293, pp. 783-784.
>
> Time for filing of this appeal was not extended by the so-called order nunc pro tunc. * * * *

It is evident that the deputy's nunc pro tunc order did nothing but amend the decision to give credit for benefits previously paid. The order did not alter the outcome of the case and was not prejudicial to the parties involved.

The general rule is that the entry of a nunc pro tunc order 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).

Therefore, the nunc pro tunc order filed January 28, 1980 relates back to have validity from the date of the deputy's decision rendered on January 24, 1980. The nunc pro tunc order does not act to extend the time for filing a notice of appeal under the deputy's decision under rule 500-4.27. Thus, claimant failed to file his notice of appeal within twenty days of the deputy industrial commissioner's decision. As previously noted, this time requirement is jurisdictional in nature. Therefore, the industrial commissioner lacks the power to hear this appeal.

* * *

Signed and filed this 26 day of March, 1980.

ROBERT C. LANDESS
Industrial Commissioner

No Appeal.

MARVIN DALE McDONALD,

Claimant

vs.

WILSON FOODS CORPORATION,

Employer,
Self-Insured,
Defendant.

Appeal Decision

Defendant has appealed from a proposed arbitration

decision wherein claimant was given a running award for temporary total disability.

* * *

The issues on appeal are whether claimant suffered an injury which arose out of and in the course of his employment and, if he did, then what is the nature and extent of disability which resulted.

Claimant first went to work at Wilson Foods in 1974. He was assigned to the load-out dock where he cut down sides of beef to load onto trucks. After three weeks claimant was reassigned to pulling leaf lard from hogs. Claimant performed this duty until October 18, 1978, when he stopped working. Pulling leaf lard requires breaking the lard loose with a thumb, then pulling the lard with both hands from the hog and finally throwing the lard into a hopper. Claimant testified that this task required a lot of exertion and that he performed this procedure about 5,000 times each day.

In about 1976 claimant started getting a fingernail infection which is known at Wilson Foods as "leaf lard nails." The personnel manager for Wilson Foods testified that this infection is common among new employees and that it normally takes two to three days to heal. Claimant testified that for him the occurrence of the infection increased with time.

In June, 1978 claimant started getting pain in his knuckles and arm. The company doctors told claimant the pain was due to the infection mentioned above. In September, 1978 the pain continued to worsen and claimant had to take some time off work.

On October 18, 1978 claimant saw Dr. Garner, who made a diagnosis of arthritis of the hands with Heberden's nodes. October 18 was also claimant's last day of work.

On October 20, 1978 claimant saw Albert D. Blenderman, M.D. Dr. Blenderman examined claimant and reported:

> . . . [claimant] has developed some nodules especially along the dorsum of some of the finger joints, especially around the thunb.
>
> Physical examination of both hands is approximately the same. The patient has what appears to be typical Heberden's nodes on the dorsum of the distal phalange of the thumbs and a lesser degree in the region of the index fingers bilaterally.
>
> All of the joints on both hands are enlarged and all of the joints are very tender to palpation.
>
> The patient does not have any obvious ulnar drift of the fingers as yet and has no actual limitation of motion. However, flexion and extension of the fingers is moderately uncomfortable.
>
> The patient denies joint problems elsewhere.
>
> X-rays of the left hand in multiple projections were taken here in our office on this date. These x-rays show the soft tissue enlargement, but there is no obvious major joint narrowing of the finger joints. On the thumb there is some calcification along the volar surface of the joint, but no major joint narrowing.

Dr. Blenderman diagnosed claimant's condition, as rheumatoid arthritis and gout but the doctor did not consider this to be a definitive diagnosis. Dr. Blenderman thought claimant should find lighter work because claimant's hands could not stand up to heavy usage for much longer. Dr. Blenderman recommended vocational rehabilitation and noted that retraining for claimant ought to be easy.

According to the record, Dr. Garner saw claimant for the last time on December 12, 1978. There is some indication in the record that claimant was going to see Dr. Garner sometime in June, 1978, but nothing has been submitted in regard to that visit. In a report dated December 18, 1979, Dr. Garner indicated that the diagnosis of claimant's problem was still rheumatoid arthritis. Dr. Garner indicated that the condition was worsened by heavy work and recommended that claimant seek another line of work. Dr. Garner prescribed some medication, but there is no indication as to the type and reason for the medication.

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 Company, 236 Iowa 296, 18 NW2d 607 (1945). A possibility is insufficient; a probabilty is necessary. Burt v. John Deere Waterloo Tractor Works, 247 Iowa 691, 73 NW2d 732 (1956). Questions of causal connection are essentially within the domain of expert testimony. Bradshaw v. Iowa Methodist Hospital, 251 Iowa 375, 101 NW2d 167 (1960).

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 NW2d 667 (Iowa 1971). 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 or "lighted up" so it results in a disability found to exist, he is entitled to compensation to the extent of the injury. Yeager v. Firestone Tire & Rubber Company, 253 Iowa 369, 112 NW2d 299 (1961). If claimant's condition is more than slightly aggravated, the resultant condition is considered a personal injury within the Iowa law. Ziegler v. U S Gypsum Company, 252 Iowa 613, 106 NW2d 591 (1961).

Claimant failed to sustain his burden of proof that his rheumatoid arthritis with Heberden's nodes arose out of and in the course of his employment. Dr. Garner established in his testimony that trauma is not a factor in the type of arthritis which has Heberden's nodes, and that claimant has the type of arthritis in which Heberden's nodes are the predominant physical finding. The evidence is clear that claimant's employment did not cause the underlying arthritis. Just because a condition progresses to the point that it becomes disabling while work for an employer is being performed does not make it a compensable injury.

However, claimant did sustain his burden of proof that he suffered an aggravation of his arthritis which arose out of and in the course of his employment. Dr. Garner

testified that the heavy work claimant performed at Wilson Foods aggravated the pain and swelling associated with the arthritis. Dr. Garner thought the pain claimant was experiencing was more severe because of the work. Therefore, claimant is entitled to compensation to the extent of the work-related aggravation.

The next question is the extent and type of disability which the aggravation caused. There is no evidence in the record that the aggravated pain caused any permanent disability. Rather, the record indicates that the aggravation was more like a "lighting up" of the condition. Also, the recommendations of the doctors for claimant to find lighter work do not indicate that the aggravation has caused any permanency. The recommendations were made because the underlying condition of arthritis exists, and is much like the case where a person has had a heart attack and is advised not to get into stressful situations.

Claimant, however, was temporarily and totally disabled because of the aggravated pain. Temporary total disability does not necessarily contemplate that all residuals from an injury must be completely healed and returned to normal. It is only when the evidence shows that because of the effects of the injury gainful employment cannot be pursued. The pain in claimant's hands had become so severe by October 18, 1978 that he stopped working and saw Dr. Garner. Claimant continued under regular medical care until December 12, 1978. Beyond December 12, 1978 it is impossible to determine from the record the extent of claimant's disability. At the hearing on June 13, 1979 claimant was asked on direct examination:

> Q. And how are your hands now?
>
> A. They seem to have healed up a lot better, but if I don't use them a little bit, they'll get stiff. And if you do a lot to get the stiffness out, then I get pain in it.

Later in the hearing claimant's wife, Tamara McDonald, was asked on direct examination:

> Q. And what has happened from your observation with his hands since he [claimant] hasn't been working?
>
> A. Well, I know that when he does use them, they do get sore, but from what I've watched, they're not half as bad as when he was working at Wilson.
>
> Q. Does he complain of pain as often?
>
> A. No.

This testimony from claimant and his wife indicates that the work-related aggravated pain eventually disappeared. However, the testimony does not indicate when it disappeared. To extend the period of temporary total disability beyond the period of regular medical attention--December 12, 1978--would amount to speculation. Therefore, claimant has sustained his burden of proof that he was temporarily and totally disabled from October 18, 1978 through December 12, 1978.

In his resistance to defendant's petition for review, claimant argues that defendant's petition is untimely and not in accordance with the administrative rules since no application for rehearing was made to the hearing officer. The proposed arbitration decision was filed on July 26, 1979 and defendant's petition for review was filed on August 13, 1979 and therefore was timely under Industrial Commissioner Rule 500-4.27 since twenty days had not elapsed. Also, there is no requirement that a party who is appealing file a request for a rehearing before filing a petition for review within this agency. See Rule 500-4.27, supra.

* * *

Signed and filed this 21 day of December, 1979.

ROBERT C. LANDESS
Industrial Commissioner

No Appeal.

G. DICK McELROY,

Claimant,

vs.

ROUNDY'S FOODLAND,

Employer

and

INSURANCE COMPANY OF NORTH AMERICA,

Insurance Carrier,
Defendants.

Arbitration Decision

This is a proceeding in arbitration brought by G. Dick McElroy, claimant, against Roundy's Foodland, employer and Insurance Company of North America, insurance carrier, for benefits as a result of an injury sustained in October 1978.

* * *

The issues to be determined are whether the claimant received an injury arising out of and in the course of his employment; whether there is a causal relationship between the alleged injury and the disability; whether claimant is entitled to benefits for temporary total disability; and whether the claimant is precluded from recovery under Section 85.23, Code of Iowa.

* * *

Claimant, age 38, testified he lived all his life in Missouri Valley, Iowa. He is a high school graduate and worked since 1958 exclusively in the grocery business. In 1964 he became employed by the defendant and worked as a checker, in the produce department as a stock boy and reguarly helped unload the delivery trucks. He has worked fo;the employer for 14 1/2 years doing the heavier work including lifting 40 to 80 pound salt bags and occasionally lifting 100 pound bags of potatoes.

Claimant is presently employed at one of the HyVee grocery stores in Council Bluffs, Iowa. Claimant stated he never experienced a hernia before the present claimed injury.

He testified that some time in October 1978 while unloading a delivery truck, he lifted up a series of bags of pellets, placing them in stacks, when he felt a sharp pain or strain in his left abdomen. The pain continued for approximately a week and eventually went away. He did not tell anyone at the time that he had experienced the pain in his lower abdomen area. Sometime in January or February 1979 the area on the left side of his groin bulged and he told the owner, Mr. Roundy, of his condition. Nevertheless, he continued to work and did the regular lifting duties for his employer. He testified that in late June 1979 the area bulged out again and would not go back in. At that point he saw his treating physician, J.W. Barnes, M.D., the first treatment being on June 22, 1979.

Claimant admits he knew he hurt himself somehow and he had a sharp and acute pain following the lifting episode in October 1978. He stated he did not recall telling any co-employees of the accident or incident but did tell Mr. Roundy sometime in late January or early February 1979 that he thought he had a hernia but did not state that he received it on the job. He stated that since it started to bulge out in January or February and would go away that he started to associate or put all together the occurrence of the hernia at that time. In January and February 1979 he would feel the hernia and it bothered him, seeming to be worse.

Claimant stated he was not aware of what caused his hernia until he was told by Dr. Barnes that he had a left inguinal hernia that required surgery. He then told Mr. Roundy that he had a hernia which required surgery. He requested from Mr. Roundy the workers' compensation forms which were given to him to fill out. The commissioner's file reflects that an employer's first report of injury was filed on June 26, 1979.

Claimant underwent surgery, a herniorraphy, at the hands of Dr. Barnes and R. J. Fitzgibbons, M.D., at Community Memorial Hospital, Missouri Valley, Iowa on June 29, 1979. He returned to work on August 13, 1979.

Lloyd Roundy, age 67, testified that he was the owner of Roundy's Foodland for some thirty-one to thirty-two years and acknowledge that the claimant had worked for him for about 14 years. He testified that the claimant did not tell him of an accident or injury in October 1978. Furthermore, he did not recall in January or February 1979 that he was told that the claimant had a hernia. Roundy testified that in late June of 1979 he was told by the claimant that he had seen a doctor and the doctor had advised the claimant that he had a left inguinal hernia that needed surgery. Roundy denied at that time that the claimant stated that his hernia was work-related. He acknowledged that the claimant asked for workers' compensation forms and he obtained them for the claimant.

Will Peffer's testimony was admitted over objection of the claimant. Mr. Peffer testified that he was an employee for Roundy's Foodland for 5 years and had worked with the claimant stocking shelves and unloading trucks and doing similar jobs. Peffer stated that he could not recall the exact time or date, but while working with the claimant, the claimant had stated he thought he had hurt himself and that he had discussed the lower abdomen injury with Peffer. Peffer stated that on more than one occasion he had advised the claimant to tell his employer, Mr. Roundy, that he was hurt and he had better obtain medical attention.

The medical report of J.W. Barnes, M.D., dated December 11, 1979, and February 4, 1980, does establish causation:

> Dick McElroy was first seen by me on June 22, 1979 for inguinal hernia -- eight months duration -- Secondary to lifting during his employment.
>
> He underwent subsequent herniorrhapy on June 29, 1979. He returned back to work on August 13, 1979.

Additionally:

> In reference to your letter of December 28, 1979, the medical records at Community Memorial Hospital state the duration to be eight months. This coincides with my recollection and understanding as to when the hernia occurred.

The claimant has the burden of proving by a preponderance of the evidence that the injury of October 1978 is the cause of his disability on which he now bases his claim. *Bodish v. Fischer, Inc.,* 257 Iowa 516, 133 N.W.2d 867 (1965). *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 testimony. *Bradshaw v. Iowa Methodist Hospital,* 251 Iowa 375, 101 N.W.2d 167 (1960).

There appears to be little dispute as to the fact that the claimant sustained his hernia on the job. The unrefuted testimony of the claimant shows that he injured himself, incurring the hernia in a lifting episode sometime in October 1978.

The applicable notice provision of Section 85.23, Code of Iowa, provides:

> 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.

Code Section 85.23 specifically refers to the "date of the occurrence of the injury" and the Iowa Supreme Court has held that "an occurrence" indicates when the employee first discovered the nature of his or her disability.

This statutory section has been annotated in the revised edition of the Iowa Workers' Compensation Law, citing several cases including *Jacques v. Farmers Lumber and*

Supply Co., 242 Iowa 548, 47 N.W.2d 236 (195).

It is the "notice" issue under the Iowa Code Section 85.23 which is dispositive of this claim. The question of when the claimant acquired or should have acquired knowledge of a possible causal connection between his disability and the industrial injury was properly raised in this case. It is found that the claimant became aware of the compensable nature and cause for his apparent discomfort in late January or early February 1979 when he first noticed that the hernia bulged out and would not go away. This knowledge coupled with the initial pain caused in a lifting incident in October, 1978, which continued for a period of a week should have led the claimant, as a resonable man, to the conclusion of a causal connection between his condition and the industrial injury. It is found that claimant did associate the bulging of the hernia in January or in October 1978. He mentioned his condition to his employer in late January or February 1979 without calling attention to the employer the fact he had the injury on the job. The employer's testimony is given the greater rate of credibility where he testified that it was not until late June 1979 that he was informed by the claimant of his left inguinal hernia which required surgery and at that time he was requested to provide the workers' compensation forms to the claimant.

It is therefore concluded that neither the employer nor his representative had actual knowledge of the occurrence of an injury received by the claimant within ninety days from the date of the occurrence of the injury as is required under the notice of injury provision, Section 85.23, Code of Iowa. This is fatal to the claimant's claim for compensation. The claim must necessarily be denied.

* * *

Signed and filed this 11th day of April, 1980.

THOMAS R. MOELLER
Deputy Industrial Commissioner

No Appeal.

JAMES A. McINROY,

Claimant,

vs.

PIONEER SEED COMPANY,

Employer,

and

SEABOARD FIRE & MARINE,

Insurance Carrier,
Defendants.

Appeal Decision

This is a proceeding brought by defendant employer, Pioneer Seed Company, and its insurance carrier, Seaboard Fire & Marine Insurance Company, pursuant to Rule 500-4.27 seeking appeal of a review-reopening decision wherein claimant, James A. McInroy, was awarded medical expenses, healing period benefits, and permanent partial disability as a result of an industrial injury sustained on December 5, 1974.

* * *

On December 5, 1974 claimant fell thirty-five to forty feet in a manlift. This fall resulted in a compression fracture of the twelfth thoracic vertebra. Claimant was off work from that time until April 3, 1975.

The case sub judice is complicated by the claimant's having suffered as a teenager from rare avian tuberculosis which caused osteomyelitis. Treatment of this disease required some thirty operations and chemotheraphy. These measures had rendered claimant asymptomatic at the time of his accident and, apparently from doctors' reports, for some time subsequent thereto. After claimant's accident, he underwent a lymphadenopathy, a dacryocystorhinostomy, and a bronchoscopy none of which was related to the accident. The perplexing nature of the causation factor here has contributed to several delays in the resolution of this matter as an attempt has been made to sort out, to distill, and to interpret the medical evidence and testimony in the proper manner. An endeavor has been made to determine claimant's physical condition prior to, immediately following and subsequent to his accident.

Defendants argue two issues on appeal. First they allege that "claimant has failed to establish by a preponderance of the evidence a causal connection between his injury and the condition or disability being claimed." Defendants' second contention is that "claimant is not entitled to recover for permanent disability which was present at the time of the injury."

Defendants are of course correct that 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 employment. *Lindhal 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 (1970). 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.,* 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). A 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 pre-existing 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). Defendants' propose error in the deputy's finding a "causal connection between the employment injury and the problems the claimant is experiencing at the third lumbar vertebra." No dispute exists as to the finding that the fracture of the twelfth thoracic vertebra arose out of and in the course of claimant's employment. Claimant has been seen by several doctors. The medical evidence will be presented with particular emphasis given to that dealing with the lumbar area.

Dr. Ivins, orthopedic surgeon and oncologist at the Mayo Clinic, began seeing claimant in 1954 when he came to the clinic with draining sinuses which were ultimately diagnosed as avian tuberculosis. Dr. Ivins stated that "[i]t would be impossible to examine Mr. McInroy and come up with a negative physical examination at any time. He had manifest abnormalities. . . " The doctor reported first seeing claimant regarding his fall on February 13, 1975. At that time, the doctor testified, "[I]t appeared that the only effect of the accident had been a mild to moderate compression fracture of the body of the twelfth thoracic vertebra, and it was for the investigation of this that he sought examination at that time." Regarding his examination of claimant and in response to the question, "Was it negative for his old condition [osteomyelitis]?" the doctor said "Yes." Symptomatic treatment was provided, and claimant was released to return to work. On September 9, 1975, claimant returned to Dr. Ivin complaining of pain in his back and knee. Noting percussion tenderness over the upper lumbar area, the doctor indicated feeling "that there was some change in the appearance of his [claimant's] lumbar spine below the area of his injury." Bone scans done at this time revealed increased uptake at the third lumbar vertebra. The purpose of bone scans, according to Dr. Ivins, is to

> [s]earch for abnormal areas of bone by injecting a radioisotope into the blood stream, and if there is some area of abnormality such as might be caused by an infection or tumor or something like that causing bone destruction and bone repair it will take up an extra amount of the isotope and create a dark spot on the scan.

Agreeing that an injured part of the body is more susceptible to infection, the physician proposed that "this is the relationship originally taken into account by this concept that an infection would be more apt to become clinically evident in an area that has been damaged by trauma than an undamaged area because the resistance of that area would be lowered." It was the doctor's opinion that "the injury received in the accident of stated date gave rise to definite abnormalities in Mr. McInroy's back . . . and that the effect of these injuries and abnormalities in his back has been to seriously decrease his ability to function physically." Dr. Ivins' reexamination of claimant on December 9, 1976 found L-3 to be normal except for degeneration in texture. He voiced "considerable suspicion that he [claimant] "does have activation of his tuberculosis in the body of the third vertebra. In that respect he does have a cause and effect relationship between his injury in 1974 and his present condition." Dr. Ivins' rating of claimant at the time of his deposition was thirty percent whole body permanent disability. This followed a rating of thirty-five percent temporary partial disability of the back reported by the doctor on January 21, 1976.

William C. Sheehan, M.D., whose practice at the Mayo Clinic involves thoracic diseases and internal medicine reported on September 26, 1975 a "presumptive diagnosis" of "traumatic injury to the lumbar spine." A subsequent report on October 24, 1975 listed the diagnosis of the clinic as "traumatic injury to the thoracic and lumbar spine as a result of the accident . . . ."

John C. McDougall, M.D., on December 8, 1976 saw claimant at the request of Dr. Ivins. In a letter to claimant's attorney dated December 20, 1976 the doctor wrote:

> I believe that the L-3 pathology present in your client, Mr. James McInroy, is not related to any injury he suffered prior to early 1976. I base this on the results of x-rays, bone scans and my examination of him on repeated occasions. The pathology in the L-3 vertebral body may be due to recurrent infection and I would say it is possible that this is realted to his trauma, but most unlikely.

Dr. Walker, orthopedic surgeon, evaluated claimant. His thorough report of November 15, 1976 lists the following complaints arising immediately after the accident: "1. Pain in the cervical spine; 2. Pain in the low back generally and also in the lumbodorsal region; 3. Pain in the right shoulder; 4. Pain in the left elbow; and 5. Pain in the left knee and right foot." Claimant's complaints at the time of Walker's examination were:

1. The patient gets pains in his cervical spine and headaches. He also complains of crepitation of the cervical spine in rotation of the neck and head.
2. Some pain in the shoulder, right. The patient is not quite sure whether this is additional pain since the fall or whether it relates directly to the osteomyelitis operations.
3. The patient complains of an aching pain in both forearms from the elbow down.
4. The patient complains of pain particularly in the region of the lumbar spine. I should add that he does not basically complain of the fracture of the body of T-12 in other words this is asymptomatic at this time.
5. He complains of an aching pain in the right sacroiliac joint area.
6. He complains of some generalized aching and pain in both legs in the region of the posterior thigh.
7. He also complains of some aching pain in both lower legs in the area of the tibias and fibulae.

The doctor's findings were:

1. Sprain of the cervical spine associated with some

headache and neck ache.

2. Mild discomfort and tenderness over the body at T-12 which is the area of the compression fracture as described. Sprains in the general region of L-2 and L-3.
3. Sprain in the region of the right sacroiliac joint which is at this time fused.
4. Generalized telalgic pains with radiation of pain into both thighs and lower legs.

Describing telalgic pain the doctor said it would be "pain that is not distributed over a nerve root course." He attributed some of the pain to operation scars; however, he believed the back pain was the greater contributing factor.

Although Dr. McDougall reported the L-3 pathology was not related to an injury prior to early 1976, the testimony of Drs. Ivins, Sheehan and Walker taken together is of sufficient weight to sustain claimant's burden of establishing a causal connection between the employment injury and the problems the claimant is experiencing at the third lumbar vertebra level.

When an injury is to the body as a whole as in the case here presented, the claimant's disability must be evaluated industrially and not just functionally. *Martin v. Skelly Oil Co.,* 252 Iowa 128, 1976 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 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).

Forty year old, married claimant, who quit school in the eleventh grade and who has had no further formal education since that time, has a work history as a truck driver, mechanic, painter and laborer. He began work for defendant in 1966 as a truck driver who also loaded and unloaded goods he carried. Claimant said this was seasonal work occupying from eight to twenty-four hours a day. According to claimant, he quit driving the truck on his doctor's advice. At that time, he transferred to the millroom as assistant to the supervisor and assumed responsibility for care and maintenance of the mills, the elevators and the motors. This work included climbing ladders to check bins and mills. He also lifted and carried bags of grain to scales to be weighed. During the slower summer season claimant said he did maintenance work on vehicles.

When claimant returned to his job on April of 1975, he testified that he had constant pain in his lower back and leg and difficulty in bending, stretching or lifting heavy weights thereby slowing his work. Shortly after claimant returned to the mill he contracted pneumonia and was again off work. On his next return to the job, he said he got help from other employees as he resumed his former position. Claimant's work periods continued to be interspersed with time off.

Steven C. Soy, a co-employee of claimant, worked with claimant both before and after his accident. He stated prior to the accident claimant had no difficulty with his work and voiced no physical complaints. After the accident, Soy claimed claimant needed assistance with many of the tasks he had done before the accident and complained frequently. Soy observed claimant's inability to lift, to stretch and to climb ladders and his apparent discomfort. Also testifying was Scott Allen Diehl, a seasonal employee of defendant from approximately October of 1974 until June of 1975 who was supervised by claimant. It was his opinion that claimant "didn't do his work as well as he did before the accident. It was a lot more strenuous for him." Diehl noted that claimant "wasn't able to bend or move as a normal person would" as claimant "stood pretty much upright most of the time."

Dale A. Bruns, acting general manager for defendant, testified as to claimant's being a good employee and as to defendant's attempts to accommodate claimant's situation. Bruns recalled conversations with claimant in which claimant had complained of physical problems. It was Bruns' opinion that claimant was a very, very good mechanic. He thought with training claimant could work as a transportation manager, but he was unaware of the jobs ever having been offered to claimant. Mark A. Batchelder was also a witness for defendants.

Dr. Ivins' testimony was that claimant "should confine his activities to activities that do not make significant physical demands on his back or other parts of his body. . . . [as claimant] has many abnormal areas. . . ." He said claimant would be unable to carry on an occupation requiring repetitive stooping or bending or the use or lifting of heavy tools or objects. The report of September 29, 1976 contains the doctor's thought that claimant "should be placed in line for vocational rehabilitation, hopefully, to be retrained in some gainful occupation that would be sedentary in nature." He wrote, "It also seems to me quite definite that his present work is entirely unsuitable for him and that he is permanently disabled for anything except sedentary occupations."

Dr. Walker's observations were similar to Dr. Ivins' in that he thought claimant

> could handle a supervisory job as long as he was able to sit down from time to time and as long as there were not long, long periods of steady walking and as long as he was not required to do much stooping and lifting and bending, this type of thing. I said that I felt that basically he could lift twenty pounds occasionally and that in finality that basically I thought he could do supervisory work.

The doctor gave further clarification by saying, "I would think that picking up and carrying twenty pounds occasionally, perhaps once or twice every hour would not hurt him."

It is apparent that based on the factors which the Iowa Supreme Court has said must be considered that claimant has significant industrial disability. The problem of difficult resolution is how much of this disability is directly traceable to the fall. It is clear that because of physical

limitations existing prior to claimant's fall and resulting from his problems with osteomyelitis that claimant was limited in his employment opportunities; and therefore, he had a preexisting industrial disability. Claimant's present industrial disability is found to be eighty percent overall. Of that eighty percent, twenty percent is found to have existed prior to claimant's fall in December 5, 1974.

WHEREFORE, it is found:

That on December 5, 1974 claimant sustained an injury to his twelfth and to his third lumbar vertebrae arising out of and in the course of his employment.

That claimant has an industrial disability of sixty percent (60) attributable to his injury of December 5, 1974.

* * *

Signed and filed this 31 day of July, 1978.

ROBERT C. LANDESS
Industrial Commissioner

No Appeal.

PERCY G. McSPADDEN,

Claimant,

vs.

BIG BEN COAL COMPANY,

Employer,

and

OLD REPUBLIC INSURANCE CO.,

Insurance Carrier,
Defendants.

Appeal Decision

This is a proceeding brought by claimant, Percy G. McSpadden, appealing a proposed decision in arbitration denying him benefits under the Iowa Workers' Compensation Law.

* * *

At the time of the appeal claimant filed exceptions and motion for specific rulings.

Claimant first alleges that the deputy erred in denying claimant's request for a physical examination under Iowa Code §85.39 after defendants denied disability or injury. Section 85.39 specifically refers to an injury and provides that following an evaluation of permanent disability by an employer retained physician which the claimant believes is too low, the claimant may request an employer furnished examination by a physician of his own choice. As stated in the deputy's order denying claimant's oral request for an examination, §85.39 contemplates that liability for an injury be established either by the filing of a memorandum of agreement or by adjudication. An issue as to the extent of disability does not exist until it has been determined that an injury occurred arising out of and in the course of employment.

Claimant's second allegation is that the deputy erred in overruling his motion for an order compelling discovery by failing to make relevant findings of fact and proper conclusions of law. The deputy's ruling incorporates paragraphs two and three of defendants' resistance to motion for order compelling discovery. These paragraphs include sufficient factual basis and authority for overruling claimant's motion.

Claimant's third and fourth allegations are that the deputy erred in permitting defendants to take the deposition of Dr. Hanson without the time frame of Rule 500-4.31 and by failing to rule on claimant's motion to quash and suppress notice and medical depositions. Notice of assignment for hearing was received by the parties on August 11, 1977. Claimant was given a hearing on September 22, 1977. Dr. Hanson's deposition was taken on October 4, 1977 and filed with this office on October 13, 1977 well within the thirty days set out in the rule. The deputy's reasoning in this matter is presented in the colloquy in the transcript at pp. 42-53.

Claimant's fifth allegation is that the deputy erred in admitting Dr. Hanson's deposition. The deputy's decision capsulized the various medical evidence presented and explains his reason for weight given to the evidence.

Claimant's sixth allegation is that the deputy erred in failing to require defendants to go forward with what he designated the "affirmative defense"; that is, of proving that claimant's condition arose out of causes other than those connected with employment. Defendants' answer states that "if the claimant suffers from any disabling condition the same did not arise out of and was not sustained in the course of employment by the named employer, but arose out of causes other than those connected with such employment." An affirmative defense comes into play after claimant has established a prima facie case. When claimant, as in this case, fails to present a prima facie case, there is no need for defendants to submit evidence relating to the affirmative defense.

Claimant's seventh allegation is a general allegation relating to the deputy's findings of fact and conclusions of law. Decisions in contested cases are based on the totality of the evidence marshalled for the hearing officer. The ultimate decision gives consideration to all evidence. That rejected is so designated. That given greater weight is likewise specified. It would be an impractical impossibility for deputies to make individual findings relating to each item of evidence.

Claimant's eighth allegation is that an improper standard of proof has been applied. Claimant argues that the deputy did not apply the proper standard of "disablement" as defined in Iowa Code 85A.4. As the deputy found that claimant had failed to establish "occupational disease," the standard for disablement "because of occupational disease" is irrelevant.

Claimant's ninth allegation is that the deputy erred in failing to allow claimant to take additional evidence. The deputy's denial was not a blanket denial but rather a limita-

tion. Claimant's attorney was told:

> If you have depositions that you are considering taking, I would limit you to taking the depositions within thirty days of this hearing and also limit you to taking the depositions of the physicians whom you have submitted reports from. I will not permit you to take a deposition of a physician who has not previously examined Mr. McSpadden or for you to go out and find another expert witness.

The reasons for denial of claimant's request to present additional evidence on appeal are sufficiently set out in this commissioner's ruling of March 22, 1978.

Claimant's tenth allegation is that the proceedings in this case have resulted in a deprivation of claimant's constitutional rights. In view of the fact that none of claimant's allegations of error have been sustained on appeal, no privation is found.

On reviewing the record, it is found that the deputy industrial commissioner's findings of fact and conclusions of law are proper.

WHEREFORE, the proposed decision in arbitration filed by the deputy is adopted as the final decision of this agency.

* * *

Signed and filed this 17 day of July, 1978.

ROBERT C. LANDESS
Industrial Commissioner

Appealed to District Court. Affirmed.
Appealed to Supreme Court. Affirmed in Part, Reversed in Part and Remanded.

MAVIS MAKEDONSKI,

Claimant,

vs.

THE RATH PACKING COMPANY,

Employer,
Self-Insured,
Defendant.

Appeal Decision

This is a proceeding brought by self-insured defendant-employer, The Rath Packing Company, appealing a proposed review-reopening decision wherein claimant was awarded healing period benefits.

* * *

The claimant, age 52, has been employed by the defendant since 1949, and has been working in the hog-cut department since 1953. By the early 1970's, claimant developed a problem of soreness with her left elbow that caused her to leave work temporarily. In November of 1971, a facietomy and lateral epicondylar stripping was performed by John R. Walker, M.D., on claimant's left elbow. The claimant received workers' compensation for the work-related injury to her left elbow. The workers' compensation was being supplemented by her employer's sickness benefits up to seventy percent of her earnings. Claimant last received workers' compensation benefits on November 12, 1973.

The claimant began having serious difficulty with her right elbow and Dr. Walker performed surgery on her in June of 1974. No workers' compensation benefits were paid in regards to claimant's right elbow. Instead, claimant received weekly sickness benefits from the defendant under the company's health plan for personal injuries. The payments for the right elbow were in the same amount as claimant received when she was getting benefits for her injury to her left elbow.

Due to her condition, claimant was forced to quit her employment with the defendant on May 7, 1975. The claimant last received health plan benefits from the defendant in October of 1975. The petition for review-reopening was filed by the claimant on September 13, 1977. Iowa Code section 85.26 sets the limits under which an original or a reopening proceeding may be brought. Under Iowa Code section 85.26(1), an original proceeding must be brought within two years of claimant's injury. Under Iowa Code section 85.26(2), a review-reopening proceeding must be brought within three years from the date claimant last received benefits. Thus, the petition for review-reopening was filed over three years since claimant last received workers' compensation on November 12, 1973 and over two years from the date claimant left her work due to her condition.

The issue on appeal is whether payment made under defendant's health plan can be construed as a payment of compensation under Iowa Code section 86.13, and if so, whether defendant's failure to file a memorandum of agreement within thirty days after payment of weekly compensation began tolled the statute of limitations under Iowa Code section 85.26.

The issue in this case is strikingly similar to the issue in *Carr v. John Deere Waterloo Tractor Works* (Decision of Iowa Industrial Commissioner filed September 27, 1978). There it was found that there must be evidence that either the employer intended payments to be on account of workers' compensation liability, or that the employee believed them to be so intended for a payment to be construed as a payment of compensation under Iowa Code section 86.13. It was also found that the Iowa Workers' Compensation Act does not contemplate the filing of a memorandum of agreement in the event an employee is paid for reasons other than a workers' compensation liability. Here, the record reveals that the employer did not intend the health plan benefits after the second injury to be on account of workers' compensation liability. It is also clear that the claimant did not believe the payments were so intended. See also *H. Raymond Smith v. Walnut Grove Products, et al,* 32nd Biennial Report of the Industrial Commissioner, p. 70; and *Charles W. Howard v. John Deere*

Waterloo Tractor Works, 33rd Biennial Report of the Industrial Commissioner, p. 170.

When claimant's left elbow became injured, the employer paid workers' compensation benefits. When claimant was forced to quit working after her right elbow became affected, the employer paid health plan benefits in light of a report by R.D. Waldorf, M.D., where in answering the question "Did this sickness arise out of patient's employment?", he responded "No." Thus, it is clear that the employer did not intend for the health plan benefits to be on account of workers' compensation liability, because the injury to the right elbow was not work-related. The defendant believed he was not liable under workers' compensation.

The claimant's own testimony in the original proceeding shows that she did not believe that the defendant intended the health plan benefits to be on account of workers' compensation liability. The claimant testified that she knew she was only getting sickness benefits or disability benefits instead of workers' compensation for her right elbow. She also stated that she understood that sickness benefits or disability benefits were for non-work related injuries. The claimant's own testimony shows that she knew the defendant saw her injury as non-work related by virtue of the type of payments she received.

Since the defendant did not intend the health plan benefits to be in account of workers' compensation liability, and the claimant did not believe the benefits were so intended, the defendant's health plan cannot be construed as a payment of compensation under the Iowa Code section 86.13. The statute of limitation under Iowa Code section 85.26 was not tolled by defendant's failure to file a memorandum of agreement because claimant was paid for reasons other than a workers' compensation liability under Iowa Code section 86.13.

* * *

Signed and filed this 18 day of May, 1979.

ROBERT C. LANDESS
Industrial Commissioner

Appealed to District Court: Pending.

RAYMOND D. MALONE,

Claimant

vs.

CLINTON CORN PROCESSING COMPANY,

Employer,

and

COMMERCIAL UNION ASSURANCE COMPANIES,

Insurance Carrier,
Defendants.

Appeal Decision

This is a proceeding brought by claimant appealing a proposed arbitration decision wherein he was denied temporary total benefits.

* * *

Claimant, who is 25 years old, married and has one child, was working for defendant-employer as an apprentice journeyman millwright. On April 28, 1978 claimant had to crawl under a hopper car to install a sanitary cover. Shortly thereafter he noticed a little red mark on his hand and later on noticed several red spots on his arms and legs. This occurred on a Friday. Claimant completed his shift and that night at home he felt feverish and nauseous. On Saturday morning he felt fine, but the symptoms returned on Saturday night and Sunday night.

Claimant returned to work on Monday morning and saw one of the company nurses about the problem. The nurse's notes indicated that the claimant gave a history of being bitten by an insect while installing the sanitary cover. The nurse referred the claimant to M.E. Barrent, M.D., the company doctor. Dr. Barrent noted claimant had some small pustules over his right forearm. Dr. Barrent prescribed Tetracycline and instructed claimant to use hot packs and to return the following day. Claimant was seen once more by Dr. Barrent and twice by Dr. Barrent's partner. Claimant returned to work on May 8, 1978 after missing a total of one week of work.

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., 261 Iowa 352, 154 N.W.2d 128 (1967). 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. The Iowa Supreme Court in Becker v. D. & E Distributing, 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 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.

Although the evidence of medical causation presented

by claimant is not overwhelming, there is a reasonable inference that the medical treatment given was consistent with the history of insect bites. Claimant's own testimony was that he did not have any red marks before he placed the sanitary cover on the hopper car and that he first noticed them at the end of the day while he was still in the course of his employment. The combination of medical testimony and claimant's testimony is sufficient to carry the burden of proof.

* * *

Signed and filed this 26 day of October, 1979.

ROBERT C. LANDESS
Industrial Commissioner

No Appeal.

MARY MARINO,

Claimant,

vs.

IOWA BEEF PROCESSORS, INC.,

Employer,
Defendant.

Order

Be it remembered that on February 20, 1980 the defendant herein filed a special appearance. On February 27, 1980 the claimant herein filled a resistance to the special appearance.

The special appearance alleges that the employer is a foreign corporation with its principal place of business outside of the state of Iowa; that the employment contract was entered into outside the state of Iowa; that the regular employment of the claimant and the alleged injury occurred outside the state of Iowa; and that Section 85.71, Code of Iowa, is unconstitutional on its face.

Section 85.71, Code of Iowa, reads:

> 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 workers' 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.

The legislative intent as expressed by the grammatical construction of subparagraph 1 above indicates that employee domicile alone is enough to confer jurisdiction on this agency to determine matters provided for in the Iowa Workers' Compensation Act. Attention to the breakdown of the sentence, as mandated by the placement of the commas, dictates that the sentence be read as follows:

> His employment is principally localized in this state, that is,
>
> (a) his employer has a place of business in this state or some other state and he regularly works in this state,
> or (b) he is domiciled in this state,
> or. . . .

The sentence should not be read as follows:

> His employment is principally localized in this state, that is,
>
> (a) his employer has a place of business in this or some other state
>
> and (1) he regularly works in this state,
> or if (2) he is domiciled in this state,
> or. . . .

If the legislature had wished to express the latter construction, subparagraph one would have been altered as follows -- "His employment is principally localized in this state, that is, his employer has a place of business in this or some other state, and (either) he regularly works in this state or ~~if~~ he is domiciled in this state, or. . . ."

WHEREFORE, pursuant to Code section 85.71(1), if the claimant be domiciled in the state of Iowa, she is subject to the Iowa Workers' Compensation Act. The original notice and petition filed herein indicates that the claimant has an Iowa address; and therefore, on its face, the petition states that this agency may have jurisdiction.

Additionally, defendant-employer challenges the constitutionality of the Code section in issue and as applied. This tribunal is without jurisdiction to discuss the constitutionality of various statutes and therefore that issue will not be addressed at this time.

* * *

Signed and filed this 31st day of March, 1980.

LEE M. JACKWIG
Deputy Industrial Commissioner

No Appeal.

BEN JOHN MAULORICO,

Claimant,

vs.

WILSON FOODS CORPORATION,

Employer,
Self-Insured,
Defendant.

Appeal Decision

This is a proceeding brought by defendant appealing a proposed decision in review-reopening wherein claimant was found to be twenty-five percent industrially disabled as a result of an injury on November 11, 1975.

* * *

In 1974 claimant started work for defendant and also started to Kirkwood Community College where he got his associate degree. Working at Wilson was a means of supplementing his income while he was a student.

Claimant's work for defendant was primarily in the cure department. On November 11, 1975 claimant said that he

> was working in the beef area and we were packing the huge pieces of meat, loin and others, and this particular loin weighed somewhere around 75 to 100 pounds. We had a very small lady working with us and I reached over to help her when picking up that meat, and when I did I was completely off balance and my back just completely went out. (pages 8, 11, 1-6)

Claimant went to David C. Naden, M.D., the next day and was sent to Mercy Hospital where he was put in traction. During this hospitalization, it was discovered that claimant had carpal tunnel syndrome. Surgery was performed on both the right and left wrist. After a two-month convalescence, he returned to Wilson on February 1 or 2, 1976. There was a two-week layoff. Claimant attempted to go back to work on February 18 but he was unable to do so. He saw Dr. Naden who sent him to Iowa City.

Claimant's prior medical history included a sprained back in the 1960's as he worked out with weights and a fall downstairs on his tailbone in June of 1975. Claimant subsequently had his back go out following a shoveling incident in January 1978, which necessitated hospitalization and traction. At the time of hearing claimant complained of constant back pain and restricted activity and lifting.

A history and physical performed by Dr. Naden in November, 1975 resulted in a diagnosis of acute lumbosacral strain and carpal tunnel syndrome. Dr. Naden gave claimant a return to work slip for January 19, 1976, which was later changed to February 2, 1976. Claimant visited the doctor on February 18, 1976. Dr. Naden's notes indicate the thought that claimant's expectations of the carpal tunnel surgery were unrealistic and the inability to find physical evidence to substantiate claimant's complaints. A letter from the doctor on November 22, 1976 rated claimant as fifteen percent permanently physically impaired "[a]s a result of disabilities involving the neck and upper limbs from his previous employment" with defendant and stated no further active treatment would be necessary.

X-rays taken at University of Iowa Hospitals and Clinics on March 26, 1976 showed "mild degenerative changes at the C5-6-7 level and also bilateral cervical ribs." Claimant was advised not to return to work involving heavy lifting. In February of 1977 the impression of the examiner was "[p]robable thoracic outlet syndrome."

This outlet compression syndrome was evaluated by Montague S. Lawrence, M.D., thoracic and cardiovascular surgeon. He found in March of 1977 good reason for claimant's inability to lift in that claimant "most likely [had] a very tight band across to the first rib since he has a large amount of widening of the anterior portion of the ribs bilaterally." Dr. Lawrence suggested a resection of the first rib.

Later in February the doctor at University Hospitals wrote an impression of "[d]egenerative arthritis of the lumbar spine with positive instability test." A report of B. L. Sprague, M.D., dated November 14, 1977 expressed his opinion that applying the AMA Guide to Permanent Physical Impairment,

> Mr. Maulorico has essentially no deformities, no decreased range of motion, and no objective decreased muscle strength or wasting. Consequently, on a physical impairment basis, I find no restrictions. This is not to say that he does not have pain which restricts his activities in his employment. This, however, is something that I cannot evaluate in an objective manner, and therefore, it is not a part of the physical impairment rating.

Further, Dr. Sprague noted that

> neither of these conditions could be directly attributed to Mr. Maulorico's employment. However, he could conclude that the type of work that he performs did have an aggravational effect on the thoracic outlet syndrome. Concerning Mr. Maulorico's lower back pain, his fall at work may have been in initiating factor. As you know, low back pain is a very difficult problem for us to give a cause and result relationship to, and therefore I cannot say with any great assurity [sic] that his problem is directly related to his work other than the fall.

He also noted psychological overlay.

An electroencephalogram performed by Donald D. Castle, M.D., on May 24, 1976 resulted in the doctor's concluding that claimant had an "[a]bnormal EEG with deep mid-line focus." The EEG was apparently conducted because of claimant's complaints of lapses of memory, deja vu, and loss of concentration.

A February 9, 1978 report from the Industrial Injury Clinic in Neenah, Wisconsin, recorded the results of claimant's examination there. X-rays of the lumbosacral area showed the vertebral bodies to be in normal alignment with disc spaces maintained. A myelogram showed a "mild degree of diffuse peripheral neuropathy" with "no evidence of radiculopathy or nerve root compression." The report states that in performing the physical capacity test

> the patient was able to complete all gripping, pulling,

pushing, lifting and carrying activities up to the 60 to 80 pound limit requested. He demonstrated good body mechanics throughout. He gave a good performance in all functional activities such as reaching, climbing stairs, balancing, standing from sitting, squatting and kneeling. Trunk strength and mobility appeared good. It was the notation of the therapist who administered the test that the patient did well with the lifting and carrying activities, although displaying guarded behavior and verbalized concern that it would damage his back.

The impression of the staff was "1. Muscular strain syndrome, primarily psychic hypertensive type. 2. Personality disorder with hysterical elements." Recommendations were:

1. We understand this individual has been awarded a 15 percent permanent partial disability. However, at this time we find no objective scientific evidence to support any elements of permanent disability.

2. He should continue with an active physical reconditioning program as outlined and demonstrated to him while in the Industrial Injury Clinic.

3. There are no post traumatic psychological difficulties resulting from the industrial injury in question.

4. He may return to his usual and customary vocational activities as of March 6, 1978. We would recommend that he not do prolonged manual work overhead or at shoulder level.

5. Although this individual did have a positive Adson test bilaterally and symmetric, we do not believe this represents a significant problem and do not feel surgery is indicated. Further, this would bear no relationship to the industrial incident in question.

A report by T. A. CoBabe, Ph.D., stated that claimant "does appear to have had history of vocational instability." CoBabe speculated that claimant "may very well be . . . utilizing the present situation to continue his educational pursuits. There is no evidence of emotional pathology that would mitigate his return to work."

Robert Besda, Ph.D., chairman of the psychology department at Mt. Mercy College, had claimant as a student and had worked with him in the field placement course. He did not feel that claimant had psychological deficiencies nor did he find claimant's behavior consistent with hysteria. Criticizing Neenah's testing procedure, Besda said there were six verbal and five performance sections to the Wechsler Adult Intelligence Scale and he had determined that only three areas were tested at Neenah.

The claimant must prove by a preponderance of the evidence that the injury is the cause of the disability on which the claim is based. *Lindhal 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 the 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.34 (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. Firesonte Tire & Rubber Company,* 253 Iowa 369, 112 N.W.2d 299 (1961).

As this is a review-reopening proceeding, it is clear there is no question but that claimant suffered a compensable injury. It is equally clear that claimant has doctored for a number of physical difficulties and that these difficulties existed prior to the incident at Wilson. Claimant was adamant that "[i]t was the work that precipitated the reoccurrence of the condition." He further responded to the question of whether there was a specific incident, "If we can say specific incident, related to an area of which involved a great deal of lifting." It appears that claimant had a particular physical condition which was forced to the surface when he engaged in heavy lifting.

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 also 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 (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).

Married 56-year-old claimant has a work history beginning at seven as a shoeshine boy. He went to barber college at age sixteen, finished an apprenticeship and got a master barber's license. When the war started claimant went to work for Fisher Body doing riveting and welding. He was inducted into the navy. After discharge from service, he worked as a barber in California and also as an assistant manager in a drugstore and as an assembler. Claimant came to Iowa in 1960 and worked assembling signs until he got his barber's license. In addition to barbering, he worked at Sears and as an insurance salesman for Prudential and later for Franklin.

Claimant went through ninth grade. While working at Fisher, he attended high school. He went back to high school after he got out of the navy. At the time of hearing, claimant hoped to earn a bachelor of arts degree in psychology in May of 1978.

Glenn Michael Millard is manager for Job Services whose duty it is to see that services are delivered in Linn County. Claimant had been in a work-study program which assigned him for a period to Job Services. In describing his experience with claimant, he said, "Ben had an excellent attitude toward work. He was very efficient and his sincerity toward the whole program, I think, was excellent." Millard believed claimant had a 70% chance of getting a job, and reported that claimant had filed an application with Job Services which at the time of hearing was classed as inactive. Millard suspected there was age discrimination in private industry. He did not, however, think claimant's age would be a factor in his employment with the state and that claimant's veteran preference would give him more points in the merit system.

Numerous attempts have been made by the industrial commissioner's office in seminars and symposiums to educate concerning the factors considered in determining industrial disability. These factors include the employee's medical condition prior to the injury, after the injury and present condition; the situs of the injury, its severity and the length of healing period; the work experience of the employee prior to the injury, after the injury and potential for rehabilitation; the employee's qualifications intellectually, emotionally and physically; earnings prior and subsequent to the injury; and age, education, motivation, and functional impairment as a result of the injury and inability because of the injury to engage in employment for which the employee is fitted. These are matters which the finder of fact considers collectively in arriving at the determination of the degree of industrial disability.

When considering a loss of earning capacity for employments for which a person is fitted, it is not considered initially that a person before an injury is fitted for every line of employment. Consideration must be given only to those employments which the employee, taking into account his age, education, qualifications and experience, had the ability to engage in prior to his injury. This would include employments for which, based upon the employee's characteristics, it can reasonably be anticipated that the employee would be trainable without undue inconvenience. Next is considered the earning capacity within the fields of endeavor for which the employee was fitted which has been lost as a result of the injury to determine the degree of industrial disability.

The record as a whole indicates to this commissioner that claimant was not well fitted for jobs involving heavy lifting even prior to his injury on November 11, 1975.

It also appears that current recommendations regarding restricting employment activities particularly with regard to working at shoulder level or overhead are based in large part on the existence of the thoracic outlet syndrome which preexisted the injury. Although symptoms had not previously manifested as a result of this syndrome, it is evident that the advice to not engage in this type of activity is a warning that the symptoms would likely reoccur if such activity were attempted because of the existence of this syndrome and not because of any injury the claimant sustained.

It is also not established that the reasons claimant was not hired for positions for which he applied after his injury were related to his injuries.

Therefore, it is evident that not all of the claimant's inability to perform gainful employment in the total labor market is as a result of an injury received arising out of and in the course of his employment with defendant employer.

WHEREFORE, it is found and held as finding of fact:

* * *

3. That considering all of the factors in determining industrial disability, claimant's earning capacity as a result of the injury has not been substantially diminished.

4. That claimant's permanent partial disability to the body as a whole as a result of the injury is fifteen percent (15%).

* * *

Signed and filed this 3 day of October, 1979.

ROBERT C. LANDESS
Industrial Commissioner

No Appeal.

ROBERT MAUSETH, II,

Claimant,

vs.

GRA-IRON FOUNDRY,

Employer,

and

AMERICAN MOTORIST (KEMPER),

Insurance Carrier,
Defendants.

Arbitration Decision

INTRODUCTION

This cause was commenced by the claimant, Robert Mauseth, II, by filing a petition in review-reopening alleging injury dates of June 20, 1977 and October 5, 1977, against Gra-Iron Foundry, employer, and American Motorist (Kemper), insurance carrier. A hearing was held on October 20, 1978 at the beginning of which the claimant stated he was withdrawing the October 5 injury date from consideration. Claimant also stated that the injury designated in the petition as of the October 5 date might have taken place as early as September 29, 1977 and that any reference in the pleadings to the October 5 date was in fact a reference to the September 29 date. The memorandum previously filed in this office only discloses an injury on September 29, 1977. Therefore, this case is being considered a case in arbitration because no memorandum is on file regarding the June 20 date.

* * *

ISSUES

At the beginning of the hearing, the parties stated that causal connection and the extent of permanent partial disability were the only issues presented for determination.

FACTS

On May 16, 1977 claimant started working for the defendant employer, Gra-Iron Foundry, on the "shaker" or "shake out". On June 20, 1977 claimant injured his back while shoveling sand near that machine. As a result of that injury, the claimant missed a little over two weeks of work.

Claimant has previously injured his back while working in steel and cement construction. That injury had stopped giving claimant problems.

On June 21, 1977 claimant saw Axel T. J. Lund, M.D. Dr. Lund's progress reports indicate that during July 1977 claimant continued to have low back pain. Claimant did not see Dr. Lund from July 25, 1977 until October 10, 1977. On August 1, 1977 claimant saw John W. Hughes, M.D., an orthopedic surgeon, whose diagnosis of claimant's back was lumbosacral strain resolving. Dr. Hughes indicated claimant was to return as often as necessary and advised claimant to have some physical therapy.

On September 29, 1977 claimant again injured himself by dropping a sand core on his left thigh. Claimant missed some work and on October 5 saw Dr. Lund again. Although claimant testified he kept telling Dr. Lund he had back pain, Dr. Lund's progress notes of October 4, 1977, October 10, 1977, November 8, 1977, December 5, 1977, December 12, 1977 along with four visits in early 1978, lack any reference to back pain. It was not until March 3, 1978 that Dr. Lund's progress notes again referred to back pain and at that time Dr. Lund made assessment of strain resolving. On March 22, 1978 Dr. Lund indicated claimant needed lighter work and from that time on, Dr. Lund's progress notes refer to claimant having back pain. On April 12, 1978 claimant told Dr. Lund he was lifting a heavy object and again had back pain.

Dr. Hughes' report of February 24, 1978 states claimant complained of back pain and gave a diagnosis of "back pain, subjective without objective findings."

APPLICABLE LAW

Claimant has the burden of proving by a preponderance of the evidence that the injury on June 20, 1977 is the cause of the health impairment upon which he now bases his claim. *Lindahl v. L. O. Boggs,* 236 Iowa 296, 18 N.W.2d 607 (1945); *Bodish v. Fischer, Inc.,* 257 Iowa 516, 133 N.W.2d 867 (1965). 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).

ANALYSIS

Based on the foregoing principles, it is found that claimant has failed to meet his burden in proving that the injury of June 20, 1977 is the cause of the disability of which he now bases his claim. From July 25, 1977 until March 1978 Dr. Lund's progress notes fail to show that claimant had any complaints regarding back pain. This result is also strengthened by Dr. Hughes' diagnosis on August 1, 1977 of "lumbosacral strain resolving".

No weight is given to the second page of claimant's exhibit 1 in that the page is not dated and does not inform the reader when notes were taken.

It should be noted that claimant had a back injury in 1975, an injury in the September 1977 and a possible injury on April 12, 1978, and neither Dr. Lund nor Dr. Hughes were asked about the causal connection of the injury on June 20, 1977 and the disability.

In that the claimant loses on the question of causal connection, it is unnecessary to decide the issue of extent of permanent partial disability.

Although it would appear to this deputy industrial commissioner that there may be an issue as to temporary total disability, that issue is not being decided because it was not raised by either of the parties at the hearing.

* * *

Signed and filed this 30th day of November, 1978.

DAVID E. LINQUIST
Deputy Industrial Commissioner

Appealed to Commissioner: Affirmed.
Appealed to District Court 4-18-79: Pending.

LARRY T. MEADE,

Claimant,

vs.

CECIL SMITH TRUCKING COMPANY,

Employer,

and

AETNA CASUALTY & SURETY COMPANY,

Insurance Carrier,
Defendants.

Appeal Decision

Claimant, Larry T. Meade, has appealed from a proposed arbitration and rehearing decision wherein claimant was awarded temporary disability compensation and certain medical and transportation expenses.

* * *

The issue presented on appeal is whether claimant is entitled to compensation for periods of time in addition to the period for which the deputy awarded compensation.

Claimant was injured on April 29, 1975, when the truck he was driving for his employer went out of control and landed in a ditch. Claimant was hospitalized as a result of the truck accident. While in the hospital, claimant was treated by Dr. Wubbena. Claimant's condition, as diagnosed by Wubbena, was abrasions and contusions secondary to

the accident. Dr. Wubbena further noted that claimant suffered from considerable generalized pain with sore muscles, but that x-rays showed no fractures or dislocations. Claimant left the hospital on May 1, 1975.

Claimant then went to Nile Smith's house. Claimant stayed there for three weeks. Nile Smith, son of Cecil Smith, the defendant employer, testified that claimant did not move around much in that three week period and had problems walking up and down stairs.

After those three weeks claimant stayed at his mother's house. Claimant's mother, Mary Meade, testified that claimant was very sore and engaged in very little activity during his stay, which continued until the middle of July, 1975.

On June 17, 1975, claimant was examined by Dr. Cozine. The only thing noted from this exam was that claimant had multiple contusions and complaints of sore joints. It is not clear whether or not this was obtained by way of history or observation. On July 1, 1975, claimant was seen by Dr. Brown and treated for acute prostatitis. There was no indication that this was related to the April 29, 1975 incident. Claimant was seen by no other doctors during the period between the injury date, April 29, 1975, and July 23, 1975, when he returned to work as a truck driver for Cecil Smith.

After returning to work claimant testified that he would work about three days at a time and then would rest for an interval because of soreness and pain.

On October 25, 1975, claimant, who complained of pain and cramps in the abdomen and severe pain in his back with headaches, returned to the hospital on an outpatient basis. Dr. Cozine diagnosed claimant's problem as Prostatitis. Claimant then called Dr. Brown on November 3, 1975, complaining of low back and abdominal muscle pain. Dr. Brown recommended that claimant see an orthopedist and on November 11, 1975 claimant was examined by Dr. Baird. The examination revealed slight tenderness over the right upper quadrant and lumbosacral instability. Dr. Baird concluded, based on the November 11 and December 5, 1975 examinations, that claimant was able to return to work at any time. Claimant returned to Dr. Cozine on December 9, 1975, and as a result Cozine wrote that claimant was unable to work because of the April 29, 1975 incident.

Claimant returned to work on December 26, 1975, but he ceased working on January 2, 1976. Sometime in January or early February, 1976, claimant's employment was terminated with Smith. Claimant testified that upon receipt of Dr. Baird's report stating the claimant could work, he started collecting unemployment compensation. Claimant's employment with the defendant employer appears to have been terminated so that claimant could become eligible for unemployment compensation. Claimant continued to collect unemployment through July of 1976, except for one week when he returned to work for Smith.

On July 29, 1976, claimant saw Dr. Sebek at the request of vocational rehabilitation division of the Department of Public Instruction. Sebek noted claimant's visits to Drs. Cozine and Baird and diagnosed claimant's problem as cervical, thoracic and lumbar muscle and ligament strain with lumbar and cervical nerve root irritation.

On August 13, 1976, claimant went to work for Modern Farm Systems. Claimant continued working there until September 12, 1976. On September 14, 1976, claimant was hospitalized because of severe pain and headaches. Claimant underwent conservative treatment until his discharge on September 26, 1976. Dr. Sebek testified that claimant's problems were the result of the April 29, 1975 incident. This testimony was initially rejected by the deputy industrial commissioner, but was accepted on rehearing after Dr. Sebek was more fully apprised of claimant's history.

The deputy awarded claimant nine weeks of temporary disability compensation for the period from September 15, 1976 through November 16, 1976 on the basis of Dr. Sebek's testimony. This finding for this period is not contested on appeal and is hereby affirmed.

However, question has been raised as to whether claimant is also entitled to compensation for other periods of time between April 29, 1975 and September 15, 1976 when he was either not working or receiving unemployment compensation.

The first period to be considered is from April 29, 1975 through July 23, 1975. After claimant was discharged from the hospital on May 1, 1975, he did not see a doctor until June 17, 1975, when he was seen by Dr. Cozine. Dr. Cozine's report was not clear about claimant's condition on June 17 and whether claimant's condition was in any way related to the April 29 injury. However, when Dr. Cozine's report is viewed in light of the lay and circumstantial evidence for this period, it is found that claimant's disability during that period was related to the April 29, 1975 incident. *Burt v. John Deere Waterloo Tractor Works,* 247 Iowa 691, 73 N.W.2d 732 (1955).

Claimant saw Dr. Brown on July 1, 1975, and claimant's problem was diagnosed as prostatitis. As previously mentioned, there is no indication that there was any relation between the prostatitis and the April 29 incident. However, claimant's condition related to his injury had not significantly changed between June 17 and July 1, 1975 and the time when claimant returned to work on July 23, 1975. The constancy of claimant's condition during this period is given weight. *Henricks v. Davenport Locomotive Works,* 203 Iowa 1935, 214 N.W.2d 585 (1927). Thus it is found that claimant was disabled from April 29, 1975 through July 22, 1975, and his disability was caused by the April 29, 1975 incident.

The second period to be considered is from October 25, 1975 through December 26, 1975. Since claimant's major problem during this period was due to prostatitis and there is no evidence that claimant's disability was causally related to the April 29, 1975 incident, it is found that claimant is not entitled to compensation for this period. The deputy's decision to reject Dr. Cozine's letter dated December 12, 1975 which stated that claimant was unable to work because of the April 29, 1975 incident, is affirmed because Dr. Cozine failed to describe any physical findings, diagnosis, treatment, or prognosis of claimant's condition. Rule 500-4.17 Iowa Administrative Code.

The third period to be considered is from January 2, 1976 until claimant started receiving unemployment compensation. There is nothing in the record to support any finding of compensable disability during this period and thus claimant is not entitled to compensation for this period.

The fourth period to be considered is from July 19, 1976 through August 13, 1976. Claimant, in his appeal brief, claims that he stopped receiving unemployment compensation on July 12, 1976 when he returned to work for defendant employer. Claimant worked for Smith until July 19, 1976 and did not work again until August 13, 1976. The record is unclear about whether claimant received unemployment compensation from July 19, 1976 through August 13, 1976. The most definite evidence is found in claimant's testimony in which he stated on two different occasions that his unemployment compensation terminated upon the commencement of his employment with Modern Farm Systems. Claimant's appeal brief indicates unemployment benefits for a total of 28 weeks. Defendants' appeal brief, which shows unemployment benefits paid for a total less than 28 weeks, shows such benefits paid during this period. It is reasonable to conclude that claimant received unemployment compensation until August 13, 1976; thus he is as stipulated not entitled to any workers' compensation for this period.

As indicated at the appeal proceeding no consideration is given to periods of disability beyond that covered in the hearing before the deputy.

WHEREFORE, the proposed decision by the deputy is affirmed in part and reversed in part.

It is found that claimant suffered an injury on April 29, 1975 while in the course of his employment.

It is further found that claimant was temporarily disabled and was entitled to compensation for the periods from April 29, 1975 through July 23, 1975 and September 15, 1976 through November 16, 1976 at the rate of ninety-seven dollars ($97) per week.

* * *

Signed and filed this 19 day of September, 1978.

ROBERT C. LANDESS
Industrial Commissioner

No Appeal.

ROBERT E. MEIER

Claimant,

vs.

JOHN G. CRANE d/b/a/ CRANE SIDING AND ROOFING COMPANY,

Employer,

and

MILLHISER-SMITH AGENCY, INC.,

Insurance Carrier,
Defendants.

Arbitration Decision

This is a proceeding in Arbitration brought by the claimant, Robert E. Meier, against John G. Crane d/b/a/ Crane Siding and Roofing Company, the alleged employer and Millhiser-Smith Agency, Inc., the alleged insurance carrier, to recover benefits under the Iowa Workmen's Compensation Act by virtue of industrial injury which occurred on April 11, 1976.

* * *

The primary issue requiring resolution is whether or not the exclusionary language contained in Section 85.61 (3)(b) which deems independent contractors as not being "workers" or "employees" is applicable to this case.

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

John G. Crane, entered the siding business in 1957, (depo. p. 4, l. 1) and functions as a sole proprietorship (depo. p. 4, l. 11). He intended to incorporate several years ago but "never followed through." (depo. p. 24, l. 2) Crane testified that he had no employees, only six or seven subcontractors, (depo. p. 41, l. 25). and that he required each person, including his son, Ronald, to sign the following document each year (depo. p. 12, l. 1):

THIS AGREEMENT, made this _____ day of by and between Jerry Crane D/B/A Crane Siding & Roofing Inc., hereinafter called the FIRST PARTY, and _____ , hereinafter called the SECOND PARTY.

Whereas first party is a general contractor in the city of Cedar Rapids, and holds certain building contracts covering certain work which it deems advisable to have the labor for said work to be performed by subcontractors skilled and reliable in said work, and whereas first party is desirous of entering into a contract with second party to perform said labor, it is mutually agreed by parties as follows:

1. SECOND PARTY hereby acknowledges that he is not a employee of FIRST PARTY in any legal understanding of the term whatever. That he has freely and independently contracted with FIRST PARTY to render certain services in exchange for compensation to be determined.

2. SECOND PARTY shall perform this contract in all respects in a good and workmanship manner in accordance with accepted standards and in conformity to all laws governing said work. Said contract shall be performed by second party in good faith and second party shall determine method and manner of completing said contract.

3. SECOND PARTY guarantees satisfaction to first party and to the customer and agrees to remedy all defects in said work at his own expense, promptly upon notification from first party. SECOND PARTY

shall furnish his own equipment.

4. SECOND PARTY shall not sublet or assign this contract without prior written consent of first party.

5. SECOND PARTY hereby acknowledges and affirms that he is not an employee of first party in any consideration or manner which might require first party to withhold monies due to second party for FEDERAL and/or STATE INCOME TAXES. Second party agrees with first party that he shall pay his own FEDERAL and/or STATE INCOME TAXES as same may become due in any state, and any obligation he may have to pay Self-Employment Tax to the Federal Internal Revenue Service or any State agency.

6. SECOND PARTY understands and is aware that he is not carried as an employee by first party on its Workmen's Compensation Insurance program, and agrees to maintain in force adequate liability and workman's compensation insurance of all kinds for its protection as a subcontractor and independent contractor, and further to assume and keep first party harmless from all liability for injury or damage to any person or property by whomsoever suffered occurring as a result of the performance of this contract by second party, or any act or default on the part of second party or his agents or employees in connection therewith, either while this contract is in progress or as a result of the completion thereof.

7. SECOND PARTY agrees to immediately undertake the performance of contract because time is the essence of contract, and this agreement shall be fully performed as soon as possible.

In any other considerations not covered specifically herein, second party acts under and assumes all responsibilities in his capacity as sub-contractor and specifically stipulates with first party that under no consideration does he consider himself an employee of first party, and no other agreement orally shall be deemed to exist or bind any of the parties hereto.

_____

(Signature) SECOND PARTY

Mr. Crane also required all persons to sign an agreement fixing the compensation to be paid for such work. The agreement read as follows:

This agreement made this _____ day of _____, 19 , at Cedar Rapids, Iowa, by and between Jerry Crane D/B/A Crane Siding & Roofing Co., hereinafter called the first party, and _____ hereinafter called the second party.

Whereas first party is a general contractor in the city of Cedar Rapids, and holds certain building contracts covering certain work which it deems advisable to have the labor for said work to be performed by subcontractors skilled and reliable in said work and whereas first party is desirous of entering into a contract with a subcontractor to perform said labor, it is mutually agreed by the parties hereto as follows:

1. First party agrees to pay to second party the sum of_____ per sq. aluminum or_____per sq. asbestos as payment in full for which second party agrees to do certain work.

2. First party shall furnish and pay for the materials needed on said contract.

3. Second party shall perform this contract in all respects in a good and workmanship manner in accordance with accepted standards and in conformity to all laws governing said work. Said contract shall be performed by second party in good faith and second party shall determine the method and manner of completing said contract. The relationship of first and second parties shall not be employer-employee, but second party shall at all times be an independent contractor.

4. Second party guarantees satisfaction to first party and to the customer and agrees remedy all defects in said work at its own expense, promptly upon notification from the first party.

5. Second party shall be entitled to payment for this contract in the sum specified in paragraph one upon completion of this contract, and after the signing of a completion certificate by the customer of the first party.

6. First party agrees to secure and pay for any building permit required to perform the contract.

7. This contract may not be sublet or assigned by second party without prior written consent of first party.

8. Second party shall furnish its own equipment and employees necessary to perform this contract, and also agrees to maintain in force adequate liability and workman's compensation insurance of all kinds for its protection as a subcontractor and independent contractor, and further to assume and keep first party harmless from all liability for injury or damage to any person or property by whomsoever suffered occurring as a result of the performance of this contract by second party, or any act or default on the part of the second party or his agents or employees in connection therewith, either while this contract is in progress or as a result of the completion thereof.

9. Time is the essence of this contract, and second party agrees to immediately undertake the performance of this contract and this agreement shall be fully performed as soon as possible.

10. This contract contains all the terms and conditions agreed to by the parties hereto and no other agreement orally shall be deemed to exist or bind any of the parties hereto.

_____

(Signature) (Second Party)

_____

(Signature) (John G. Crane)

Crane retained unto himself the exclusive right to enter

into agreements with the homeowner whose premises were to be repaired. Crane required all signatories to purchase the siding from him. (depo. p. 20, l. 15) The homeowner is not specifically told that Crane may be subcontracting part of the work (depo. p. 24, l. 2) Crane did not deduct from any such payments made to the signatories of the foregoing agreements withholding for state or federal income taxes or social security contribution. Crane provided all caulking material necessary to complete a job. Crane accepted the responsibility for obtaining all necessary building permits.

In 1972 John Crane hired Del Werner on an hourly basis to learn the siding application trade (depo. p. 11, l. 8). The arrangement between Werner and Crane was described by Crane as follows: "I didn't directly pay him as such in a way, because it was handled through my son who was a subcontractor at the time" (depo. p. 11, l. 14).

Werner describes the relationship between Crane and the persons doing the actual labor on page 7, l. 14, as follows, to wit:

> "Okay, he was absolutely death on us doing any work that was not for Crane Siding and Roofing."

Werner further stated on page 17, l. 2-18 as follows:

> This is the way it was put to me, yes, I was told, that I was -- we were all considered subcontractors. That way he did not withhold any taxes or FICA or anything like that, and we were required to furnish our own tools and equipment, trucks, et cetera, for which he was supposed to be paying us a little extra, a little more per square than employers around town. You know, I didn't split any hairs about it, you know. I mean I figured if that's the way he wanted to put it, that's his business.
>
> That was okay with you, in other words?
>
> Yeah, except it got a little upsetting when he put his no moonlighting rules and things like that.
>
> Apparently you didn't always abide by those rules, did you?
>
> Normally, we did. Once in a great while we'd sneak off and do something, but he was likely to tell us to hit the road if we did if he caught us.

It was agreed the claimant would "go into business" (depo. p. 20, l. 16) with Werner, at a later time based primarily on the claimant's sales ability. The claimant, together with Dick Aucutt, began to side a house on April 9, 1976 for Crane under Werner's supervision. On April 11, 1976, the claimant fell from a scaffold receiving foot injuries.

The claimant did not sign any of the documents previously referred to. By agreement of the parties this decision will address itself to the sole issue of the alleged employment contract between the claimant and John G. Crane.

Nelson vs. Cities Service Oil Company, 259 Iowa 1209, 146 N.W.2d 261 (1967), held that a claimant has the initial burden of proving an employer-employee relationship by preponderance of the evidence. Upon such proof a defendant may use evidence to negate the factual pattern or may allege an affirmative defense such as an independent contractor status as was done in this matter.

In *Nelson, supra,* the Court enumerated some elements constituting a test as to whether an individual is an independent contractor:

1) the existence of a contract for the performance by a person of a certain piece or kind of work at a fixed price.

2) the independent nature of his business or of a distinct calling.

3) his employment of assistants with the right to supervise their activities.

4) his obligation to furnish necessary tools, supplies, and materials.

5) his right to control the progress of the work, except as to final result.

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.

It is necessary to deal with the relationship between Crane and Werner in light of *Nelson, supra.* The document signed yearly (Crane depo. Ex. 1-4) fails to fix a price, nor does it specify terms concerning a particular job. Werner was not free to seek work in that he was required to accept the jobs assigned to him by Crane. (Werner depo. p. 17) Crane furnished supplies and materials to complete the work. It is implied by this entire record that Werner could not purchase any siding material independently. Any rental charge for equipment incurred by Werner was charged to Crane (Depo. p. 47 and p. 48). Crane controlled the work by retaining the right to send any "subcontractor" of his choosing to any job (depo. p. 66). The ultimate completion of any contract to side a dwelling is the regular business of Crane.

Of further interest is the case of *Usgaard v. Silver Crest Golf Club,* 256 Iowa 453, 127 N.W.2d 616 (1964), wherein the opinion of the Court discussed elements required to establish an employer-employee relationship:

1) Employers right to selection or to employ at will.
2) Responsibility for the payment of wages by the employer.
3) Right to discharge or terminate the relationship.
4) Right to control the work.
5) Is the party sought to be held as employer responsible authority in charge of the work of or whose benefit the work is being performed.
6) The intention of the parties who are creating the relationship.
7) The customary outlook taken by the community towards similar working relationships.

Crane retained the power of selection, both as to the indemnity of the "independent contractor" as well as to

the indemnity of the "subcontractor's employees". He effectively discharged a female "employee" of Del Werner (depo. p. 34, l. 12).

Crane "sold" the job, collected the money and paid the "subcontractor".

Crane could and did require a "subcontractor" to leave a job prior to its completion. (Depo. p. 16, l. 25, p. 17, l. 1-7) Crane's answers on this issue are ambivalent and are given little weight in this decision.

Crane controlled the work being done (Werner depo. p. 44) and was ultimately responsible to the homeowner for a satisfactory completion.

Meier did not consider himself a subcontractor, but rather an employee. (Meier depo. p. 16, l. 1-18) The general public is not aware that the applicators are not employees of Crane who sells and accepts payment upon completion. (Depo. p. 24, l. 20)

Applying the foregoing to the test laid down in *Usgaard, supra,* the claimant has established an employer-employee relationship with the defendant, John G. Crane. Clearly Werner had the apparent authority to hire the claimant and that in the claimant's mind, this defendant had the authority to fire him.

The Iowa Supreme Court has not been called upon to decide a similar case, however in the case of *Becker v. Interstate Properties,* 569 F. 2d 1203 (1977), 98 S. Ct. 2237 cert. denied, wherein a 19-year-old construction worker was severely injured by a minimally financed and under-insured sub-contractor who was not required by the main contractor-developer to carry standard insurance when that developer was a large company with extensive experience in the industry where high-coverage insurance was a trade practice. The New Jersey court held that the failure of the developer to engage a properly solvent or adequately insured sub-contractor was a violation of their duty to obtain a competent, independent contractor and, therefore, rendering the developer liable to the third party.

The Court in *Becker, supra,* based its decision on a number of factors:

1) That the burden of accidental loss should be shifted to those best able to bear and distribute that loss rather than having it imposed on the helpless victim.

2) The liability for an accidental loss should be allocated to those in the best position to control the factors leading to accidents causing such loss.

3) That were the developers in an excellent position to assure the proper degree of financial responsibility of the sub-contractor, he should be required to do so.

4) That the costs of accidents should be borne by those who secure the benefits of the activities that engender these mishaps. Without such a rule, the developer can obtain the advantage of lowered operating costs to be (passed on to him by his contractor in the form of reduced prices) without liability for the decision to expose third parties to the risk of uncompensated losses.

Notwithstanding that the *Becker* case was a tort case the logic behind the decision would certainly seem applicable to this case.

THEREFORE, after taking all of the credible evidence contained in this record into account, it is found as a matter of law, that the claimant was an employee of the defendant, John G. Crane.

* * *

Signed and filed this 4th day of May, 1979.

HELMUT MUELLER
Deputy Industrial Commissioner

Appealed to Commissioner: Affirmed
Appealed to District Court: Pending

GLEN MENSCHING,

Claimant,

vs.

PUROLATOR COURIER CORP.,

Employer,

and

ROYAL-GLOBE INSURANCE COMPANY,

Insurance Carrier,
Defendants.

Arbitration Decision

This is a proceeding in arbitration brought by the Glen Mensching, the claimant, against Purolator Courier Corporation, employer, and Royal-Globe Insurance Company, to recover benefits under the Iowa Workers' Compensation Act by virtue of an injury which occurred on February 10, 1978.

* * *

The parties entered into a stipulation which was filed in these proceedings and read in part as follows:

Purolator Courier Corporation is in the business of picking up and delivering general commodities such as bank cash letters, medicine to hospitals, and other items. Pickups and deliveries are, for the most part, made to regular customers on established routes. The essence of the business is speed in the pickups and deliveries Purolator Courier Corporation offers overnight delivery of items from one point in the United States to any other point. This goal is achieved by means of ground and air transportation. In the Council Bluffs, Iowa, area, air connections are made with an airplane which leaves Eppley airport in Omaha, Nebraska, each evening and which carries items to Columbus, Ohio, a distribution point of Purolator Courier Corporation's network.

For the purposes of this proceeding, the term

"courier" refers to the truck drivers who pick up and deliver general commodities.

Glen Mensching, the claimant, was employed by Purolator Courier Corporation in 1972. By February of 1978, he was a full-time courier. He was guaranteed forty hours per week work.

On the evening of February 9, 1978, there was a conversation between Barry Judkins and Glen Mensching at the Purolator Courier Corporation facility at 1626 Avenue D in Council Bluffs, Iowa. The position of Purolator Courier Corporation is that Glen Mensching was discharged and terminated from his employment during that conversation; it is the position of Glen Mensching that he was not terminated from his employment during the discussion of February 9, 1978.

On the morning of February 10, 1978, Glen Mensching came to the Purolator Courier Corporation facility at 1626 Avenue D in Council Bluffs, Iowa, and commenced to drive the route. On that day, Barry Judkins and Wayne Beckner drove to Shenandoah, Iowa, where Barry Judkins picked up Glen Mensching to return him to Council Bluffs, and Wayne Beckner took over the route. Barry Judkins, the Operations Supervisor, was at that time driving a vehicle of Purolator Courier Corporation, and was acting within the course of his employment. That vehicle, while being so driven by Barry Judkins and while Glen Mensching was riding in it, was involved in an accident near the Lake Manawa exit of Interstate 80 and Interstate 29 in Council Bluffs, Iowa.

The issue so joined is whether or not the claimant's presence in the defendant owned vehicle at the time of the accident was occasioned by virtue of a contract of employment.

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

Claimant, married, a mature 37, began his duties as a courier driver for the defendant employer in 1972 and had periodic complaints concerning normal items of conduct that were sent to him in memorandum form (defendants' exhibit A through H). The employer's dissatisfaction was primarily due to the claimant's occasional tardiness in returning to the terminal.

On February 9, 1978 the claimant returned to the Council Bluffs, Iowa terminal at 6:55 p.m. and had a conversation with his operations supervisor Barry Judkins. As a result of this conversation, the defendants contend that the claimant's employment was terminated.

The claimant denies that he was discharged and did in fact appear at his normal time the following day (February 10, 1978) and left in a company car to begin his accustomed route. The testimony of Mr. Judkins is given little weight in the decision. The acts of the parties to this conversation belie Judkins' revision of the circumstances here under consideration. The claimant returned and this action demonstrates that Mr. Judkins did not advise the claimant he was discharged as pointed out. Mr. Judkins did not obtain custody of the claimant's set of office keys nor his official identity card. Mr. Judkins dictated a memo on February 9, 1978 at 1:00 p.m. which indicates that the claimant was found to arrive at an unacceptable time prior to the happening of the occurrence as claimant was not scheduled to arrive that evening until later. The testimony of Wayne Becker, a co-employee, is suspect in that while he purports to corroborate Mr. Judkins, he failed to instruct anyone at the terminal the following morning that the claimant was no longer an employee and should not be allowed custody of a company car.

WHEREFORE, it is found that the claimant was in the course of his employment on February 10, 1978.

Signed and filed this 28th day of November, 1978.

HELMUT MUELLER
Deputy Industrial Commissioner

No Appeal.

PATRICIA A. MERICAL,

Claimant,

vs.

UNITED BRICK & TILE CO. OF IOWA and/or SIOUX CITY BRICK & TILE,

Employer,

and

WESTCHESTER FIRE,

Insurance Carrier,
Defendants.

Decision on Application for Partial Commutation

This is a proceeding for Partial Commutation brought by the claimant, Patricia Merical, against her employer, United Brick & Tile Co. of Iowa and/or Sioux City Brick & Tile, and the Westchester Fire Insurance Company, the insurance carrier, to recover a commutation of benefits in the amount of 53.3 weeks.

* * *

On January 12, 1978 the claimant received an award in a Review-Reopening decision written by Iowa Deputy Industrial Commissioner, Dennis L. Hanssen, which held in part as follows:

> THEREFORE, defendants are ordered to pay claimant one hundred seventy-five (175) weeks of permanent partial disability compensation at the rate of eighty-two and 06/100 dollars ($82.06) per week. Defendants are further ordered to pay claimant one hundred eleven and six-sevenths (111 6/7) weeks of healing period compensation at the rate of eighty-two and 06/100 dollars ($82.06).

The issue requiring a ruling is whether or not the claimant's application shall be granted.

The defendants, in open court, agreed to claimant's application, but requested leave to file and make a part of these proceedings a release signed by the claimant in the sum of five thousand five hundred and 00/100 dollars ($5,500) in favor of Parnell Mahoney, John R. Hill, Lawrence E. Newman, Al Bernal, Sioux City Brick & Tile Company and/or United Brick & Tile Company of Iowa. Said release is found to be admissible and is made a part of these proceedings as defendants' exhibit "A", said exhibit being attached hereto and made a part hereof, together with the letter of transmittal from attorney Spellman.

Defendants further agreed to waive their rights of subrogation as contained in §85.22, Code of Iowa.

Therefore it is found that the claimant's application in partial commutation be approved.

* * *

Signed and filed this 9th day of February, 1979.

HELMUT MUELLER
Deputy Industrial Commissioner

No Appeal.

CARL MICHAEL,

Claimant,

vs.

HARRISON COUNTY,

Employer,

and

EMPLOYERS MUTUAL INSURANCE CO.,

Insurance Carrier,
Defendants.

Appeal Decision

This is a proceeding brought by claimant appealing a proposed decision in review-reopening wherein claimant was awarded one hundred thirty-five (135) weeks of permanent partial disability as a result of an injury arising out of and in the course of his employment on February 27, 1976.

* * *

Claimant's allegations on appeal all relate to the deputy's finding of twenty-seven percent industrial disability. Defendants' reply brief raises the additional issue of whether or not the rate of compensation awarded by the deputy was correct.

The form four filed with this agency on March 16, 1976 lists married claimant's gross weekly earnings at $182.40 and states claimant is entitled to five exemptions. The rate on the form is $124.32. Apparently the deputy industrial commissioner took the rate from this form; and as the defendants correctly point out, the deputy appears to have perpetuated the error in the form four. The proper rate should be $120.88.

Claimant, who was injured on February 27, 1976, described his injury as follows:

> I was standing on the bannister of the bridge. The dragline was swinging steel beam around, and I reached out to grab it so I could steady it to hand it down to some other guys that were working down below me. When I grabbed it, why evidently the cable of the dragline came in contact with the high line and arced across or something. But that's when I got shocked. After that I don't remember anything.

At the time of his injury, he testified that he had pain in his back and arm and burns on his arms, legs and face. During a hospitalization of about nine weeks, claimant had his two middle fingers amputated as well as a section of his thumb and underwent a number of skin grafting procedures.

Louis F. Tribulato, M.D., board-certified orthopedic surgeon, saw claimant in the emergency room on the day of his injury. Claimant had head lacerations, burns on the arms, mid-back pain and a fracture of T-12. The doctor reported surgery on March 3 to debride the burns to claimant's arms, head and legs. Dr. Tribulato saw claimant several times after claimant's release from the hospital, primarily to examine a fracture at T-12 which the doctor said had healed well. He defined claimant's period of disability as extending from February 27, 1976 to August 26, 1976, with disability thereafter referable to his hand. The doctor, without use of a particular table, rated claimant's disability as 15% of the total body. Dr. Tribulato said he would defer to the treating doctors for a rating of the hand.

Mario Edward Baccari, M.D., board-certified plastic and reconstructive surgeon, first saw claimant on March 3, 1976. He performed a series of operations to remove the third and fourth fingers and to complete skin grafts. Claimant was released by the doctor to return to light duty on December 7, 1976 and to return to full-time work on June 27, 1977. On cross-examination defendants' attorney convinced Dr. Baccari that his partner, Dr. Dahl, had incorrectly applied the AMA Guides to the Evaluation of Permanent Impairment. A careful reading of the Guide, however, reveals that Dr. Dahl's application was correct. The Guide at 8 gives the following formula to be used when two or more digits are involved:

1. Calculate *separately* and record impairment of each digit involved.

2. Calculate *separately* and record impairment of hand as contributed by each digit involved.

3. Add all impairment of hand values. The sum of these values is impairment of the hand.

4. Consult Table 11 to ascertain impairment of *upper extremity* as contributed by *hand*.

Applying the formula to claimant yields these figures:

	Impairment of Hand
95%of Thumb	= 38
100% of Long Finger	= 20
100% of Ring Finger	= 10
	68%

Sixty-eight percent impairment of the hand translates to 61% of the upper extremity, which converts to 37% of the whole man. The 37% allotted for functional impairment to his hand is not then added to the 15% assessed to the back. Rather, the values are taken to the combined value chart in the AMA Guide. Use of that chart yields a value of 46%.

John L. Beattie, board-certified surgeon, examined claimant on February 20, 1978. At that time claimant was complaining of low back pain with radiation into the shoulder. The doctor, who found limitation of motion, gave his impression relating to the back as that of "post-traumatic compression changes of the body of T-12 with marked anterior wedging, and muscle spasms of the thoracic spine." In making his disability rating this physician looked to the AMA Guide and McBride's and also called upon his years of experience and then arrived at a disability rating of 65% of the total body. That 65% could be broken down into 15% to the low back, 40% to the right arm and hand as it relates to the body as a whole and 10% to other problems which might arise; i.e., keloids that could undergo malignant degeneration.

Joseph A. Heaney, M.D., psychiatrist, saw claimant on March 31, 1978. His examination consisted of administration of the Minnesota Multiphasic Personality Inventory (MMPI) and an interview. Claimant complained of insomnia; discomfort in his ankles and feet; feelings of losing control of his fingers; and numbness, itching, and some pain in the scar areas. Some of these conditions, the doctor believed, "could interfere in a moderate way with his activities . . . in daily living." Dr. Heaney interpreted the MMPI as showing a chronic pain profile with claimant "worried about his bodily functions, tense, anxious, fearful. Elevation of 2, indicating a chronic depression associated with chronic back pain. Elevation of 3, which is a psychopiological [sic], which would be an episodic loss of psysiological [sic] functionings." Some of Dr. Heaney's testimony related to neurosis. The doctor said,"Neurosis essentially is vague feelings about one's body. It may not be real. Chronic aggravation, aching and pain, with concomitant fear and anxiety." Dr. Heaney reported neurosis as it related to claimant was "anxiety, fear--fear-motivated type behavior, with a loss of interest in his activities; depression; hysterical psychophysiological types of things that he feels in his scars and his ankles and feet; and his fatigueability [sic] and tiredness and some irritability." Traumatic neurosis was characterized by the psychiatrist as a particular set of mental symptoms. Although he said it was not possible to tell if a traumatic neurosis was previously present, Dr. Heaney testified claimant's "elevation--his elevation on testing and his clinical material indicate a chronic pain profile, which certainly an accident and a series of operations would precipitate." When questioned about how traumatic neurosis would affect claimant's ability to do his job, the physician commented, "It can be a hundred percent totally disabling, so the person is fearful and homebound, so afraid and so scared in his mind that -- Based upon my clinical impression with the MMPI, I estimated this man to be 30 percent in my psychiatric medical judgment." The 30% disability to the body as a whole was "associated with chronic depression, and the traumatic emotional neurosis, which is associated with the accident, plus--plus the hospitalizations and surgeries that the man has gone through, which is a traumatic experience . . ." The doctor suggested that 80% of the traumatic neuroses would not go away without active intervention and treatment and in spite of such intervention, might recur. In claimant's case, Dr. Heaney proposed that claimant could be treated with hospitalization, medication, exercises, and biofeedback.

Frederick L. Crouter, Ph.D., evaluated claimant, using the MMPI given by Dr. Heaney and a thirty to forty minute interview. Elevation of three scales on the MMPI suggested to Crouter the necessity for ruling out--looking to evidence to support or negate the finding--neurosis which he described as "a person [sic] who is experiencing enough difficulty in handling his emotions and his feelings that it is interfering with his ability to cope adequately in his everyday life." Although Crouter was "[n]ot an awful lot" familiar with claimant's accident and he stated that claimant's history would not change his interpretation of the test, it appeared to him more likely that claimant had a chronic neurosis than a traumatic neurosis. While he was unable to make a diagnosis on the information he had and he did not see the test as establishing a cause and effect relationship between the neurosis and the trauma, Crouter declared it was possible for chronic pain to cause depressive neurosis or for neurosis to cause trauma.

When the ratings of the various doctors regarding physical impairment are considered, there is not a wide variance in the estimates if they are put in the proper perspective. The back problems were assessed consistently at 15% impairment, the arm problem was assessed at 37% and 40%, Dr. Beattie gave an additional 10% for problems which *could* develop regarding keloid scars. This was speculative and conjectural. The difference between the overall assessments of total body physical impairment after disregarding the 10% for keloids was basically in the manner in which the various factors were combined. Dr. Beattie's result is considered excessive.

With regard to the psychological aspects of the claimant's condition, the evidence is considered insufficient to establish more than a minimal amount of functional disability or impairment which is causally related to the injury.

Functional disability is an element to be considered in determining industrial disability which is the reduction in earning capacity, but consideration must also 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 (1963). It is the reduction of earning capacity which must be determined. *Barton v. Nevada Poultry,* 253 Iowa 285, 110

N.W.2d 660 (1961).

Thirty-four year old claimant has done primarily truck driving and laborer type work except for a brief period when he was self-employed as a service station owner. At the time of his injury he had worked for the county for two and one-half years, repairing and building bridges and driving a truck. He returned to work driving a rock truck for the county in December 1976, a job involving less manual labor than the operation of a winch truck that he has run prior to his injury which required extensive use of both hands. He also runs an end loader scooping rock. Claimant's complaints at the time of the hearing included a constant ache in his back made worse by standing, itching in the scar area, occasional sharp pain in his hand, difficulty in sleeping and a short temper. Claimant said his ability to work was affected by tenderness and loss of strength in his hand and arm, a decreased ability to lift, a lack of feeling in his thumb making it difficult for him to know when he was holding onto things, a diminished capacity to move and a sensitivity to weather conditions.

Defendants presented the testimony of David Arthur McWilliam, county road foreman, who said that claimant's present job was the equivalent of his prior job or perhaps better, that claimant had not complained while at work and that claimant got on well with his fellow employees.

Dr. Tribulato expected that claimant would continue to suffer pain as a result of the injury and that claimant's ability to do heavy work would be impaired. Dr. Baccari stated that claimant's function with regard to "grasp, heat, cold, pinch, touch, anything which anybody usually does with the hands will be impaired." Dr. Beattie believed claimant's injuries would preclude him from lifting heavy objects, working on his knees and being exposed to sunlight or the elements. Dr. Heaney submitted that claimant's ability to work would be restricted because:

> the tension and fear and the sleep disturbance will continue, and that the fear and the anxiety will limit his ability to function as a truck driver; and, as outlined when I asked him about sitting, standing and walking, he put very severe restrictions on that, like an hour and a half hour, and that type of thing, indicating that the man is restricted. And I think that there's physical reasons for that restriction, and there are mental--mental anxiety, fear, mental components, that cause that.

Defendants suggest that as claimant is making a larger salary today than he made at the time of his injury that he, therefore, has not suffered a reduction in earning capacity. Claimant's pay records show that at the time of his injury claimant's gross earnings were $395.48 biweekly. At the end of December 1977, claimant's earnings had risen to $419.23.

It should be noted that industrial disability relates to a reduction in *earning capacity* rather than a change in actual earnings. *Ford v. State Accident Insurance Fund,* 492 P.2d 491 (Ct. App. Ore. 1972), presented a factual situation similar to the case sub judice. Claimant, who suffered burns in an industrial incident resulting in hospitalization, skin grafts and an extended period of disability, returned to his old job at an increased salary. The opinion of the chief justice at 493 discussed earning capacity as follows:

> Earning capacity must be considered in connection with a workman's handicap in obtaining and holding gainful employment in the broad field of general industrial occupations and not just in relationship to his occupation at any given time. A workman's post-injury earnings is evidence which, depending upon the circumstances of an individual case, may be of great, little, or no importance in determining loss of earning capacity. A person whose physical and mental capacities have been impaired not at all by an injury may voluntarily choose to enter an occupation which provides less compensation than his pre-injury occupation. Likewise, a person with almost total physical disability may find a post-injury occupation not involving physical effort which pays him substantially more than his pre-injury occupation--yet such a man is severely disabled in terms of ability to obtain and hold gainful employment in the broad field of general industrial occupations.

The Fifth Circuit Court of Appeals in *Travelers Insurance Co. v. Truitt,* 280 F.2d 784 (1960), also discussed earning capacity. The opinion at 787 states that:

> [P]hysical disability or physical impairment while not the conclusive standard for recovery, is of course, a highly relevant factor in determining loss of earning *capacity.* By the same token, the fact that an injured employee resumes work after an injury and earns substantially the same as before the injury is not a conclusive indication that there has been no loss of earning capacity, but is evidentiary only.

The Louisiana Court of Appeals in *Jones v. Employers Mutual Liability Insurance Co.,* 114 So.2d 602 (Ct. App. La. 1959), handled at 605 the issue of greater earnings thusly:

> The fact that an employee is able to earn a greater wage following an accident than he was paid at the time of injury does not bar his recovery of workmen's compensation benefits provided he is actually disabled. This principle of law is so elementary as to require no citation of authority in support thereof.

It is clear from claimant's testimony and that of the medical experts who testified that claimant's *earning capacity* has been impaired in that certain employment opportunities will be foreclosed to claimant. This commissioner concludes that the finding by the deputy industrial commissioner of industrial disability of twenty-seven percent is appropriate. This is so in spite of the fact that the degree of functional impairment assigned here is different from that found by the deputy.

While, as indicated previously, functional disability is an element to be considered in determining industrial disability which is the reduction of earning capacity, the other factors such as age, education, qualifications, experience and inability to engage in employment for which he is fitted are also to be considered. They are all considered as a group, however, to determine the overall loss of earning capacity and not considered as additions or subtractions from the medical evaluation of the degree of impairment or

functional disability. *Olson v. Goodyear Service Stores, supra.*

* * *

Signed and filed this 30th day of January, 1979.

ROBERT C. LANDESS
Industrial Commissioner

Appealed to District Court: Pending.

CHARLES L. MILLEDGE,

Claimant,

vs.

PRODUCTS, INC.,

Employer,
Defendant.

Arbitration Decision

INTRODUCTION

This is a proceeding in arbitration brought by Charles L. Milledge, claimant, against Products, Inc., alleged employer, for benefits as a result of an injury on February 9, 1977.

* * *

On August 17, 1978, Deputy Industrial Commissioner Mueller filed a decision in the case of Charles L. Milledge v. Four Seasons. Said decision found claimant to be an employee of Four Seasons, that Four Seasons was paying claimant a gross weekly wage of approximately $350 and awarded claimant benefits to be paid by Four Seasons, Inc. As stated by the claimant, the problem is as follows:

> MR TAUKE: Initially the case was brought against two defendants. They were Four Seasons Cooperative, Inc., and Products Unlimited, Inc. It was the Claimant's position at that time that he was employed by Products Unlimited and/or both Four Seasons Cooperative, Inc.
>
> The insurance company representing Products Unlimited, Inc., Alexander and Alexander, filed a special appearance on the basis that Products Unlimited, Inc., was not under their jurisdiction and it was not an employer of Charles Milledge. At that special hearing in which Deputy Commissioner Alan Gardner presided, it was found that Products Unlimited, Inc., was not an employer of Charles Milledge.
>
> It came out in that hearing that Products, Inc., was the corporation, Nebraska corporation that owned the vehicle driven by the Claimant. And from that hearing we proceeded, granted somewhat late to proceed against Products, Inc.
>
> We also proceeded against Four Seasons Cooperative, Inc., and we did obtain a default judgment against them. Now, Four Seasons Cooperative, Inc., is a corporation. We have a hard time to know where it is.
>
> They are based out of Milford, Massachusetts, and Upland, California. It's basically a shell corporation with no assets, and no proceeds or collections have been made against Four Seasons. Four Seasons leased the truck owned by Products, Inc.
>
> For that reason we had the Court, and that was Helmet Mueller presiding, find that Four Seasons was an employer for Charles Milledge and responsible. We are here today filing a claim against Products, Inc., the owner of the vehicle driven by Charles Milledge. And we are claiming that Charles Milledge was an employee of Products, Inc., that he would be entitled to benefits as an employee for the injury that he incurred in the incident in Pittsburgh, Kansas.
>
> I believe that clears up the parties, unless you want me to explain a little more about what we are alleging as to Products, Inc.
>
> * * *
>
> MR. TAUKE: The only relationship that I understand that exists between Products, Inc., and Four Seasons Cooperative, Inc., is that there was a lease agreement between Products, Inc., owner of the truck, and Four Seasons Cooperative, Inc., a holder of an ICC Cooperative Permit.
>
> They were hauling two different types of freight, cranberries and foam. And the foam came from Products Unlimited, Inc.
>
> * * *
>
> MR TAUKE: What we are claiming today is that Charles Arbogast was an agent for Four Seasons and was an agent for Products, Inc. And under this agency he hired Charles Milledge to drive a truck owned by Products, Inc., and leased to Four Seasons Cooperative, Inc.
>
> On the basis of that employment we feel that Products, Inc., is an employer and is responsible for Workman's (sic) Compensation.
>
> In addition, we would submit the lease agreement which specifically states that Products, Inc., the lessor owner of the truck, is responsible for any damages and injuries to the employees driving the truck. And we would submit that as an exhibit. It's the lease agreement between Products, Inc., and Four Seasons Cooperative, Inc.

FACTS

As indicated in Helmut Mueller's decision, the following are the facts regarding claimant's injury:

> On or about February 7, 1977, Charles Arbogast, then an agent for Four Seasons in Council Bluffs, Iowa contacted the claimant in the state of Iowa and hired him to drive a load of cranberries and foam in a truck leased to Four Seasons. The agent of Four Seasons directed claimant to deliver his load of foam to Pittsburgh, Kansas and cranberries to Dallas, Texas. Claimant was given an expense check and delivered the load of foam to Pittsburg, Kansas. The load was being hauled under an ICC Permit held and owned by defendant.

At the time the claimant was unloading foam in Pittsburg, Kansas, he suffered a myocardial infarction. Claimant was unloading the foam from inside his truck at the time of the infarction. His pain became more severe and was taken to the hospital in Claremore, Oklahoma where he remained in the Claremore hospital for a couple of days and was transferred to Mercy Hospital in Council Bluffs. During his hospitalization, he incurred medical bills with Claremore Hospital of $1003.45 and Mercy Hospital of Council Bluffs for $2297.45. He was seen by Dr. Heck on September 27, 1977, who reported his opinion that Mr. Milledge suffered a myocardial infarction resulting in permanent disability of claimant. It is also the opinion of Dr. Heck that the increased physical exertion at the time of unloading the foam at Pittsburg, Kansas resulted in and precipitated the myocardial infarction. Claimant has incurred medical fees with Dr. Heck in the amount of $185.

Defendant owned the truck that claimant was driving when he was on his trip and which was leased to Four Seasons.

ISSUE

The issue presented by the parties is whether or not claimant was an employee of the defendant.

APPLICABLE LAW

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. *McDowell v. Town of Clarksville,* 241 N.W.2d 904 (Iowa 1976); *Musselman v. Central Telephone Co.,* 261 Iowa 352, 154 N.W.2d 128 (1967). Claimant initially has a burden of proving an employer-employee relationship. *Nelson v. Cities Service Oil Co.,* 259 Iowa 1209, 146 N.W.2d 261 (1967).

In *Usgaard v. Silvercrest Golf Club,* 256 Iowa 453, 127 N.W.2d 636 (1964), the court discussed the elements required to establish an employer-employee relationship: (1) employer's right to select or employ at will; (2) responsibility for the payment of wages by the employer; (3) right to discharge or terminate the relationship; (4) right to control the work; (5) is the party sought to be held as employer responsible party in charge of work of or whose benefit the work is being performed; (6) the intention of the parties who are creating the relationship; (7) the customary outlook taken by the community towards similar working relationships.

ANALYSIS

Based on the foregoing principles, it is determined that claimant has failed to meet his burden of proving an employer-employee relationship existed between the defendant and himself. First, it is noted that claimant has already proved he was an employee of Four Seasons. Secondly, claimant has not produced any evidence that the defendant had a right to select or employ claimant at will. Claimant himself indicated he was never paid by defendant. It would appear from the evidence that Charles Arbogast individually, or as agent for Four Seasons, could terminate claimant's employment and even Claude Ayers may have had that authority. It is also clear from the evidence that defendant in no way controlled claimant's work. The evidence presented again would indicate that the lessee (Four Seasons), Charles Arbogast and Claude Ayers controlled whether or not claimant could work. All defendant did was own the truck claimant ended up driving. It would appear from claimant's own statement that he did not intend to be the employee of the defendant.

Q. You never thought you were working for Products, Inc., did you? You never got any paychecks from Products, Inc.?

A. No, not that I can recall. I don't believe so.

Also the defendant had no intention of hiring employees.

Q. Did you have Workman's (sic) Compensation on Products, Inc.?

A. No.

Q. Why not?

A. Because I never had any employees. All we had was a truck.

It would also appear from the testimony that it is common in the trucking industry for a truck owner to lease a truck and give up control of it while the lessee uses it for a period of time.

Claimant puts some emphasis on claimant's exhibit 4. Even if this was some type of binding lease which the undersigned does not believe it is, it still would not make defendants liable, because claimant has failed to show the employer-employee relationship with defendant. Claimant's exhibit 4 appears to be an agreement between Claude Ayers and Four Seasons. Everywhere the signature of the lessee is required, Charles Arbogast has signed his signature and everywhere the owner lessor is to sign, the document is signed by Claude Ayers. This would be consistent with defendant's position that Claude Ayers was purchasing the truck.

* * *

Signed and filed this 24th day of September, 1979.

DAVID E. LINQUIST
Deputy Industrial Commissioner

No Appeal.

LORINE M. MILLER,

Claimant,

vs.

IOWA BEEF PROCESSORS, INC.

Employer,
Self-Insured,
Defendant.

Arbitration Decision

This is a proceeding in arbitration brought by Lorine M. Miller, the claimant, against her self-insured employer, Iowa Beef Processors, Inc., to recover additional benefits under the Iowa Workers' Compensation Act on account of an injury she sustained on August 28, 1978.

* * *

The issue at this stage of the proceeding is the nature and extent of claimant's disability. If any disability is found, defendant requests that it be given credit for compensation paid to the claimant for this injury under the Nebraska Compensation Law.

At the outset it is noted that defendant filed a special appearance on January 24, 1978 challenging the jurisdiction of this agency to determine the case at hand. The point of controversy was Code section 85.71(1). In an order filed March 1, 1979 another deputy commissioner overruled the special appearance. He found that the original notice and petition indicated claimant had an Iowa address and therefore on its face, the original notice and petition had stated that this agency might have jurisdiction. The deputy also commented that this agency is without jurisdiction to discuss the constitutionality of Code section 85.71.

Testimony of the claimant at the hearing verified that indeed her domicile is in the state of Iowa. Accordingly, she is subject to the Iowa Workers' Compensation Act. Further testimony from the claimant revealed that she was born in Nebraska, that she has lived in Iowa since 1952, that she has paid income tax in both Iowa and Nebraska, that she votes in Iowa, and that in response to an advertisement about the Iowa Beef Processors job that appeared in the Iowa Sioux City Journal, claimant went to defendant's plant in Dakota City, Nebraska, to apply for the job. It is further noted that defendant's hearing brief concerns the Section 85.71 issue. The brief, however, relies heavily upon a prior agency decision which discusses an injury that arose before Code section 85.71 was enacted. At the time of the hearing, defendant's counsel amended his brief to add a full-faith and credit argument.

Claimant, who began work for defendant-employer on August 14, 1972, had done a variety of jobs in the plant including running an extruder, working on the T-pack and on the big and small tippers, janitoring, manifesting, and reworking. As of Friday, August 25, 1978, claimant had been working for three or four weeks bagging shoulder clods weighing between 25 and 30 pounds and throwing them over her shoulder. On that day claimant developed pain through the center of her chest and went home where she rested all weekend. On August 28, 1978 claimant began a new job bagging knuckle bones weighing about 15 pounds and throwing the bags forward above her head and shoulders. Although she was able to finish her shift, her back hurt and she went to Aaron Katz, D.O., who gave her an electrical treatment, codine and Tylenol and told her to stay off work for three days. According to claimant, Fran O'Brien in personnel was called and O'Brien in turn called claimant's foreman, Bob Kellogg.

After three days Dr. Katz released claimant with a 15 pound weight restriction and a restriction against throwing meat. Claimant said she took the release to Harvey Beardsley, a head foreman, who told her to go home because no light duty was available. The claimant went back to the doctor, got another release which she took in and again was sent home because there was no light duty available.

When she returned to Dr. Katz, claimant testified she was told to see Dr. Paulsrud. Claimant was given another release for light duty but was again sent home by the company.

The company, in January 1979, directed claimant to see Dr. Dougherty who she said took x-rays, gave her a back brace and told her to return in three weeks at which time she was released to return to light duty. Claimant later was reevaluated by the doctor and was given six weeks of therapy and a different brace which she still wears today.

Claimant reported having a partial hysterectomy at age 27, taking medication for low blood pressure and a nervous stomach and injuring a cartilage in her right knee.

Defendant's witness Wayne Boyd, an attorney, testified that he thought claimant was entitled to benefits under the Nebraska Law. He went on to discuss the procedures and theories of the Nebraska Law as these would apply to claimant's case. He indicated how many more weeks of benefits she would be entitled to under the Nebraska Law.

Notes of claimant's visit to the office of David G. Paulsrud, M.D., dated November 21, 1978, report: "no laboratory abnormality" and that claimant could return to work on November 27, 1978 with a lifting restriction on weights over 20 pounds and on repetitive throwing.

John J. Dougherty, M.D., in an orthopedic history recorded December 19, 1978, lists three diagnoses:

(1) Pain in the mid-dorsal area, superimposed upon a scoliosis to the right, with a marked increased kyphosis, probably an old juvenile epiphysitis with moderate wedging of D-8 with some wedging of D-6 and D-7 and some degenerated discs at this level with degenerative arthritis.

(2) Scoliosis to the right, rotary in type, in the lumbar spine, with a marked degenerative disc at L-4-5 and some degenerative arthritis.

(3) Dorsal sprain, superimposed upon the above, question of whether this is a compression fracture, is it new or old.

In a letter written the next day, the doctor expressed his feelings that claimant would have further trouble if she were required to do "a lot" of heavy lifting and that claimant could return to work lifting weights of 30 to 35 pounds and that he had unsureness regarding whether claimant could tolerate throwing meat above her head. In a February 5, 1979 letter, Dr. Dougherty states: "I still feel this is an aggravation of a pre-existing problem. We went over what she had done before, which apparently had never bothered her." In a letter dated February 8, 1979 Dr.

Dougherty states: "[a]gain, I do not really feel she has sustained any compression fractures. I think she sustained a sprain superimposed upon previous problems which seem to be persisting." A March 16, 1979 letter from Dr. Dougherty contains his opinion that claimant "probably has sustained approximately 10 percent permanent partial impairment of her body as a result of the recent injury." This rating possibly could be lower if claimant improved with a back support. The doctor reiterated his belief that claimant could go back to work if she could be assured of a lighter job.

The claimant has the burden of proving by a preponderance of the evidence that the injury of August 28, 1978 is the cause of her disability on which she now bases her claim. *Bodish v. Fischer, Inc.,* 257 Iowa 516, 133 N.W.2d 867 (1965). *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). The opinions of experts need not be couched in definite, positive or unequivocal language. *Sondag v. Ferris Hardware,* 220 N.W.2d 903 (Iowa 1974). The 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).

A claimant is not entitled to recover for the results of preexisting injury or disease, but only for an aggravation thereof which resulted in the disability found to exist. *Olson v. Goodyear Service Stores,* 255 Iowa 1112, 125 N.W.2d 251 (1963). In *Ziegler v. U.S. Gypsum Co.,* 252 Iowa 613, 620, 106 N.W.2d 591 (1961), the Iowa Supreme Court said:

> It is, of course, well settled that when an employee is hired, the employer takes him subject to any active or dormant health impairments incurred prior to his employment. If his condition is more than slightly aggravated the resultant condition is considered a personal injury within the Iowa law.

The record supports a finding that claimant has sustained disability to the body as a whole as a result of a work-related aggravation of her preexisting condition. Since the date of the injury, claimant has been unable to resume the same activities she was able to perform before the date of the injury. It is indicated by the medical experts that she will not be able to resume such activities in the future.

Functional disability is an element to be considered in determining industrial disability which is the reduction of earning capacity, but consideration must also be given to the injured employee's age, education, qualifications, experience and inability to engage in employment for which he is fitted. *Olson v. Goodyear Service Stores,* 255 Iowa 1112, 125 N.W.2d 251 (1963); *Barton v. Nevada Poultry,* 253 Iowa 285, 110 N.W.2d 660 (1961).

Fifty-six year old claimant, widowed 33 years, has a tenth grade education. She has done farm work, performed housework, sold cosmetics and worked for nine years with a commercial sewing machine--a job she felt unable to do at present because of the work rhythm involved. Claimant, who said there are many things she can no longer do, claimed trouble getting her hands above her head, inability to do heavy lifting and difficulty bending. She currently has headaches and takes Tylenol. She thought she could do ordinary housework or work as a clerk if she could find a job. Claimant has been to Job Service, CETA and Vocational Rehabilitation. Claimant stated she checked for jobs at the plant which she could do whenever she picked up her compensation check, but the jobs posted were always filled by someone with more seniority. She earlier testified that of all the jobs she had done with defendant- employer, the two that did not involve heavy lifting were janitor work and manifesting. She indicated that the two manifesting positions were "going company". Claimant agreed that there is currently an unemployment problem in Sioux City. Although she has her name before an employment agency, she has not had any interviews. She states she was making $5.92 an hour when she quit working with the defendant-employer in August 1978.

WHEREFORE, it is hereby found that the Iowa Industrial Commissioner has jurisdiction to decide the present matter.

It is further found that claimant sustained an eighteen (18) percent permanent partial disability to the body as a whole from the injury on August 28, 1978.

It is further found that healing period terminated as of November 27, 1978, the date upon which Dr. Katz indicated claimant could return to light work. It is clear from the record viewed as a whole that the release claimant received at that time is in effect the same as all the other releases she has received since that time. That is, in effect claimant appears to have reached maximum recovery as of November 1978.

* * *

Signed and filed this 7th day of August, 1979.

LEE M. JACKWIG
Deputy Industrial Commissioner

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

PHILIP MILLER,

Claimant,

vs.

GRA-IRON FOUNDRY,

Employer,

and

FIREMANS FUND INSURANCE COMPANIES,

Insurance Carrier,
Defendants.

Review-Reopening Decision

INTRODUCTION

This is a proceeding in review-reopening by Philip Miller, claimant, against Gra-Iron Foundry, employer, and Firemans Fund Insurance Company, insurance carrier, for the recovery of further benefits as the result of an injury on August 19, 1974.

* * *

FACTS

Claimant, who is 58 years old, married and has an eighth grade education, started working for defendant in 1956. Claimant testified that he started working for defendant as a chipper and grinder and worked in that position for one year using an air chisel and grinder to clean castings. Claimant then became a foreman and did that job for four to five years. He then returned to a job of chipping and grinding for another 4 years. In 1967 claimant took the position as oven tender. The job of oven tender required claimant to move racks of cores in and out of an oven with the use of an electric jack.

Claimant received an injury arising out of and in the course of his employment on August 19, 1974 as he was moving a rack of cores when he backed into a rack of patterns. One pattern was sticking out of the rack and struck the claimant somewhere between the shoulder and the neck. Claimant indicated the power switch of the jack had stuck on him. Claimant testified he didn't think much about the accident although he hurt for awhile. The pain got worse and claimant told his foreman but refused to see a doctor at that time. After finishing his shift, claimant saw a Dr. Lund before going home, who gave claimant pain pills. Claimant did not return to work until March 31, 1975.

Dr. Lund referred claimant to Donald W. Blair, M.D. Dr. Blair examined claimant and took x-rays. As a result of that examination claimant was given Valium and Darvon 65. Pursuant to Dr. Blair's instructions, claimant also took whirlpool treatments at home for three months, an electrical shock treatment at home, used a neck stretcher for a period of ten to fifteen minutes two to three times daily and was instructed on exercises to do at home.

On March 31, 1975 claimant returned to work at the same job. In 1976 claimant again injured his back right under his shoulder. Claimant remained off work after that accident until he was terminated by the company in 1977.

The testimony of claimant, claimant's wife and the exhibits clearly show back problems and injuries preceding the August 1974 injury as well as injuries after the August 1974 injury.

ISSUES

The issues presented by the parties at the time of hearing were whether there is a causal relationship between claimant's disability and work injury and extent of claimant's permanent partial disability.

APPLICABLE LAW

The claimant has the burden of proving by a preponderance of the evidence that the injury of August 19, 1974 is the cause of his disability on which he now bases his claim. *Bodish v. Fischer, Inc.,* 257 Iowa 516, 133 N.W.2d 867 (1965). *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).

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. *Nicks v. Davenport Produce Company,* 254 Iowa 130, 115 N.W.2d 812 (1962). *Yeager v. Firestone Tire & Rubber Company,* 253 Iowa 369, 112 N.W.2d 299 (1961).

A claimant is not entitled to recover for the results of a preexisting injury, but only for an aggravation thereof which resulted in the disability found to exist. *Olson v. Goodyear Service Stores,* 255 Iowa 1112, 125 N.W.2d 251 (1963).

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.2d 899 (1935), 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. * * * *

ANALYSIS

Based on the foregoing principles, it is found that claimant has shown a disability which is causally connected to the injury he received on August 19, 1974. This is

proven by claimant's testimony as well as Dr. Blair's report of November 15, 1978 where it is indicated as an aggravation of claimant's previous injuries.

The real problem comes in determining the extent of permanent partial disability attributed to the August 1974 incident and being distinguished from the permanent partial disability attributed to the claimant's injuries before and after that injury. On January 14, 1963 claimant was given a residual disability estimate of 25 percent total and in 1970 a Dr. Thornton estimated claimant's disability at 40 to 50 percent. Dr. Blair, in his report of December 13, 1976, indicated claimant's present permanent functional impairment at "approximately 45 to 50 percent, total". This is reaffirmed by Dr. Blair in his letter of June 2, 1977. In his report of November 15, 1978 Dr. Blair stated: "Some aggravation of his symptoms could be considered and this would be based primarily on the basis of his subjective complaints and this would not be expected to exceed 5-10% of the man as a whole." Claimant testified that his symptoms regarding his neck and back originated from the August 1974 injury. However, Dr. Blair's reports clearly indicate that claimant had complained about the same symptoms for several years. As indicated by the cases previously cited, claimant is not entitled to recovery for results of the preexisting injury but only the aggravation thereof.

It is quite clear from the evidence that claimant is 58 years old, married and has only an eighth grade education. He has worked for the defendant since 1956 and has generally had work requiring a great deal of exertion. It is also quite clear that because of the combination of all of claimant's injuries, he is unable to return to his prior employment. It is determined by the undersigned that claimant has received 20 percent permanent disability to his body as a whole for industrial purposes as the result of the injury on August 19, 1974.

* * *

Signed and filed this 9th day of May 1979.

DAVID E. LINQUIST
Deputy Industrial Commissioner

Appeal to Commissioner: Affirmed.

MISHAK TRUCK LINE, INC.,

Petitioner,

vs.

DAHLSTEN TRUCK LINE, INC., MARLYS K. MISHAK d/b/a MKM RENTAL COMPANY, JOYCE MEYER, ERIC RAYMOND MEYER, PATRICIA ELAINE MEYER, DAVID ALAN MEYER, NATALIE STRIBLEY, GREG D. STRIBLEY and MICHAEL P. STRIBLEY,

Defendants.

Appeal Decision

This is a proceeding brought by Joyce Meyer, Eric Richard Meyer III, Eric Raymond Meyer, Patricia Elaine Meyer, David Allen Meyer, Natalie Stribley, Greg D. Stribley and Michael P. Stribley appealing a proposed ruling by a deputy industrial commissioner overruling their motion for summary judgment and by petitioner appealing a proposed ruling by a deputy industrial commissioner overruling its special appearance.

Petitioner in this action originally sought a declaratory ruling. After a number of filings and a great amount of correspondence, Joyce Meyer, Eric Richard Meyer III, Natalie Stribley, Greg O. Stribley and Michael P. Stribley moved for summary judgment. Marlys K. Mishak d/b/a MKM Rental Company also sought a summary judgment. A deputy industrial commissioner overruled those motions on August 11, 1978.

Petitioner then filed a dismissal of the action initially filed. That dismissal was resisted. Petitioner then specially appeared challenging the jurisdiction of this agency "to hear or determine any matters concerning the Resistance to Dismissal." An appeal was filed by Joyce Meyer, Eric Richard Meyer III, Eric Raymond Meyer, Patricia Elaine Meyer, David Alan Meyer, Natalie Stribley, Greg D. Stribley and Michael P. Stribley appealing this ruling which overruled the motion for summary judgment. A second special appearance was filed by petitioner concerning the notice of appeal. The appeal was then stayed by this commissioner.

On February 28, 1979 petitioner's special appearance challenging this agency's jurisdiction to hear matters concerning the resistance to the dismissal was overruled. Petitioner now appeals the ruling of February 28.

The proposed ruling overruling the motion for summary judgment will be dealt with first. The deputy industrial commissioner did not consider the question of whether or not a motion for summary judgment could properly be filed in a declaratory ruling. Neither will this commissioner address that issue as he agrees with the deputy that an evidentiary hearing is necessary and the motion for summary judgment should be overruled.

The Iowa Supreme Court has repeatedly said that summary judgment is to be used to avoid the expense and delay of useless trials. *Daboll v. Hoden,* 222 N.W.2d 727 (Iowa 1974). However, before a motion for summary judgment may be granted, it must be shown by the moving party that there is an absence of any genuine issue of material fact and the materials before the court--pleadings, admissions, depositions, answers to interrogatories and affidavits--must be viewed in a light most favorable to the opposing party. *Meyer v. Nottger,* 241 N.W.2d 911 (Iowa 1976). Dicta in a recent case from the supreme court of Iowa, *Estate of Campbell,* 253 N.W.2d 906, 908 (Iowa 1977) appears to indicate that a hearing on a motion for summary judgment is appropriate in any event.

In the case *sub judice* the parties requesting summary judgment failed to meet the burden of showing that no genuine issue of material fact exists and therefore the

deputy's proposed ruling is proper.

The second matter to be considered is petitioner's appeal of the proposed ruling which overrules its special appearance.

Industrial Commissioner's Rule 500-4.35 states:

> Rules of civil procedure. 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 chapters 85, 85A, 86, 87 and 17A, or obviously inapplicable to the industrial commissioner. In those circumstances, these rules or the appropriate Code section shall govern. Where appropriate, reference to the word "court" shall be deemed reference to the "industrial commissioner."

Iowa Rule of Civil Procedure 215 provides for voluntary dismissal:

> A party may, without order of court, dismiss his own petition, counterclaim, cross-petition or petition of intervention, at any time before the trial has begun. Thereafter a party may dismiss his action or his claim therein only by consent of the court which may impose such terms or conditions as it deems proper; and it shall require the consent of any other party asserting a counter-claim against the movant, unless that will still remain for an independent adjudication. A dismissal under this rule shall be without prejudice, unless otherwise stated; but if made by any party who has previously dismissed an action against the same defendant, in any court of any state or of the United States, including or based on the same cause, such dismissal shall operate as an adjudication against him on the merits, unless otherwise ordered by the court, in the interests of justice.

The Supreme Court of Iowa has held that a plaintiff has an absolute right to dismiss under the terms of this rule and that the effect of such a dismissal will finally terminate the jurisdiction of the court in those cases in which defendant's pleadings are only defensive in nature. *Witt Mechanical Contractors, Inc. v. United Brotherhood of Carpenters & Joiners,* 237 N.W.2d 450 (Iowa 1976).

In the matter here presented it would appear that this agency would have no jurisdiction following petitioner's dismissal unless it can be shown that a counterclaim has been filed. Iowa Rule of Civil Procedure 72 allows that an answer "may contain a counterclaim which must be in a separate division."

The Iowa Supreme Court has reiterated its opinion that the Workmen's Compensation Act, enacted for the benefit of the workingman, should be liberally construed. *Barton v. Nevada Poultry Co.,* 253 Iowa 285, 110 N.W.2d 660 (1961). With equal frequency the court has observed technical rules of pleading are not essential in workmen's compensation proceedings. *Cross v. Hermanson Brothers,* 253 Iowa 739, 16 N.W.2d 616 (1944).

The deputy in his ruling overruling the motion for summary judgment noted that the original proceeding had taken on the character of an arbitration proceeding and scheduled the matter for pretrial hearing. The observations of the deputy are accurate and it is held that the case shall be considered an arbitration proceeding. Although the pleadings in this matter are unique, it is apparent that all parties are apprised of the ultimate issue, which is the right of the dependents of Eric R. Meyer, Sr. to benefits from any of the alleged employers. This issue was sufficiently stated in the prayer of Eric Raymond Meyer, Patricia Elaine Meyer and David Alan Meyer as well as the prayer of Joyce Meyer, Eric Richard Meyer III, Natalie Stribley, Greg D. Stribley and Michael P. Stribley.

Since the action is now considered an arbitration, it is the claimants' pleadings that state the cause of action. They have the burden of proof to establish their claim.

As rulings have been made on the various issues before this agency, it is obvious that petitioner's special appearance filed September 11, 1978 is overruled.

* * *

Signed and filed this 25th day of June, 1979.

ROBERT C. LANDESS
Industrial Commissioner

Appealed to District Court:
Special Appearance Overruled.

RONALD MORRISON,

Claimant,

vs.

WILSON FOODS,

Employer,
Self-Insured,
Defendant.

Review-Reopening Decision

This is a proceeding in review-reopening brought by Ronald Morrison, the claimant, against his employer, Wilson Foods Corporation, to recover additional benefits under the Iowa Workers' Compensation Act as a result of an injury he sustained on May 3, 1978.

* * *

The issues to be determined are the causal connection between claimant's injury and his resulting disability and the nature and extent of said disability. There is also an issue concerning which party will pay the substantial charge of Dr. Pakiam for his deposition and the consultation related thereto.

There is sufficient credible evidence in the record to support the following findings of fact, to wit:

Claimant, age 30, married with two dependent children, suffered a compensable injury on May 3, 1978 while employed by the defendant, Wilson Foods Corporation.

Claimant has been employed at Wilson Foods Corporation for seven years and on the date of his injury was a

meat cutter. His job was to cut meat out of hog snouts through the use of an electric knife. Claimant was using the knife with his right hand when someone accidentally pulled on the knife's cord, causing the knife to move up into claimant's hand causing the blade to cut into the proximal interphalangeal joint of claimant's right index finger.

Claimant went directly to the plant nurse's office and reported the injury. He was transported to Mercy Hospital where he was seen in the emergency department by A. Ivan Pakiam, M.D., a specialist in reconstructive and plastic surgery.

Dr. Pakiam testified in his deposition that claimant related a history of having cut his right index finger on the job with an electric knife.

On examination in the emergency room, Dr. Pakiam found that claimant had a one inch slash across his right index finger at the second knuckle and the nerve and both tendons of the right index finger had been severed. Claimant could not flex his right index finger and he had complete numbness on the radial side of the finger. Dr. Pakiam also found that the volar plate which separates the joint cavity from the tendons had been severed.

Dr. Pakiam operated on claimant on May 3 and with regard to that surgery testified:

Q. Did you operate on him?

A. Yes, that same day.

Q. And what operation was conducted?

A. What I had to do was to expose all the structures that were injured, which meant extending the wound towards the palm of the hand proximally and also into the finger, itself, distally.

Q. What was the reason why you extended the opening both into the palm and also further out on the finger?

A. In order to get at the tendons. The main problem in this particular area is that both these tendons move within the very tight tunnel, and if you repair both, they invariably jam up. So the modern treatment of this, in fact, is to excise the less important tendon, which is the one that bends the proximal interphalangeal joint. This is known as the sublimis tendon or superficial tendon, but to repair the deep tendon.

Q. And the deep tendon is the one that bends the fingertip?

A. That's right. It bends the end joint or third knuckle, but also, incidentally, because it crosses this other joint, it will also flex the proximal interphalangeal joint.

The undersigned deputy closely observed claimant's right index finger, right hand and the location of the scarring resulting from surgery. The scarring extends from the tip of the right index finger into the center of the right palm. Claimant's exhibit 1 is a fair and accurate protrayal of the condition of claimant's hand from a cosmetic standpoint. Claimant testified that he is right handed.

Claimant testified he had had no prior injury or surgery to the area Dr. Pakiam operated on.

Claimant continued to see Dr. Pakiam for ten months after his surgery.

According to Dr. Pakiam's testimony claimant underwent extensive physiotherapy to mobilize the joint. Claimant was very cooperative during therapy and according to Dr. Pakiam claimant was interested in getting as much function back as he was able.

Dr. Pakiam testified that sometimes with an injury such as claimant's, additional surgery is required to free the damaged tendons from surrounding tissue. In claimant's case through the successful use of physiotherapy and claimant's participation the second operation was not required.

Claimant was off work from May 3, 1978 until March 25, 1979, a period of 46 4/7 weeks for which claimant has been paid healing period benefits. Claimant has returned to the same work at Wilson Foods Corporation.

He testified he is able to do his job but that it is painful. The pain in claimant's finger increases during the work day as his work requires that the injured knuckle be continuously bent in order to hold the electric knife. Claimant's work is repetitive and he must keep his right hand in a clenched position.

Claimant's present complaints are pain in the injured knuckle which is increased by use and by cold temperatures. Claimant testified that the area in which he works is cold and this makes his finger painful.

Claimant also testified he has a decrease in mobility of his right hand as a result of the surgical incision into his palm. Claimant indicated he sometimes puts his right hand under warm water to ease the pain.

Claimant testified he has pain in the right index finger and in the right hand but does not take any medication for this pain.

Claimant testified he exercised his finger according to Dr. Pakiam's instructions but then ceased the exercises a few months prior to hearing. Up until that time claimant had done the prescribed finger exercises as directed.

Amos Freeman testified on behalf of the defendant. He has been employed by Wilson Foods Corporation in a variety of positions over the last 13½ years and is presently the general foreman, charged with running the entire plant.

He testified he knows claimant and that he is a good worker. According to the witness claimant does a good job and is able to keep up with his work maintaining speed and accuracy. He never has had claimant complain to him about his finger hurting. He testified the area claimant works in is warm.

The claimant has the burden of proving by a preponderance of the evidence that the injury of May 3, 1978 is the cause of his disability on which he now bases his claim. *Bodish v. Fischer, Inc.*, 257 Iowa 516, 133 N.W.2d 867 (1965). *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 testimony. *Bradshaw v. Iowa Methodist Hospital,* 251 Iowa 375, 101 N.W.2d 167 (1960).

The Iowa Supreme Court in *Barton v. Nevada Poultry Co.,* 253 Iowa 285, stated the following concerning scheduled injuries; "... where, as a result of an injury the claimant has sustained the loss of specified parts of his body, such loss shall be compensable only to the extent provided therein ...."

Claimant has sustained his burden of proof and established through the uncontroverted testimony of his treating physician, Dr. Pakiam, as well as his own testimony, a causal connection between the injury of May 3, 1978 and his disability.

Dr. Pakiam, in his deposition, indicates that the surgical procedure used by him to treat claimant's injury necessitated an incision into the palm of claimant's hand.

Q. Has the problem with the finger given him problems in the use of his hands, use of his hand, I should say.

A. Yes. You see, with the observation now is that the tip of that finger misses the palm by nearly 6 centimeters, which is a fair distance. That's about 2 inches, just over 2 inches. And this means that he can grip anything that's that size, but if it gets any smaller, then that index finger tends to stick out

Q. Okay. So it has actually had an effect on the entire extremity and not just that finger?

A. Yes.

Dr. Pakiam testified on direct examination that the disability to the right hand was 50 percent. That is 25 percent disability to the right hand attributable to the index finger and an additional 25 percent disability to the right hand based on loss of strength.

On cross-examination Dr. Pakiam indicated a slight miscalculation and testified the disability to the hand which is attributable to the right index finger was 19 percent plus the 25 percent loss of grip strength or a total functional disability of 44 percent to the right hand.

Dr. Pakiam's testimony is uncontroverted. He is the only physician who presented any evidence.

There was some evidence that claimant saw Dr. John Gustafson for a nervous condition which claimant states came about after the injury. However, Dr. Gustafson did not testify and there is no evidence of causal relationship between this nervous condition and claimant's injury of May 3, 1978.

Defendant urges that any award made to the claimant should be reduced, suspended or forfeited because of his failure to continue doing finger exercises as prescribed by Dr. Pakiam. Defendants cite the case of *Stufflebean v. Fort Dodge,* 233 Iowa 438, 9 N.W.2d 281, as authority for their position.

This position is found to be without merit based on the testimony of Dr. Pakiam that claimant was cooperative during physiotherapy and as a result was not required to undergo further surgery. Claimant also testified that he continued with the prescribed finger exercises until a couple of months before hearing. It is found that claimant substantially complied with his physician's directives and any award will not be reduced.

Attached to claimant's exhibit 2 is a statement for services from Dr. Pakiam. There are two items on this statement which are in dispute between the claimant and the defendant. The disputed items are the $250 charge on August 27, 1979 for consultation and in the $650 charge on August 27, 1979 for Dr. Pakiam's deposition. The deposition was taken by the claimant. Dr. Pakiam is the claimant's treating physician hence the $250 consultation charge is the claimant's responsibility. Costs of this action as defined in Commissioner Rule 500-4.33 are taxed to the defendant. The witness fee contained in 500-5.33(4) is set at $150 as prescribed in §622.72, Code of Iowa.

The balance of Dr. Pakiam's fee for his position is the claimant's responsibility.

* * *

Signed and filed this 20th day of February, 1980.

E. J. KELLY
Deputy Industrial Commissioner

No Appeal.

RONALD MORROW,

Claimant,

vs.

ALLIED CONSTRUCTION SERVICES, INC.,

Employer,

and

AETNA LIFE & CASUALTY,

Insurance Carrier,
Defendants.

Appeal Decision

This is a proceeding brought by claimant, Ronald Morrow, appealing a proposed review-reopening decision wherein the claimant was denied by any additional benefits as a result of an injury sustained September 1, 1977.

* * *

Claimant's contentions on appeal as noted by defendants' brief are two.

1. The evidence was sufficient to establish a causal connection between the incident of September 1, 1977 and Dr. McClain's subsequent diagnoses and determination of permanent partial disability.

2. The Deputy Industrial Commissioner disregarded uncontroverted expert medical testimony and did not state why he did so.

As to the first contention, defendants point out the difference in the diagnosis made by David B. McClain, D.O., as evidenced by his letter of February 20, 1978 and the one

of April 14, 1978. In the former letter the diagnosis is made of "spondylolisthesis" while in the latter it is "spondylosis." While the medical definitions are much different, it is most likely a typographical error, as the word "spondylosis" is modified by the term "Grade I," which is used in grading spondylolisthesis. The reports are both signed by Dr. McClain, however, and the discrepancy should have been explained.

The ease in making such an error is highlighted by the reference by the deputy in the review-reopening decision when referring to Dr. McClain's diagnosis on page three, second paragraph, line two, as "spondylolysis," which is not contained in any of the reports of Dr. McClain, although it is contained in the report of Dr. Boulden when referring to a diagnosis made by "a private orthopedic D.O. doctor." In reading from the history in his file, Dr. Boulden stated in his deposition (p.5, 11. 10-13): "He said he was treated by a private orthopedic doctor who said that he had a Grade 1 spondylosis and he told me, in fact, a spondylolisthesis . . ." Dr. Boulden went on to say (p. 7, 11. 18-25):

> . . . so the reason the question arose why I took x-rays to begin with is because the patient stated he had a spondylosis or a spondylolisthesis. He said he couldn't remember which one was used on him. He had heard both of them, so I checked that because this is a source of back pain at times and he did not have these either on my x-rays or on Methodist's x-rays.

In any event there is no showing that the condition diagnosed by Dr. McClain was causally related to the injury of September 1, 1977.

As to the second contention, there is controverted expert medical testimony in the record. Dr. McClain diagnosed claimant's condition as spondylolisthesis (presumable). Dr. Boulden found no spondylolisthesis and diagnosed claimant's condition as paraspinous muscle strain, chronic in nature, of the left thoracic region. The radiology report of G. H. Holmes, M.D., revealed no evidence of bony injury involving the lumbar spine. The diagnosis of a Dr. R. C. Porter immediately after the September 1 incident was contusions chest wall and lower back. Dr. McClain gave a permanent partial disability rating of the body as a whole in the amount of eight percent for the condition he diagnosed. Dr. Boulden found no permanency. The expert medical testimony is in substantial conflict and it is clear from the record why greater reliance should be given to the testimony and diagnoses of Dr. Boulden. Even if the testimony of Dr. McClain were accepted, there is no showing that the disability he found to exist is causally related to the September 1, 1977 injury.

For these reasons and those indicated in the review-reopening decision, the deputy industrial commissioner's proposed findings of fact and conclusions of law are proper.

* * *

Signed and filed this 23rd day of February, 1979.

ROBERT C. LANDESS
Industrial Commissioner

No Appeal.

BRIAN MUNDEN,

Claimant,

vs.

IOWA STEEL & WIRE,

Employer,

and

PROTECTIVE FIRE & CAUSALTY COMPANY,

Insurance Carrier,
Defendants.

Appeal Decision

Claimant and defendants have appealed from a proposed review-reopening decision wherein claimant was awarded healing period and permanent partial compensation for a 1973 injury.

* * *

The evidence reflects that claimant sustained an injury resulting in the amputation of two lesser toes. In addition, there was some involvement beyond the toes and into the foot. The disability evaluation by the doctor as it relates to the foot including the toes was 15%. This would result in 22.5 weeks of permanent partial disability benefits [15% of 150 weeks (s85.34(n))]. The loss of more than one phalange of a lesser toe is 15 weeks each (s85.34(i) and (k)). In this case there are two toes which so qualify, making the permanent partial disability benefits applicable for the loss of two toes equal to 30 weeks. Healing period benefits applicable at the time of this injury were limited to 60% of the permanent partial disability found to exist.

Applying the principle espoused by the supreme court of Iowa that the workmen's compensation law, being a remedial statute, is to be interpreted liberally in favor of the employee, awarding benefits for the loss of two toes, resulting in 30 weeks of benefits as opposed to 15% of the foot which would result in 22.5 weeks of benefits, would appear in order.

On reviewing the record, it is found that the findings of fact and conclusions of law are proper.

* * *

THEREFORE, it is ordered:

That claimant is entitled to thirty (30) weeks of permanent partial disability compensation at the rate of sixty-three dollars ($63) per week.

That claimant is entitled to eighteen (18) weeks of healing period compensation at the rate of sixty-eight dollars ($68) per week.

That costs are charged to defendants and shall include the witness fee for Dr. Summers in the amount of one-hundred fifty dollars ($150) and the transcription cost for his deposition as contemplated by Iowa Code section

622.73. (See Rule 500-4.33 IAC)

That defendants receive credit for any amounts already paid on the award.

That defendants file a form 5.

Signed and filed this 16th day of March, 1979.

ROBERT C. LANDESS
Industrial Commissioner

Appeal to District Court: Pending

SHIRLEY J. MURRA

Claimant,

vs.

AMF LAWN & GARDEN DIVISION,

Employer,

and

FIREMAN'S FUND INSURANCE,

Insurance Carrier,
Defendants.

Appeal Decision

This is a proceeding brought by claimant seeking review of a proposed decision in review-reopening wherein she was awarded temporary total disability and medical expenses resulting from an industrial injury which occurred on February 23, 1976.

* * *

Claimant's first contention is "that the deputy commissioner erred in failing to admit claimant's exhibits 5 and 6." Claimant's exhibit five is a letter from Robert C. Jones, M.D., to claimant's attorney. Claimant's exhibit six is a letter from Dr. Jones to the Industrial Injury Clinic at Theda Clark Memorial Hospital which appears to have been sent to claimant's counsel at the time Dr. Jones' letter was sent.

An affidavit by claimant's attorney affirms that he requested a report from Dr. Jones on April 10, 1978. The doctor responded with a letter requiring a prepayment before a report would issue. A carbon of office correspondence dated April 25, 1978 indicates payment of the reporting fee was made on that date. Although the report is dated April 20, 1978, claimant's counsel states it was not received until "several days after April 25, 1978." Claimant's attorney swears that he discussed the report with defendants' attorney before the hearing which was held May 23, 1978.

At the time of the hearing, an attempt was made to offer exhibits five and six on behalf of claimant. Defendants' counsel made the following objection:

> We would object to Exhibits 5 and 6 on the grounds that they have not been heretofore provided as required by the rules of practice before the Industrial Commissioner, and that our first knowledge of them comes at this offering today.

Defendants' attorney was asked by the deputy industrial commissioner if he had been provided with a copy of the exhibits and he responded that he had not. He then sought sanctions available under the commissioner's rule and asked that the medical record be closed.

Industrial Commissioner's Rule 500-4.18, which should be distinguished from Rule 4.17 which relates to evidence, deals with the service of doctors' and practitioners' reports in the following manner:

> 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 at least thirty days prior to the date of hearing. Notwithstanding 4.14, the reports need not be filed with the industrial commissioner; however, each party shall file a notice that such service has been made in the industrial commissioner's office identifying the reports sent by the name of the doctor or practitioner and date of report. Any party failing to comply with this provision shall be subject to 4.36.

The first sentence in Rule 4.18 mandates the delivery of "all reports of a doctor or practitioner relevant to the contested case proceeding *in the possession of party* upon each opposing party *at least thirty days prior to the date of hearing.*" (emphasis added) Obviously it is not possible to exchange information if the information is not in existence. If a report is received less than thirty days prior to hearing, an exchange at the time would be in order. Even if claimant's attorney, in this case, could not have served the reports in dispute on opposing counsel precisely thirty days prior to the May 23 hearing, it would seem that substantial compliance with the rule would have been achieved by service when the reports were received.

The second and third sentences discuss the filing of notice that service has been made and the imposition of sanctions under Industrial Commissioner's Rule 4.36 for failure to comply. Rule 4.36 says:

> The deputy commissioner or industrial commissioner may dismiss the action. Such dismissal shall be without prejudice. The deputy commissioner or industrial commissioner may enter an order closing the record to further activity or evidence by any party for failure to comply with these rules or an order of a deputy commissioner or the industrial commissioner.

The preferable course would be to serve notice as dictated by the rule. However, even if no notice is served and if there is strict compliance in that the reports are exchanged and thus the intent of the rule satisfied, no sanctions would necessarily be imposed by the hearing officer as the language in Rule 4.36 speaks in terms of "may."

Because misinterpretation of Industrial Commissioner's Rule 4.18 often occurs in conjunction with a failure to properly interpret Industrial Commissioner's Rule 4.17, it

seems appropriate to discuss that rule which reads:

> 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 decision-making 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.

Two situations can arise under this rule -- one when a report is offered without notice, the second when a report is offered with notice. When a report is offered and admitted without prior notice as set out in Rule 4.17, but after having been exchanged so that compliance with the intent of Rule 4.18 has been accomplished, the opposing party shall have thirty days after the hearing to cross-examine, at the party's expense, the doctor or practitioner. However, when a party has filed a notice of intent to offer specific medical reports, Rule 4.17 allows thirty days from the receipt of that notice by the opposing party for the conduct of cross-examination. Under a hypothetical situation a party who received a notice of intent to offer reports thirty-five days prior to hearing could not conduct a cross-examination after the hearing took place. On the other hand, if notice of intent to offer reports were given twenty-five days prior to hearing, the other party would have five days after the hearing to complete cross-examination. It should be noted that an exchange of reports under Rule 4.18 may not be construed as a notice of intent to offer which starts the running of the thirty-day period in which cross-examination must be completed. Additionally, an exchange of reports under Rule 4.18 does not mandate the offering of those reports into evidence.

Exhibit six, a letter from Dr. Jones which is sought to be admitted by claimant, says on its face that it was written at the request of defendant insurance carrier. Can defendant insurance carrier now claim to be unaware of the letter's existence? If the insurance carrier failed to receive a copy of a letter from a doctor which was written at its request and in all likelihood paid for by it, they cannot at a later date be heard to complain when its contents are made known to it. Normally this letter, exhibit six, would have been one which the defendants would have provided to the claimant pursuant to Rule 4.17 rather than causing the claimant to locate and pay for a report to which the defendant insurance carrier had access. If the facts should prove to be different than what is inferred by the first sentence of exhibit six, then a ruling may need to be otherwise. If not, however, the actions of the defendant insurance carrier in not securing and providing a copy of a medical report prepared at its request would frustrate the purpose of the rule and cannot be condoned by imposing sanctions against the opposing party.

Claimant's second contention is that the deputy erred in failing to grant a continuance so that she might take the deposition of Dr. Jones. The ruling of the deputy imposing sanctions under Rule 4.36 for failure to comply with Rule 4.18 is found to be correct.

Claimant's third contention is unclear. The order of the deputy filed May 26, 1978 recognizes the importance of the evidence sought to be admitted by referring to the exhibit as "the crux of the claimant's case." No good reason is found for claimant's failure to comply with the industrial comissioner's rule as it relates to exhibit five.

WHEREFORE, it is found that exhibit six should have been allowed into evidence.

THEREFORE, it is ordered that this matter be remanded to the deputy industrial commissioner so that he might weigh and consider exhibit six along with the other evidence and render a supplemental decision with judgment accordingly. No intimation is intended of what that decision and judgment should be.

Signed and filed this 21st day of February, 1979.

ROBERT C. LANDESS
Industrial Commissioner

No Appeal.

THOMAS R. MURRAY,

Claimant,

vs.

H. T. LENSGRAF,

Employer,
Defendant.

Order

NOW on this day the matter of defendant's appeal to the commissioner comes on for determination.

On February 15, 1978 claimant filed an original notice and petition naming H. T. Lensgraf, employer, as defendant. A special appearance was filed by H. T. Lensgraf June 7, 1978 alleging that claimant was employed by H. T. Lensgraf Co., Inc.. On August 31, 1978 a deputy industrial

commissioner overruled defendant's special appearance. This ruling was appealed September 18, 1978.

The general rule regarding appeals which has been propounded by the Iowa Supreme Court on many occasions is found in *Crowe vs. DeSoto Consolidated School District,* 246 Iowa 38, 66 N.W.2d 859 (1954). After pointing out that an appeal is proper only after a final judgment has been granted, the court then held that "[a] final judgment or decision is one that finally adjudicates the rights of the parties, and it must put it beyond the power of the court which made it to place the parties in their original positions." In a very recent decision, *Citizens State Bank of Corydon vs. Central Savings Association,* 267 N.W.2d 33 (1978), the court considered the matter of an appeal of a special appearance. The opinion suggested "[g]reat harm would result to litigants under a system which tolerated indiscriminate appeals from each and every adverse ruling." Reasoning that regulation of interlocutory appeals contributes to the orderly litigation and to the peace of mind of the parties in that they "have at least the comfort of knowing they will not be put to the expense, or threat of the expense, of repeated, permissive appeals," the court dismissed the appeal.

Iowa Rule of Civil Procedure 66, which provides for the special appearance and contains the provision that "[i]f the special appearance is erroneously overruled, defendant may plead to the merits or proceed to trial without waiving such error" can be seen as a safeguard for a party whose appeal is dismissed. Because Industrial Commissioner's Rule 500-4.35 states that "rules of civil procedure shall govern the contested case proceedings before the industrial commissioner unless the provisions are in conflict with these rules and chapters 85, 85A, 86, 87 and 17A, or obviously inapplicable to the industrial commissioner," the protection of that rule is extended to the defendant in the case sub judice.

WHEREFORE, it is found:

That defendant's appeal of a ruling overruling their special appearance is interlocutory in nature.

THEREFORE, it is ordered:

That defendant's appeal be and is hereby dismissed.

Signed and filed this 11th day of October, 1978.

ROBERT C. LANDESS
Industrial Commissioner

No Appeal.

THOMAS R. MURRAY,

Claimant,

vs.

H. T. LENSGRAF COMPANY, INC.,

Employer,
Uninsured,
Defendant.

Arbitration Decision

This is a proceeding in Arbitration brought by Thomas R. Murray, the claimant, against H. T. Lensgraf Company, Inc., the defendant-employer, uninsured, to recover benefits under the Iowa Workman's Compensation Act by virtue of an injury which occurred on March 5, 1976.

* * *

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

Claimant, married, age 25, injured his left eye while attempting to clean excess hardened plastic from a moulding machine owned by the defendant-employer.

The defendant asserts the affirmative defense as contemplated by section 85.16(1), which reads as follows:

> 1) By the employee's willful intent to injure himself or to willfully injure another.

The law is well settled that a party urging an affirmative defense has the burden of establishing any such defense by a preponderance of the evidence.

None of the witnesses supported the defendants' proposition that the claimant was chipping the hardened plastic from the machine in a playful manner so as to cause the chips to strike the witnesses.

It is found that the defendant has failed to establish his affirmative defense.

Claimant, who was not using safety glasses, was operating his assigned machine and was chipping plastic at the time of his injury. Defendant urges that the claimant was not in the course of his employment at the time of the injury in that he was performing an act which he had not been instructed to perform. The defendant and Leah Peters testified that they, and they alone, cleaned (chipped) the machines every Saturday morning. Such testimony is given little weight in this decision.

Defendant also raises the issue that the claimant's failure to use the safety glasses provided should result in a finding that the injury in question did not occur in the course of employment.

This record fails to support the defendant's contention that the claimant violated a repeated warning concerning the chipping operation, and it is held that the rule as announced in *Buchuer v. Hauptley,* 161 N.W.2d 170 is not applicable to the issues raised in this matter.

Claimant has the burden of proving by a preponderance of the evidence that the injury of March 5, 1976 is the cause of his disability on which he now bases his claim. *Bodish v. Fischer, Inc.,* 257 Iowa 516, 133 N.W.2d 867. *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 medical testimony. *Bradshaw v. Iowa Methodist Hospital,* 251 Iowa 375, 101 N.W.2d 167.

The claimant has sustained his burden of proof by establishing that his injury arose out of and in the course of his employment.

* * *

Signed and filed this 21st day of June, 1979.

HELMUT MUELLER
Deputy Industrial Commissioner

Appealed to District Court: Pending

DONALD E. MYSCH,

Claimant,

vs.

ROBERT SHIRLEY d/b/a SHIRLEY AGRICULTURAL SERVICE,

Employer,

and

STATESMAN GROUP,

Insurance Carrier,
Defendants.

Appeal Decision

Defendants have appealed from a proposed review-reopening decision wherein claimant was found to have sustained an industrial disability of thirty percent.

* * *

On reviewing the record, it is found that the findings of fact and conclusions of law are proper with the following modifications.

Defendants' contention that they should be allowed a credit for overpayment of healing period benefits against the permanent partial disability award is without merit.

> The law does not specifically provide for credit for overpayment of healing benefits against permanent partial disability benefits. Since the legislature specifically provided for such a credit when a permanent total disability is involved, it must be assumed that such a credit was not intended for permanent partial disability. Thus, the defendants are not entitled to a credit for any overpayment of healing period benefits. *McCombs v. Mercy Hospital,* decision filed January 31, 1979.

Defendants' contention that they should be allowed a credit for medical payments made on behalf of the claimant prior to the review-reopening proceeding for a condition which was later found not to be causally related to claimant's accident is also without merit. While it is true that the agency can only award causally related medical expenses, the agency is not a court empowered to order restitution of the medical payments.

* * *

Signed and filed this 14th day of September, 1979.

ROBERT C. LANDESS
Industrial Commissioner

Appeal to Distrct Court: Overruled 10/11/79
Appeal to Supreme Court: Pending.

DORIS (HANSON) NELSON, BRADLEY DEAN HANSON, THOMAS ALLEN HANSON & THONDA SUE HANSON, By Their Next Friend DORIS NELSON

Claimants,

vs.

CROUSE CARTAGE COMPANY,

Employer,

and

LIBERTY MUTUAL INSURANCE COMPANY

Insurance carrier,
Defendants.

DORIS (HANSON) NELSON, BRADLEY DEAN HANSON, THOMAS ALLEN HANSON & RHONDA SUE HANSON, By Their Next Friend DORIS NELSON

Claimants,

vs.

CLAYTON L. HANSON,

Employer,

and

AID INSURANCE COMPANY

Insurance Carrier
Defendants.

Motion for Summary Judgment and Motion to Join Causes

BE IT REMEMBERED that on March 19, 1979 the matters of a motion for summary judgment filed by the defendants Clayton L. Hanson and AID Insurance Company and of a motion to join causes filed by the claimants came on for determination. Pursuant to a ruling and order filed by the undersigned on that day, the matter between claimants and Clayton L. Hanson, the motion for summary judgment and resistance thereto, was set down for hearing. The record in this matter was considered fully submitted when the parties on or about May 24, 1979 waived the hearing scheduled for that date and asked that the matter be decided on the basis of the relevant file contents.

The March 19, 1979 ruling and order discussed the status of the file as of that date as follows:

> The file reveals that on May 17, 1978 claimants herein filed an application for death benefits against Crouse Cartage Company, the alleged employer, and its insurance carrier, Liberty Mutual Insurance Company. On the same day claimants filed a similar application for death benefits against Clayton L. Hanson, as the alleged employer, and AID Insurance, the employer's insurance carrier. Defendants in both proceedings filed answers on May 22, 1978.
>
> On January 18, 1979 defendant employer, Clayton L. Hanson, and defendant insurance carrier, AID Insurance Company, filed a motion for summary judgment maintaining that the uncontroverted facts reveal Clayton L. Hanson did not employ Jimmie A. Hanson, the decedent, to drive that truck which was involved in the accident in issue, and, accordingly, Jimmie A. Hanson's death did not arise out of and in the course of his employment with Clayton L. Hanson. Defendants further filed a statement and memorandum in support of their motion for summary judgment and attached the affidavit of Clayton L. Hanson (Exhibit A), excerpts from the deposition of Doris (Hanson) Nelson (Exhibit B), and a certified copy of the Articles of Incorporation of Hanson Truck Lines, Inc. (Exhibit C).
>
> * * *
>
> On February 5, 1979 claimants filed a resistance to Clayton L. Hanson's motion for summary judgment and a motion for time to produce affidavits or testimony by deposition regarding the alleged employer-employee relationship between decedent, and Clayton L. Hanson.
>
> * * *
>
> It is hereby found that review of the motion for summary judgment (including the statement and memorandum in support thereof, the affidavit of defendant Clayton L. Hanson, and the deposition of claimant Doris Nelson, and the certified copy of the Articles of Incorporation of Hanson Truck Lines, Inc.), and of the resistance thereto (unsupported by any affidavit), and the entire record properly before the agency *[(Schulte v. Mauer,* 219 N.W.2d 496 (Iowa 1974)] does not appear to raise, at this juncture, a genuine issue as to any material fact with regard to the employer-employee matter. Accordingly, a hearing will be held on defendant Clayton A. [sic] Hanson's motion for summary judgment. *Estate of Campbell,* 253 N.W.2d 906, 908 (Iowa 1977). (See enclosed notice of assignment for hearing).
>
> It is further found that in light of the unresolved summary judgment matter, claimant's motion to join causes is premature. Claimant's motion for time to produce affidavits or testimony by deposition regarding the alleged employer-employee relationship will be granted. Said time will extend to and include the date of hearing on the motion for summary judgment.

Nothing further has been filed by either party with respect to the motion for summary judgment and resistance thereto. As indicated above, the resistance was unsupported by any affidavit. It alleged that Clayton L. Hanson had the power to hire and fire because he had ownership and title of the trucks, one of which was being driven by the decedent at the time of death, and that the testimony of the surviving spouse and claimant, Doris (Hanson) Nelson was not conclusive.

Defendant Clayton L. Hanson's affidavit and Claimant Doris (Hanson) Nelson's deposition testimony are in agreement on the relevant facts surrounding the issue of whether decedent Jim Hanson was an employee of defendant Clayton L. Hanson at the time of death.

The decedent and surviving spouse owned and operated Hanson Truck Lines, Inc. Since about 1974, the trucks used in said business were owned by the Hansons and leased permanently to Crouse Cartage Company. When Crouse had no freight, the Hansons did independent hauling. When decedent hauled for Crouse, he was paid by Crouse; when he hauled independently, he was paid by Hanson Truck Lines, Inc.

In 1975 and in 1976 decedent and defendant, Clayton L. Hanson, entered into an oral agreement with regard to the farming operations of Clayton L. Hanson. The decedent leased 200 acres from Clayton on a 50/50 crop share basis. Decedent also helped Clayton farm the remainder of Clayton's land. Decedent was paid an hourly wage of $3.50. Clayton's machinery was used. Decedent paid for using the machinery.

In the fall of 1975, a couple of the Hanson Truck Lines trucks were repossessed by finance companies. Therefore decedent and surviving spouse executed a bill of sale whereby the remaining two truck-trailers and semi-trailers were sold to Clayton in addition to two automobiles owned by decedent and surviving spouse for their own use. Clayton then signed a note in sufficient amount to pay the financing companies. Decedent and surviving spouse were responsible for paying off said note. The operation of the trucking business was not affected by the change in title. Clayton had absolutely no part nor control in the trucking operation of decedent and surviving spouse.

At the time of the accident, decedent was driving a truck to which Clayton had title and which was permanently leased to Crouse. Decedent was substituting for one of Hanson Truck Lines regular drivers. He was hauling a load for Thompsen's Auto Salvage.

Clayton did not employ decedent to drive the truck which was involved in the accident giving rise to the present lawsuit. Clayton's holding title to the vehicle driven by decedent is his *only* connection to the incident in issue. Said connection is not evidence of any employer-employee relationship as that concept has been defined and discussed in well-known Iowa Supreme Court cases.

In determining whether a genuine issue of material fact exists which would preclude granting a motion for summary judgment, the court must view all material before it in light most favorable to the opposing party. *Steinbach v. Continental Western Insurance Co.,* 237 N.W.2d 780 (Iowa

1976). In resistance to motion for summary judgment resisting party must set forth specific facts showing there is a genuine issue for trial. *Iowa Civil Rights Commission v. Massey-Ferguson, Inc.,* 207 N.W.2d 5 (Iowa 1973). A party opposing a motion for summary judgment is not entitled to rely on the hope of a subsequent magical appearance at trial of a genuine issue of material fact. *Prior v. Rathjen,* 199 N.W.2d 327 (Iowa 1972). Where there is no genuine issue of fact to be decided, the party with a just cause should be able to obtain judgment promptly and without the expense and delay of trial. *Daboll v. Hodea,* 222 N.W.2d 727 (Iowa 1974).

WHEREFORE, after reviewing the entire record, the undersigned finds no material question of fact exists regarding the employer-employee relationship between defendant Clayton L. Hanson and decedent Jimmie Hanson. That is, at the time of the injury producing death, Jimmie Hanson was not an employee of Clayton L. Hanson.

THEREFORE, defendant Clayton L. Hanson's motion for summary judgment is hereby sustained and claimant's present action against said defendant is hereby dismissed.

In light of the above ruling on the motion for summary judgment, claimant's motion for joinder of causes of action will not lie.

Signed and filed this 16th day of July, 1979.

LEE M. JACKWIG
Deputy Industrial Commissioner

No Appeal

**DORIS (HANSON) NELSON,
BRADLEY DEAN HANSON,
THOMAS ALLEN HANSON &
RHONDA SUE HANSON, By Their
Next Friend DORIS NELSON,**

Claimants,

vs.

CROUSE CARTAGE COMPANY,

Employer,

and

**LIBERTY MUTUAL INSURANCE
COMPANY,**

Insurance Carrier,
Defendants.

Motion for Summary Judgment

Defendants' motion for summary judgment came on for hearing before the undersigned at the Iowa Industrial Commissioner's Office in Des Moines, Iowa on October 9, 1979.

In their motion for summary judgment filed July 20, 1979, defendants allege that decedent was an independent contractor and was not an employee of defendant-employer on the date of injury (death). In the alternative, they argue that even if decedent was an employee of the defendant-employer, his death did not arise out of and in the course of his employment with defendant-employer. Defendants attached to their motion a statement of uncontroverted facts and memorandum of authorities, and excerpts from the depositions of Dale Huebner, defendants' safety supervisor, and of Doris Nelson, the surviving spouse.

In their resistance to the motion for summary judgment filed August 29, 1979 claimants allege that the decedent was an employee of defendant employer and was "insured by agreement with the company." Claimants attached to their resistance an affidavit of another driver of decedent's truck, portions of Dale Huebner's deposition and of Doris Nelson's deposition and a letter from Crouse Cartage. Claimants also submitted brief points and attached affidavits of Larry Nelson, one of decedent's drivers, and of Doris Nelson, truck compensation check stubs, and weight tickets.

> In determining whether a genuine issue of material fact exists which would preclude granting a motion for summary judgment, the court must view all material before it in light most favorable to the opposing party. *Steinbach v. Continental Western Insurance Co.,* 237 N.W.2d 780 (Iowa 1976). * * * *

After review of the record in this matter, the undersigned hereby determines that material questions of fact exist with regard to (but are not necessarily limited to):

1) Whether claimant was an employee of defendant-employer at the time of death or whether he was a casual employee whose employment was not for the purpose of the employer's trade or business and

2) Whether claimant was acting in the course of his employment when transporting crushed cars, a non-exempt commodity, over a route the defendant-employer was not authorized by the Interstate Commerce Commission to haul.

With respect to the former issue, it is pointed out that material in the attachments to defendants' motion indicate that Mr. Huebner considered regular and causal employment to be the same in nature if not in amount of time. There is further suggestion that defendant-employer carried workers' compensation coverage for decedent's drivers and that decedent did drive on occasion.

With regard to the latter issue the merit of defendants' contention that because decedent was hauling a non-exempt commodity that was not dispatched or requested by defendant-employer over a route the defendant-employer was not authorized to travel, decedent therefore was not in the course of his employment for defendant-employer is questionable in light of a conflict in the testimony regarding whether decedent had informed claimant he was hauling crushed cars (and not an exempt commodity with which he could have traveled any route and might then have been considered an independent contractor) and in light of Dale Huebner's testimony that decedent's hauling a non-exempt commodity over an unauthorized course "should have

probably been caught" and if such activity became a routine known to the employer "he would have been told to cease doing it" because of fines that could be imposed on defendant-employer by the Interstate Commerce Commission for such activity.

The above-discussed unresolved facts of the case are not exhaustive. However, such facts amply indicate that this case should proceed to a hearing on the merits.

WHEREFORE, it is hereby found that the record before the undersigned reveals that genuine issues of material fact exist at this stage of the proceeding and foreclose granting defendants' motion for summary judgment.

THEREFORE, defendants' motion for summary judgment is hereby denied and it is ordered that this matter be assigned for a hearing on the merits.

Signed and filed this 24th day of October, 1979.

LEE M. JACKWIG
Deputy Industrial Commissioner

No Appeal.

EDWARD K. NELSON,

Claimant,

vs.

DES MOINES WATER WORKS,

Employer,

and

EMPLOYERS MUTUAL CASUALTY COMPANY,

Insurance Carrier,
Defendants.

Arbitration Decision

This matter came on for hearing at the Industrial Commissioner's Office in Des Moines, Iowa on June 14, 1979. The record was closed on June 25, 1979.

* * *

The issue for determination is whether the bee sting which claimant sustained at work arose out of and in the course of his employment.

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

Claimant has been an employee of the Des Moines Water Works since 1970. On September 19, 1978 he reported to the Water Works Park. The work orders for the morning would then be assigned to the various crews. The claimant performed his duties throughout the morning. He returned to the warehouse for lunch and at 12:30 p.m. commenced work again. He performed three or four more taps in the afternoon and while riding between jobs was stung on the right shoulder by a bee. He suffered an allergic reaction to the sting and was hospitalized.

Claimant testified that the incidence of bees is of higher average at Water Works Park. He stated that in the last 10 years he has suffered six bee stings, all occurring on the job. He did not notice bees or wasps that day. Claimant testified that most of his prior stings occurred on the Water Works grounds and that he had once been stung in the truck. Ronald Anderson, claimant's co-worker, testified that the incidence of bees in the Water Works Park area was high because of the flowers. He also testified that he found bees in the truck "a lot" and had been stung at work.

In order for an injury to be compensable, it must arise out of and in the course of employment. *Cedar Rapids Community School v. Cady,* 278 N.W.2d 298 (Iowa 1979).

There is little doubt that the injury here arose in the course of employment since the claimant was driving from one place to another upon orders.

An injury arises out of the employment when it is a natural incident of the work. This means it must be a rational consequence connected with the employment. *Cady supra; Musselman v. Central Telephone Co.,* 261 Iowa 352, 154 N.W.2d 128 (1967); *Burt v. John Deere Waterloo Tractor Works,* 247 Iowa 691, 73 N.W.2d 732 (1956).

The *unrebutted* evidence of a lay nature indicates a high incidence of bees at Water Works Park and in trucks when leaving the park. Therefore, it must be found that the injury arose out of the employment.

* * *

Signed and filed this 29th day of October, 1979.

JOSEPH M. BAUER
Deputy Industrial Commissioner

Appealed to Commissioner: Affirmed

WILLIAM E. NESBIT,

Claimant,

vs.

R. J. DICK, INC.,

Employer,

and

AETNA LIFE & CASUALTY,

Insurance Carrier,
Defendants.

Review-Reopening Decision

This matter came on for hearing at the Scott County Courthouse in Davenport, Iowa on August 3, 1978 at which time the record was closed.

* * *

The issue for determination is whether the claimant is entitled to further compensation of whatever nature.

Claimant received an injury arising out of and in the

course of his employment on October 20, 1977 when he was welding a pulley weighing 1,040 pounds. The pulley was to be held in place by means of hooks which were not in place at the time of the injury. The pulley toppled and fell upon the claimant, pinning him beneath it. The claimant was seen by Robert Klein, M.D., the plant physician, at the emergency room at the local hospital. He refused to be admitted for observation. The claimant began to notice back pain and Dr. Klein referred him to William Catalona, M.D., an orthopedic surgeon who first saw the claimant on November 8, 1977. He observed that the claimant was holding his right arm and leg in a helpless fashion and was barely able to walk. The claimant was crying, stating that he wanted to be cured of pain. Dr. Catalona was able to get the claimant to stand erect when he distracted the claimant and found that there was no neurological deficit and x-rays were normal. Dr. Catalona advised psychiatric consultation.

In late November 1977 he presented himself at the emergency room at St. Anthony's Hospital in Rockford, Illinois, being treated by Ronald E. Yake, M.D., a neurosurgeon. Examination revealed weakness of the right arm and leg which Dr. Yake attributed to a hysterical basis. The claimant was complaining of sexual problems at that time. The claimant was released from the hospital on December 3, 1978. The claimant returned to work but found that he could not perform his duties because he would get nervous when he placed his welder's mask over his head. He would "see" the pulley falling on him. The claimant worked about a week and a half. The claimant started to go to bed with the lights on. After he fell asleep his wife would shut off the lights. At times the claimant would wake up, fearing that a pulley was falling on him from behind. He was more impatient with his wife and children.

Dr. Klein referred the claimant to Roland E. Erikson, a psychiatrist, who first saw the claimant on January 9, 1978. The history revealed that the claimant was having nightmares which would roughly reconstruct the incident of October 20, 1977. Dr. Erikson admitted the claimant to the hospital from January 11, 1978 to February 2, 1978. Daily physiotherapy and psychotherapy were performed and the claimant was complaining of pain in his back, arm and leg. The claimant was diagnosed as having a neurotic depressive disorder which Dr. Erikson testified is usually one that is associated to an external event and could be translated as a traumatic neurosis. The claimant also was suffering from a phobia or fear of being in another accident and was having psychosomatic pain production from the brain or emotions.

After the claimant's release from the hospital, the claimant's treatment was continued with the goal of returning the claimant to work in late February 1978. A plan was devised whereby the claimant would return to work in the shipping department where his duties would not involve welding. He would receive lesser remuneration for his labors. Just prior to his scheduled return to work, the claimant was at home and "hitched" a ride on a snowmobile in order to pick up his mail. The snowmobile tipped over and the claimant fractured his left ankle. He was treated in Iowa City. The claimant saw Dr. Erikson and a new item in the claimant's psychological profile appeared -- the claimant had a paranoid ideation that one of the supervisors was against him and that he could not work anywhere without the supervisors being against him.

On direct examination Dr. Erikson testififed that the claimant could not return to welding regardless of the snowmobile incident. He testified that the neurosis and depressive reaction developed as a direct result of the injury of October 20, 1977. He did not think that the phobia would have been as severe or fixated but for the snowmobile incident, and that the snowmobile incident made the phobia worse. Dr. Erikson stated that the condition "may" be permanent and that psychiatric treatment would take about two years.

The claimant has the burden of proving by a preponderance of the evidence that the injury of October 20, 1977 is the cause of the disability upon 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 156, 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. Based on the foregoing principles it is found that the claimant has sustained his burden of proof. Dr. Erikson testified that there was a causal connection between the injury of October 20, 1977 and the claimant's psychiatric problems prior to the snowmobile incident.

The problem for resolution is what disability can be traced to the injury of October 20, 1977. This case involves a psychological reaction to a physical injury. The claimant was not acting at the hearing of this case when he broke into tears. This man has suffered greatly and perhaps his psychological injury is more severe than any physical trauma could have been. Dr. Erikson states that the condition "may" be permanent and that the claimant could not return to welding and would have to undergo treatment for an extended period even if the snowmobile injury had not occurred. There is ample evidence in the record, then, for the undersigned to make the finding that the claimant's injury resulted in compensable permanent partial disability.

Since the claimant has a disability to the body as a whole, he is entitled to have disability evaluated industrially and not merely functionally. In determining industrial disability, consideration may be given to the 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 (1963). It is the reduction of earning capacity which must be determined. *Barton v. Nevada Poultry,* 253 Iowa 110 N.W.2d 660 (1961).

Claimant, age 25, was in school through the eighth grade and has a G.E.D. certificate. He has worked as a fork lift operator, a terrett lathe operator and a welder. He was employed by the defendant employer for three years, becoming a welder by on the job training. He will probably never be employed as a welder again. This young man, even if he were employed in the shipping department, would suffer an economic loss. He may, someday, reach a pay

range of a welder if his vocational rehabilitation efforts succeed. Considering the elements of industrial disability, it is found that the claimant is disabled to the extent of 20 percent of the body as a whole for industrial purposes.

The next item which must be discussed is the claimant's entitlement to healing period compensation. See §85.35(1), Code of Iowa. The claimant's condition caused by this injury resulted in the following periods of disability:

October 21, 1977 - December 4, 1977
December 14, 1977 - February 26, 1978

On February 26, 1978 the climant's condition can be seen to have reached maximum medical recovery. This is the date when the claimant was to have returned to work.

* * *

Signed and filed this 24th day of October, 1978.

JOSEPH M. BAUER
Deputy Industrial Commissioner

Appealed to Commissioner: Dismissed

MARTIN NIELSEN,

Claimant,

vs.

IDA COUNTY,

Employer,

and

HAWKEYE SECURITY,

Insurance Carrier,
Defendants.

Appeal Decision

This is a proceeding brought by defendants, Ida County, employer, and Hawkeye Security, insurance carrier, appealing a proposed arbitration decision wherein claimant was found to have sustained a 31% binaural hearing loss as a result of his employment and was thus entitled to benefits under the Iowa Workers' Compensation Act.

Dr. Crawford's report states: "3. The maintainer that Mr. Nielsen operates could have been a contributing or substantial factor in his hearing loss. Furthermore, continuation of his operation of this equipment could further damage his hearing."

Defendants contend the credibility of the claimant is in doubt; the history taken by the doctor upon which he bases his opinion is erroneous; the medical evidence is lacking to support causal relation and that the facts as claimed by the claimant as to the noise in the work environment are not substantiated by the evidence. While there may be support for defendants' contentions, the record viewed as a whole sufficiently substantiates the claimant's position which is found to be more persuasive.

It should be noted that whether an injury or disease has a direct causal connection with the employment or arose independently thereof is essentially within the domain of expert testimony. *Musselman v. Central Telephone Co.,* 154 N.W.2d 128 (Iowa 1967); *Bradshaw v. Iowa Methodist Hospital,* 251 Iowa 375, 101 N.W.2d 167 (1960). The opinion of experts need not be couched in definite, positive or unequivocal language. *Dickinson v. Mailliard,* 175 N.W.2d 588 (Iowa 1970). 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).

Applying the foregoing principles to the evidence in the record supports the finding that claimant's injury arose out of and in the course of his employment. Thus, the findings of fact and conclusions of law made by the deputy industrial commissioner are proper.

* * *

Signed and filed this 14th day of November, 1978.

ROBERT C. LANDESS
Industrial Commissioner

No Appeal.

RICHARD NIEMEYER,

Claimant,

vs.

DOORS, INC.,

Employer,

and

HAWKEYE SECURITY,

Insurance Carrier,
Defendants.

Arbitration Decision

This is a proceeding in arbitration brought by the claimant, Richard Niemeyer, against his employer, Doors, Inc. and Hawkeye Security, the insurance carrier, to recover benefits under the Iowa Workers' Compensation Act by virtue of an alleged work induced condition aggravated by a non-industrial incident which occurred on July 23, 1978.

* * *

The primary issue presented by this matter is whether or not the claimant has established by a preponderance of the evidence that the knee injury sustained during a non-industrial activity was causally connected to a work induced abnormality.

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

Claimant, age 30, single, a journeyman carpenter began his employment activity for the defendant-employer in November, 1977. Claimant spent considerable time early in 1978 installing "kick plates" at the site of the addition to

the Iowa Lutheran Hospital in Des Moines, Iowa. This type of installation required the claimant to squat and kneel a great deal. Claimant testified that he complained of knee discomfort to his superiors.

Michael Davis, an employee of defendant-employer and a foreman, testified on behalf of the defendants. He stated that he received a complaint from the claimant concerning his knees which he transmitted to Douglas Sullivan, the installation manager (transcript, page 50, line 11).

Defendants place much reliance on the time cards in an attempt to show that the claimant did not work on the Lutheran Hospital job as often as he alleges, thereby creating the implication that the knee problem was not connected to the type of work required of the claimant during March, April and May of 1978. Due to internal record confusion, the accuracy of those records are admittedly in doubt (transcript, page 59, line 7-17). On Saturday, July 22, 1978 while swimming in Reinbeck, Iowa, claimant felt a sharp pain and a pop in his right knee (transcript, page 38, line 10-16).

Ultimate surgery was performed on two occasions by Sinesio Misol, M.D., who reported on August 11, 1978, in part, as follows (deposition, exhibit 1):

> Examination and subsequent studies revealed this man had a torn medial meniscus. Surgery was done on 8-3-78, and I found two different types of tears. One of the tears was located in the posterior third and it appeared to be a so-called "attrition" type of tear, one that is usually produced by hyperflexion of the knee, such as the one on squatting and kneeling, and then a fresh, more recent tear located in the mid portion of the meniscus.
>
> It is my impression that this man has had two different problems: (1) the attrition tear probably sustained at work on squatting and kneeling, and (2) the one that probably happened while he was kicking in the process of swimming.

Dr. Misol refused to express his opinion as to the period of time that would be involved in order to produce the "attrition tear" he observed (deposition, page 8, line 24).

Dr. Misol did state however, that the "fresh tear" he found could occur "at the same time he was swimming" (deposition, page 18, line 6).

The claimant has the burden of proving by a preponderance of the evidence that the injury of July 23, 1978 is the cause of his disability on which he now bases his claim. *Bodish v. Fischer, Inc.,* 257 Iowa 516, 133 N.W.2d 867 (1965). *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 testimony. *Bradshaw v. Iowa Methodist Hospital,* 251 Iowa 375, 101 N.W.2d 167 (1960).

In applying the foregoing principles to the case at hand, it is apparent that the claimant has failed to produce expert medical testimony which supports his theory of the case. Claimant has demonstrated that he sustained an "attrition tear" of the right medial meniscus, and that such tear was sustained in the course of his employment for the defendant-employer. However, this gradual condition was never disabling. Dr. Misol indicated that when "early wear and tear is present", claimant's knee may age faster than he does and that claimant's chances of having so-called degenerative arthritis are a little higher than the normal population (deposition, page 21, line 3).

* * *

Signed and filed this 14th day of January, 1980.

HELMUT MUELLER
Deputy Industrial Commissioner

No Appeal.

MARTY J. NISSEN,

Claimant,

vs.

GARY P. LATUS CONSTRUCTION COMPANY,

Employer,

and

MILWAUKEE MUTUAL INSURANCE COMPANY,

Insurance Carrier,
Defendants.

Appeal Decision

The employer and insurance carrier have appealed from a proposed review-reopening decision wherein claimant was awarded permanent partial disability, medical expenses, and any treatment which is reasonable and necessary to help claimant with his psychological problems.

* * *

On July 14, 1978, claimant received an injury which arose out of and in the course of his employment with the defendant employer. As a result of this injury, claimant had one testicle completely removed and one testicle partially removed. The record reveals that claimant may have some psychological problems associated with his injury, but the evidence clearly showed that no degree of permanent industrial disability could be established at the time of the hearing as it was expected that claimant's psychological condition would improve. Therefore, the issue to be resolved is the extent, if any, of claimant's scheduled permanent partial disability or claimant's permanent industrial disability as a result of his physical injury.

Iowa Code section 85. 34(2) presents a schedule for permanent partial disabilities. Some few states have specifically scheduled the loss of testicles as a permanent partial disability, recognizing that such a loss may not

necessarily result in industrial disability or loss of earning capacity. The Iowa Code makes no such provision in its schedule of permanent partial disabilities. Hence, under the Iowa Workers' Compensation Act no award for scheduled permanent partial disability can be supported solely on the basis of an injury to the testicles.

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, 732, 254 N.W. 35, 39 (1934), stated:

> A personal injury, contemplated by the Iowa 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. (Citations omitted) The injury to the human body here contemplated must be something, whether an accident or not, that acts extraneously to the natural processes 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.

That claimant received an injury is not in dispute. A memorandum of agreement has been filed and temporary total disability benefits have been paid.

Workers' compensation benefits are not intended to be likened to "damages" in a tort action. They are payable without any negligence on the part of an employer and in spite of any negligence on the part of the employee. The intent of such benefits is to provide a portion of wage replacement during periods of temporary disability or healing period and to compensate for a loss of future earning capacity in the case of permanent disability. This future loss in the case of scheduled permanent partial disabilities has been arbitrarily set according to the statute. Permanent disability for injuries which are outside of the schedules are considered to be industrial disability or reduction in earning capacity.

Functional impairment is an element to be considered in determining industrial disability, but consideration must also be given to the injured employee's age, education, qualifications, experience and inability to engage in employment for which he is fitted. *Olson v. Goodyear Service Stores,* 255 Iowa 1112, 125 N. W. 2d 251 (1963); *Barton v. Nevada Poultry,* 253 Iowa 285, 110 N. W. 2d 660 (1961).

A review of the record shows that there was never a finding of functional disability as a result of claimant's injury. Prior to his injury, claimant was working as a carpenter and earned $5.50 per hour. Claimant is presently working as a carpenter and is earning $7.00 per hour. Claimant does not perform certain carpentry tasks now that he did perform prior to his injury. These tasks, such as working in the rafters and sawing, are related to a perceived fear of saws and falling on rafters that claimant has as a result of his injury. The medical evidence shows that these fears are psychological and not based on any physical limitations. As heretofore noted, no award can be made at this time based upon claimant's psychological problems, as claimant's condition is expected to improve. Due to this factor, the lack of functional impairment, and claimant's ability to engage functional disability as a result of claimant's injury. Prior to his injury, claimant was working as a carpenter and earned $5.50 per hour. Claimant is presently working as a carpenter and is earning $7.00 per hour. Claimant does not perform certain carpentry tasks now that he did perform prior to his injury. These tasks, such as working in the rafters and sawing, are related to a perceived fear of saws and falling on rafters that claimant has as a result of his injury. The medical evidence shows that these fears are psychological and not based on any physical limitations. As heretofore noted, no award can be made at this time based upon claimant's psychological problems, as claimant's condition is expected to improve. Due to this factor, the lack of functional impairment, and claimant's ability to engage in employment that is substantially similar to and better paying than his previous employment, it is not possible to say that claimant has a permanent industrial disability at this time.

However deplorable a particular injury to a claimant may be, an award cannot be granted where it is not statutorily permissible. Claimant has neither demonstrated any scheduled permanent partial disability as contemplated by the Iowa Code nor established a claim for permanent industrial disability at this time.

Allen Silberman, psychologist, testified that further treatment for claimant's psychological injury would be necessary. Earl Laing, M.D., psychiatrist, found the existence of a phobic neurosis as a result of the injury, and although he could not estimate whether or not claimant would respond to treatment, noted that it had not been attempted at that time. Defendants at the time of hearing admitted the existence of phobic neuroris and offered treatment by a psychologist. Claimant indicated his willingness to participate in such treatment.

Under these conditions, if defendants have not already done so they should immediately arrange for treatment of the claimant as indicated.

The matter of the extent of permanent industrial disability to the body as a whole, if any, shall then be left open for future determination. In this regard it is noted that permanent disability does not have to be a disability that is intended to last forever. Permanent means for an indefinite and undeterminable period. *Wallace v. Brotherhood of Locomotive Firemen and Engineers,* 230 Iowa 1127, 300 N.W. 322 (1941); *Garden v. New England Mututal Life Insurance Co.,* 218 Iowa 1094, 254 N. W. 287 (1934).

* * *

Signed and filed this 31st day of January, 1980

ROBERT C. LANDESS
Industrial Commissioner

No Appeal.

EMMERT J. NORGAARD,

Claimant,

vs.

JOHN L. JENSEN, d/b/a
JENSEN STORES,

Employer,

and

EMPLOYERS MUTUAL CASUALTY
COMPANY,

Insurance Carrier,
Defendants.

Ruling and Order

BE IT REMEMBERED that on February 1, 1979 the defendants herein filed a motion to dismiss claimant's application for arbitration. Said motion alleged that claimant's cause of action is barred by the statute of limitations as set forth in Iowa Code section 85.26 because the application for arbitration, on its face, indicates that claimant now seeks workmen's compensation for disability resulting from the inhalation of paint fumes during the period of claimant's employment with defendant employer (1966 until April 1974), that no weekly payments of workmen's compensation were made, and that said application for arbitration was filed more than two years after the claimant's last date of employment with the defendant employer. On February 6, 1979 the claimant herein amended his application to include the allegation that he did not discover nor could he have discovered the causal connection between his injury and the inhalation of paint fumes "until within the two-year period immediately preceding the filing of his petition herein . . ." On February 9, 1979 the defendants renewed their motion to dismiss claimant's petition as amended.

Review of claimant's application for arbitration, filed on January 11, 1979, reveals the following: that the alleged injury date is correlated with the inhalation of paint fumes during the period of claimant's employment (paragraphs 4 and 15); that the period of employment was from 1966 until April 1974 (paragraph 9); that the claimant has been disabled as a result of the alleged industrial injury since January 1975 (paragraph 18); and that no weekly benefits were paid to the claimant for the alleged industrial injury (paragraph 17).

By amending the petition as indicated above, the claimant appears to contend that the two-year statute of limitations, Iowa Code section 85.26, begins to run when a claimant has knowledge, as in the present case, of an incident which is compensable under the Iowa Workers' Compensation Law.

At the outset it is important to note that the last possible date of injury that could control in this matter is in April 1974 because that was the last month in which the claimant was employed with defendant employer. Thus, the version of Code section 85.26 in effect at that time controls and reads in relevant part as follows:

> "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 added).

As noted by the Iowa Industrial Commissioner in *Elois Ewing v. Iowa Industrial Hydraulics* and *Aid Insurance Company (Mutual),* 33rd Biennial Report of the Iowa Industrial Commissioner, page 165 and in *Robert C. Connet, as Conservator for Edwin Albert Kray v. Farmers Mutual Cooperative Creamery Association* and *Iowa National Mutual Insurance Company,* 32nd Biennial Report of the Iowa Industrial Commissioner, page 46, the Iowa Supreme Court has strictly construed the statute of limitations herein under consideration. The "date of injury causing such death or disability" is the beginning date for the limitation period -- that is, the causal injury, not the compensable injury nor the state of facts or conditions which first entitled claimant to compensation. *Otis v. Parrott,* 233 Iowa 1039, 8 N.W.2d 708 (1943); *Mousel v. Bituminous Material and Supply,* 169 N.W.2d 763 (Iowa 1969).

Thus, in the past, the question of when a claimant acquires or should have acquired knowledge of a possible causal connection between a disability and an industrial injury was properly raised in the context of a "notice" issue under Iowa Code section 85.23 and not in the context of a "statute of limitations" issue under Iowa Code section 85.26. Code section 85.23 specifically refers to "the date of the occurrence of the injury" and the Iowa Supreme Court has held that "occurrence" indicates when the employee discovers the nature of his or her disability. *Jacques v. Farmers Lumbar Supply Company,* 242 Iowa 548, 47 N.W.2d 236 (1951). Although Professor Larson's analysis (§78.41) puts Iowa in the minority on the rule as to when the time period for a claim begins to run, the Iowa Supreme Court's language in *Otis v. Mousel* is clear, and the Iowa Industrial Commissioner is bound by it.

THEREFORE, defendants' motion to dismiss is hereby sustained.

Signed and filed this 5th day of March 1979.

LEE M. JACKWIG
Deputy Industrial Commissioner

No Appeal.

MILO C. O'BRADOVICH,

Claimant,

vs.

MORRISON RAILWAY SUPPLY CORP.,

Employer,

and

TRAVELERS INSURANCE COMPANY,

Insurance Carrier,
Defendants.

Appeal Decision

This is a proceeding brought by claimant, Milo C. O'Bradovich, appealing a proposed review-reopening decision wherein claimant was denied relief but for the payment of additional medical expenses.

* * *

Claimant contends in his appeal brief that the deputy industrial commissioner erred in allowing the defendant to cross-examine claimant as to his prior criminal record and psychiatric treatment. The record makes it clear that this was allowed for the limited purpose of its effect on earning capacity. There is no indication in the record that any prejudice resulted to claimant as a consequence of the admission.

* * *

Signed and filed this 12th day of January, 1979.

ROBERT C. LANDESS
Industrial Commissioner

Appealed to District Court: Pending

JOHN WILLIAM ORR,

Claimant,

vs.

LEWIS CENTRAL SCHOOL DISTRICT,

Employer,

and

EMPLOYERS MUTUAL CASUALTY CO.,

Insurance Carrier,
Defendants.

Appeal Decision

This is a proceeding brought by claimant appealing a ruling by a deputy industrial commissioner wherein his action was dismissed as being barred by Iowa Code section 85.26.

Claimant filed a petition in arbitration alleging an injury in May 1975. Defendants filed a motion to dismiss which was resisted by claimant.

Iowa Code section 85.26 states:

> 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.

The Iowa Supreme Court in *Otis v. Parrott,* 233 Iowa 1039, 8 N.W.2d 708 (1943), provided guidance for situations like the one here presented. In interpreting a statute which in its first unnumbered paragraph is virtually identical to that in force today, the opinion of the court at 1042, _____, noted the statute begins to run on the date of the causative injury whether compensable or not.

As claimant's petition for arbitration alleging a May 1975 (causative) injury was not filed until June 2, 1978, his petition is barred by the statute of limitations.

THEREFORE, it is ordered:

The claimant's petition for arbitration be dismissed.

Signed and filed this 14th day of December, 1978.

ROBERT C. LANDESS
Industrial Commissioner

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

CAROL ROBERT PALMER,

Claimant,

vs.

MANPOWER, INCORPORATED, OF DES MOINES, IOWA,

Employer,

and

LIBERTY MUTUAL INSURANCE COMPANY

Insurance Carrier,
Defendants.

Review-Reopening Decision

This is a proceeding in review-reopening brought by Carol Robert Palmer, the claimant, against his employer, Manpower, Incorporated, of Des Moines, Iowa, and the insurance carrier, Liberty Mutual Insurance Company, to recover additional benefits under the Iowa Workers' Compensation Act on account of an injury he sustained on July 31, 1979.

* * *

The issues to be determined are whether there is a causal relationship between the July 31, 1979 injury and the alleged disability, and if so, the nature and extent of such disability. Certain medical expenses are in issue. Claimant also questions whether he received proper notice of termination of his temporary total disability benefits pursuant to Auxier v. Woodward State Hospital-School, 266 N.W.2d 139 (Iowa 1978).

Fifty-year-old claimant, who has a ninth grade (special) education and cannot read or write, testified that he worked for defendant-employer from May 1979 until July 31, 1979 on which date he was struck by a forklift as he cleaned up broken glass at Pepsi Cola General Bottlers.

Claimant described being shoved over and pushed along the blacktop for some distance.

Claimant testified that the next day he contacted defendant-employer regarding treatment for his right hand which had been injured in the forklift incident. According to the claimant, defendant-employer referred him to Herbert Rosen, D.O, the company doctor. Claimant related being treated by Dr. Rosen for four or five weeks with hotpacks, lotion, an injection and tape. He could not remember the exact date Dr. Rosen released him to return to light duty work but he did recall telling Dr. Rosen that his hand was still bothering him and that his fingers were swollen and aching.

Claimant's memory was sketchy regarding his course of medical treatment and referrals. He thought Dr. Rosen referred him to Iowa Lutheran Hospital, to a bone specialist (either Abraham Wolf, M.D. or Sinesio Misol, M.D.). Claimant stated he went to Stephen C. Gleason, D.O., on his own. He did not recall who sent him to Mercy Hospital or to Methodist Hospital or to James O. Stallings, M.D. He speculated that Dr. Wolf sent him to a Dr. Ban and another unnamed doctor. [Claimant explained that he went to these other doctors because he was still having problems after Dr. Rosen's release.] He agreed that he could have been sent to Donald W. Blair, M.D., at the defendant-carrier's request. Claimant indicated that either his stepson or wife drove him to these doctors and hospitals.

Claimant testified that prior to the date of injury he had no problems with his right arm, wrist or hand. Since that time he has had persistent problems with the right upper extremity. He described pain from beside the little finger to the wrist and over the thumb upon squeezing. He stated that he is no longer employed and does not feel he could use a broom or shovel as in his previous job. Claimant noted he has tried to help around the house but cannot move the davenport or scratch hard to clean pans.

On cross-examination the claimant testified that although he had osteomyelitis in the right upper extremity as a child, he did heavy work all his life without any disability problem. He briefly described his prior employments which included setting pins in a bowling alley, shaking hides at a packing company, lifting 100-pound bags at a fertilizer plant, cutting livestock at a byproducts outfit and sand-blasting for a barrel and drum company. Claimant related that he was unemployed and looking for work from January 1975 to June 1975. He leased a cafe from June to August 1975 but closed when the venture proved unprofitable. He then returned to work with the barrel and drum company from September 1975 to August 1978. Claimant recalled hurting his back and being disabled for five to six weeks while so employed. Claimant stated he also was unemployed from August 1978 to May 1979.

Claimant further testified on cross-examination that he was not satisfied with Dr. Rosen's care. He stated he was satisfied with Dr. Gleason's "report." Claimant indicated he is not under any doctor's care at present.

Claimant told the cross-examiner that he has not attempted to find work since he was released. His wife is not employed.

On redirect examination the claimant explained that he has not looked for work because his hand is still swollen. He acknowledged being released from Dr. Gleason's care.

Claimant's wife of 14 years generally verified his history of no prior disabling problem with the right upper extremity and his present complaints. Claimant's wife was the record keeper for the claimant's family. She identified the various medical bills (exhibit 5) and mileage expenses (exhibit 6). She explained that when Dr. Rosen released the claimant, they went to Dr. Gleason because the claimant's hand was still swollen. According to the claimant's wife, Dr. Gleason referred the claimant to Dr. Wolf, to Lutheran Hospital, to a Dr. Ban and to Dr. Stallings. She confirmed claimant's release from Dr. Gleason's care.

On cross-examination claimant's wife conceded the claimant was able to straighten his right arm and to lift his right arm as high as his shoulder. With respect to the authorization of medical care, she described calling Robert Reid after Dr. Rosen released the claimant to find out if the claimant could go to some other doctor. She testified that Reid denied the request. She explained she did not thereafter contact Reid about the other doctors or mileage because of the definitive answer she had received earlier.

Claimant's witness, Fred Risius, testified that he has been a neighbor to the claimant for six or seven years. He has gone fishing with the claimant. He has poured cement with the claimant. Risius did not recall claimant complaining about any right upper extremity problem prior to July 31, 1979. He noted many opportunities in summer and some in winter to observe the claimant. Risius verified claimant's testimony that he no longer does much work about the home. Risius, a construction foreman, claimed that whereas he would have hired the claimant for shovel and broom work before the date of injury, he would not do so today allegedly because of his recent observations of the claimant. On cross-examination he conceded he did not in fact ever offer the claimant a job but thought he might have suggested the claimant join a union (a prerequisite). He agreed the work he supervised entailed more than shovel and broom work.

Regarding the *Auxier* issue, Robert Reid, claims adjuster for defendant-carrier, identified exhibit 3 as the October 25, 1979 letter he sent to the claimant advising of Dr. Rosen's determination of no permanent impairment and light duty release for September 21, 1979. Reid conceded this was not a notice of termination of benefits. Reid likewise identified exhibit 4 as the November 5, 1979 letter he sent to the claimant explaining why benefits had been terminated on September 22, 1979. He explained that the reference in the opening sentence to claimant "currently receiving Workers' Compensation Benefits" was incorrect. Reid explained that on September 27, 1979 he called defendant-employer and learned that the claimant had brought Dr. Rosen's release to the defendant-employer but had not asked for work. Reid said he then called the claimant who left him with the impression that the claimant was planning on returning to work after attending a relative's funeral.

Regarding the authorization of medical care, Reid

testified that claimant's wife did call him with an inquiry regarding seeking a second doctor's opinion. Reid reported that he told her to advise the carrier if the claimant did go to another doctor so that the care could be authorized. [Claimant's wife returned to the witness stand following this testimony by Reid and testified that she did not recall Reid making such a statement to her.]

Herbert Rosen, D.O., in a letter dated August 31, 1979, states that physical examination of the claimant following the July 31, 1979 injury "revealed a remarkably deformed right forearm and wrist with some abnormalities of the hand. X-rays were taken to rule out fracture because of the new injury." He reports that claimant was treated with a Jones tape cast, and an EMG conducted at Iowa Methodist Hospital "revealed a possible entrapment of the wrist nerves" (referred to in exhibit 2). Dr. Rosen advised:

> As per our conversation via the telephone, this is to advise you that this may become a disability problem. He may even require wrist surgery by an orthopedic surgeon. Temporarily I am trying out a medication on him and he has improved, bit if he continues to complain it may be necessary to consider surgery. Be aware, please, that he has had an old long term problem with the wrist from years ago. He started his employment with the deformity and a high wrist abnormality. He claims that he had been working all along and had no distress at all until this new accident occurred. I cannot delve any deeper into his work status because it is non-medical at this time and so, therefore, I advise you of this.
>
> Temporarily, until I get more results, I will continue therapy as is and he agrees to this, and has markedly improved.
>
> It is my impression that he cannot return to any work activities requiring the use of pulling, twisting, or any strain utilizing the right hand. I cannot give a disability determination at this time, it is too soon. The only definite conclusion is that he has a severe impairment for future activity of work, most probably which was precipitated again by this new fall-injury. (Exhibit 1, page 2.)

[On August 31, 1979 Dr. Rosen also referred claimant to Sinesio Misol, M.D., for examination, opinion and recommendation. (Exhibit 1, page 1.)]

In a surgeon's report dated September 24, 1979 (exhibit A, page 5) and in a letter dated October 2, 1979 confirming such report (exhibit A, page 4), Dr. Rosen indicates that claimant has no impairment as a result of the July 31, 1979 injury, has returned to a pre-injury state and is able to perform his usual duties of maintenance work. He notes the case was prolonged because the claimant "had such a severely impaired wrist from previous damage and was developing impairment, but with extensive medical care, some injections in the site of pain and other physical therapy he was returned to a pain-free status." (Exhibit A, page 4.)

Stephen C. Gleason, D.O., indicates in office notes that claimant was referred to him by a David Stevens. In notes for October 12, 1979 Dr. Gleason comments that he saw the claimant for complaints of weakness and pain in the right wrist and hand since the July 31, 1979 injury. He relates claimant's history of "essentially normal strength and painless function of the right arm prior to the injury" since an episode of osteomyelitis in the right arm which resolved itself by the time the claimant reached 17. Regarding the examination of claimant's extremities, Dr. Gleason reports:

> Extremities - reveal weakness and some possible distal thenar atrophy in the right hand. He has weakness of hand grip in the right but no evidence of superficial erythema. There is evidence of surgical deformity that he says has been present for some time. Range of motion in the wrist is approximately 80% of normal in all directions. He does not recall if the range of motion was different from the range of motion noted prior to the injury. Most of the pain that he has is distal to any of the osteomyelitis scarring and appears to be unrelated to his previous osteomyelitis. The weakness appeared to be of media [sic] nerve nature and I had suggested an EMG. He informed me that an EMG had been done and the report would be available from Methodist Hospital.

Impression at this time:

1. Sprain of the right wrist following on-the-job accident.
2. History of old osteomyelitis of the right arm unrelated to current weakness or injury.
3. Possible neuropathy secondary to trauma.

He recommended claimant not attempt manual labor at that time. (Exhibit 1, pages 4-5.)

In a letter dated November 1, 1979 Dr. Gleason concludes from the Methodist Hospital EMG report that claimant has "an entrapment neuropathy of the right median nerve with peripheral median nerve paresis" which "could very possibly be a post-traumatic carpal tunnel syndrome or variant of same." (Exhibit 1, page 6.) However, in a letter dated January 18, 1980 Dr. Gleason states:

> On receipt of the letter from Dr. Stallings, it is intuitively obvious that Carol Palmer had an acute injury that showed a positive EMG initially. His repeat EMG was normal indicating some probable healing of the affected nerve pathways. It is possible that at this point in time he may benefit from physical therapy and may regain some function in that hand.
>
> Again, I must reiterate that if there was a chronic injury present there should not be acute changes in the EMG that are rectified over a short period of time. (Exhibit 1, page 9.)

James O. Stallings, M.D., in a letter dated January 7, 1980 states that he saw the claimant on December 4, 1979 for complaints referrable to the July 31, 1979 injury. He sets forth his examination results and his opinion:

> Mr. Palmer, at the time of my examination, complained of pain in the space between the thumb and index finger on the right. He also complained of numbness in the median nerve distribution on the right hand. He can flex his wrist completely with a lot of reassurance, but he does have pain when he flexes his wrist on the right.
>
> This is a puzzling case. The electrodiagnostic studies indicate they are essentially normal. The x-ray studies show some degree of arthritis of the right wrist. The x-ray examination of the right forearm reflects scars on the forearm where he had osteomyelitis at the age of 13 years. This is clinically quiescent at the present time.
>
> Based on the normal electrodiagnostic studies, I do not know that I have anything to offer Mr. Palmer. I cannot say one way or another as to whether or not this was work related based on my examination.

Dr. Stallings suggests the claimant see Dr. Arnis Grundberg if another opinion is necessary. (Exhibit 1, page 7 and 8.)

In an evaluation report dated March 13, 1980 Donald W. Blair, M.D., states that he saw the claimant on March 4, 1980 for right wrist and hand complaints. He relates a history taken from the claimant which is essentially similar to claimant's testimony and to the other medical histories. Dr. Blair's physical examination revealed:

> On examination of the right forearm, there is evidence of old scarring as well as deformity. There are scars of the dorsal as well as the volar aspect of the radius. The wrist shows some evidence of radial deviation. Shoulder and elbow motions are ffee [sic]. Wrist moions are flexion 70°, extension 70°, ulnar deviation 0 and radial deviation 20°.
>
> Sensations todayare [sic] considered intact about the right wrist as well as the right hand. He is able to bring the finger tips into the palm and oppose the thumb and little finger. Grip is good in either hand.
>
> Discomfort, when present, is described as being over the dorsum of the metacarpals and wrist.

X-rays of the right wrist revealed findings "consistent with long standing changes which do not appear to be the result of trauma." Dr. Blair's diagnosis and conclusion was:

1. Symptoms compatible with strain and contusion, right wrist.
2. Old osteomyelitis, distal radius, right, on basis of history.

Findings at this time are not marked. He has good strength and range of motion in theright [sic] wrist. I do not anticipate any additional functional impairment in this area over what was present prior to the reported trauma in July of 1979. He has had consideration given previously for [sic] carpal tunnel syndrome but there is no evidence complaint of discomfort in the median nerve distribution.

I would feel he should be engaged in some type of work activity at this time and additional treatment is not being anticipated. This man does have a wrist support which could be used when doing physical type of work if this results in aggravation of his complaints.

The claimant has the burden of proving by a preponderance of the evidence that the injury of July 31, 1979 is the cause of his disability on which he now bases his claim. *Bodish v. Fischer, Inc.,* 257 Iowa 516, 133 N.W.2d 867 (1956). *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 testimony. *Bradshaw v. Iowa Methodist Hospital,* 251 Iowa 375, 101 N.W.2d 167 (1960).

The opinions of experts need not be couched in definite, positive or unequivocal language. *Sondag v. Ferris Hardware,* 220 N.W.2d 903 (Iowa 1974). An opinion of an expert based upon an incomplete history is not binding upon the commissioner, but must be weighed together with the other disclosed facts and circumstances. *Bodish v. Fischer, Inc.,* 257 Iowa 516, 133 N.W.2d 867 (1965). The 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 regard to medical testimony, the commissioner is required to state the reasons on which testimony is accepted or rejected. *Sondag v. Ferris Hardware, supra.*

While a claimant is not entitled to compensation for the results of a pre-existing injury or disease, the mere existence at the time of a subsequent injury is not a defense. If the claimant had a pre-existing 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. *Nicks v. Davenport Produce Co.,* 254 Iowa 130, 115 N.W.2d 812 (1962). *Yeager v. Firestone Tire & Rubber Co.,* Iowa 369, 112 N.W.2d 299 (1961).

Expert testimony stating that a present condition might be causally connected to claimant's injury arising out of and in the course of employment, in addition to non-expert testimony tending to show causation, may be sufficient to sustain an award but does not compel an award. *Anderson v. Oscar Mayer & Co.,* 217 N.W.2d 531, 536 (Iowa 1974).

The weight of the medical evidence will not support a finding that claimant has sustained permanent impairment to his wrist and hand as a result of the July 31, 1979 injury. The early reports of Dr. Rosen, the treating physician, do suggest a possibility of such impairment. However, Dr. Rosen clearly negates that impression upon further testing and examination and finds that claimant's wrist and hand have returned to preinjury pain-free status and that claimant can return to maintenance work as of September 21, 1979. Dr. Rosen's opinion is corroborated by Dr. Blair, the evaluating physician. Dr. Gleason initially opines that as a result of the injury claimant sustained a sprain of the right wrist and might have trauma related neuropathy. Upon receipt of Dr. Stallings evaluation, Dr. Gleason disgards the latter theory and suggests claimant may regain "some

function" in the hand from physical therapy. Exactly what function has been lost as a result of the work injury is not defined by Dr. Gleason. He does comment in office notes that claimant's range of wrist motion is approximately 80 percent of normal but then adds that the claimant was unable to state such range of motion was different from that prior to the injury. Dr. Stallings declines to address the causal connection issue.

Claimant has sustained his burden of proving that he was temporarily totally disabled as a result of the July 31, 1979 injury. Dr. Rosen determined that claimant could return to work as a maintenance man on September 21, 1979. As of October 12, 1979 Dr. Gleason indicates that the claimant should refrain from manual labor "[u]ntil we are sure of the etiology of his problem . . . ." As previously discussed, Dr. Gleason later dismisses his speculation about the wrist and hand neuropathy being causally connected to the work injury. An anticipated date of recovery from the sprain or date of release to return to gainful employment are not addressed by Dr. Gleason. Yet, both the claimant and wife indicated that claimant has been released from Dr. Gleason's care. The opinion of Dr. Rosen, as treating physician, is given more weight.

Parenthetically, it should be noted that the undersigned considered an argument that claimant's testimony that he was unable to return to work after Dr. Rosen's release because his hand was still swollen and caused him pain should justify extending the temporary total disability period beyond September 21, 1979. If claimant had attempted a return to work and subsequently encountered measurable difficulty, such theory might have been persuasive. In light of Dr. Rosen's release and Dr. Gleason's lack of comment on this issue, and Dr. Blair's seeming approval of an attempt to return to work (without any objective evidence of a change in condition from the time of Dr. Rosen's release to the time of Dr. Blair's examination -- other than an increased ten degree loss of motion noted by Dr. Blair as compared to that assessed earlier by Dr. Gleason), a finding that the temporary total disability period extended beyond September 21, 1979 would be speculative.

WHEREFORE, for the reasons set forth above, it is hereby found that claimant has failed to sustain his burden of proving that he received any permanent impairment as a result of the July 31, 1979 injury. He has sustained his burden of proving that he was temporarily totally disabled from the date of injury through September 21, 1979.

With respect to the *Auxier* issue, it is hereby found that neither exhibit 3 nor exhibit 4 amounted to notice of termination of temporary total disability benefits as defined by the Iowa Supreme Court. Although exhibit 4 does contain the "elements" of such notice set forth in the *Auxier* decision, said termination letter was sent to the claimant long after (rather than 30 days before) termination occurred. The exception to the requirement of advance notice of termination is "where the claimant has demonstrated recovery by returning to work." *Auxier v. Woodward State Hospital-School,* 266 N.W.2d 139, 142 (Iowa 1978). Although the record suggests genuine confusion and lack of communication between the claimant and defendants on this matter, the fact that Reid thought the claimant was intending to return to work is not a substitute for the above-quoted exception. Indeed the spirit of the *Auxier* case implies that the defendant-carrier had a responsibility in this case to check back with the defendant-employer or the defendant-employer has a duty to notify the defendant-carrier regarding the claimant's failure to return to work. Accordingly, it is hereby found that claimant is entitled to benefits from the date of injury through December 5, 1979, thirty (30) days after the November 5, 1979 "notice" of termination letter.

* * *

Signed and filed this 22nd day of April, 1980.

LEE M. JACKWIG
Deputy Industrial Commissioner

No Appeal.

BENJAMIN E. PARR,

Claimant,

vs.

WILSON FOODS CORPORATION,

Employer,
Self Insured Defendant.

Ruling

BE IT REMEMBERED that on June 15, 1979 Claimant herein filed a motion to amend his petition filed in this cause. No resistance by the defendant has been filed to date.

Claimant's proposed amendments to paragraphs 18 and 19 of the original notice and petition are deemed to be more specific allegations which should not otherwise change the issues in this proceeding.

Iowa Rule 88 of Civil Procedure provides that:

> 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. Leave to amend, including leave to amend to conform to the proof, shall be freely given when justice so requires.

Allowing amendment of a pleading is the general rule; denying amendment of a pleading is the exception. *Galbraith v. George,* 217 N.W. 2d 598 (Iowa 1974).

WHEREFORE, Claimant's motion to amend is hereby sustained and as requested, his petition is hereby considered to be amended as specified in the motion.

Signed and filed this 6th day of July, 1979.

LEE M. JACKWIG
Deputy Industrial Commissioner

No Appeal.

SHIRLEY DUVALL PECSI,

Claimant,

vs.

ROYAL ALUMINUM FOUNDRY,

Employer,

and

AETNA CASUALTY & SURETY,

Insurance Carrier,
Defendants.

Appeal Decision

This is a proceeding brought by claimant appealing a proposed ruling wherein it was held that she could not pursue weekly benefits in a review-reopening proceeding.

* * *

The sole issue on appeal is whether or not the deputy industrial commissioner erred in finding that claimant could not pursue weekly benefits in a review-reopening proceeding.

Iowa Code §85.26(2) provides in part:

> Any award for payments or agreement for settlement provided by section 86.13 for benefits under the workers' compensation or occupational disease law may, where the amount has not been commuted, be reviewed upon commencement of reopening proceedings by the employer or the employee *within three years from the date of the last payment of weekly benefits made under such award or agreement.* (emphasis supplied)

Iowa Code §86.14(2) also refers to the review-reopening proceeding.

> In a proceeding to reopen an award for payments or agreement for settlement as provided by section 86.13, inquiry shall be into whether or not the condition of the employee warrants an end to, diminishment of, or increase of compensation *so awarded or agreed upon.* (emphasis supplied)

The section of Iowa Code 86.13 alluded to in §86.14 proposes:

> If the employer and the employee reached an agreement in regard to the compensation, a memorandum thereof shall be filed with the industrial commissioner by the employer or the insurance carrier, and unless the commissioner shall, within twenty days, notify the employer or the insurance carrier and employee of his disapproval of the agreement by certified mail sent to their addresses as given on the memorandum filed, the agreement shall stand approved and be enforceable for all purposes.
>
> The code sections very clearly require payments to be made pursuant to an award for payment or an agreement for settlement. These prerequisites have not been met in this case.

* * *

Therefore, it is ordered:

That claimant may not pursue a review-reopening for weekly benefits in her petition filed May 19, 1978.

* * *

Signed and filed this 3rd day of October, 1978.

ROBERT C. LANDESS
Industrial Commisssioner

No Appeal.

DENNIS L. PETERSEN,

Claimant,

vs.

**VIKING PUMP DIVISION,
HOUDAILLE INDUSTRIES, INC.,**

Employer

and

LIBERTY MUTUAL INSURANCE COMPANY,

Insurance Carrier,
Defendants.

Appeal Decision

Claimant appeals a proposed review-reopening decision denying claimant's right to compensation but ordering defendants to pay certain medical expenses.

* * *

Claimant, who began working for defendant employer in April 1972, sustained two back injuries which arose out of and in the course of his employment. The first injury occurred on March 20, 1976 for which he was paid thirteen weeks temporary total disability compensation. The second injury occurred on January 20, 1977, and claimant was paid four and four-sevenths weeks of weekly compensation in addition to the two-thirds weekly benefit which accrued during the fourth and fifth weeks of disability.

On July 5, 1977 claimant was playing softball for a church league and twisted his back when he overran second base. On July 18, 1977 surgery was performed and a large disc fragment was found just underneath the posterior longitudinal ligament at the L4,L5 level and was removed. Claimant contends the 1976 work incident (and possibly

also the 1977 work incident) were the cause of the disability or the injury which occurred after the softball game incident. This contention is unjustified.

J. D. Kothari, M.D., testified in his May 16, 1978 deposition starting at page 14, that claimant was treated by a Dr. Sitz in October of 1970 for low back pain. Claimant was seen by a Dr. Mikelson for back complaints on November 30, 1971. Dr. Kothari further testified on page seventeen of his deposition that claimant saw a Dr. Devine on April 14, 1970 for low back pain. The record also indicates that claimant saw Earl C. Vorland, D. C. on February 19, 1973 for a December 1972 back injury.

To say that the employer in this case should be responsible for the July 5, 1977 softball injury and resulting disability is to say that when a person has a preexisting condition which is temporarily exacerbated at work that the employer is then responsible for every other exacerbation of that condition that results thereafter. While this may be so in a situation as in *Langford v. Kellar Excavating & Grading, Inc.,* 191 N. W. 2d 667 (Iowa) where the first injury was work related, it is not necessarily so in a situation such as *DeShaw v. Energy Manufacturing Company,* 192 N. W. 2d 777 (Iowa 1972) where there was a preexisting condition. Under those circumstances the employer is responsible only for the extent of the aggravation related to the employment.

Dr. Kothari's testimony was somewhat explicit as to the causal connection with the 1976 injury until he was advised of the prior medical findings indicating the condition was of longer standing. On page 20, lines 9-11, of his deposition, Dr. Kothari testified during cross-examination that he was unable to state whether the disc fragment appeared in claimant's back in 1971 or in 1976. The claimant therefore has not met his burden of proof.

* * *

Signed and filed this 15th day of January, 1980

ROBERT C. LANDESS
Industrial Commissioner

No Appeal.

GLEN FREDERICK PETERSON,

Claimant,

vs.

KEITH E. KENT, INC.,

Employer,

and

HAWKEYE-SECURITY INSURANCE,

Insurance Carrier,
Defendants.

Order

On October 29, 1979 the matter of claimant's appeal from the action of the deputy industrial commissioner in dismissing his petition for commutation came on for hearing.

Claimant filed an original notice and petition for commutation (form 9) on May 22, 1979. On June 11, 1979 defendants filed an answer to claimant's petition for commutation denying all material allegations. On June 27, 1979 defendants filed a motion for summary judgment which claimant resisted on July 2, 1979.

On July 16, 1979, a deputy industrial commissioner entered an order dismissing claimant's petition for commutation. An application for rehearing was filed on July 27, 1979 which was deemed denied on August 16, 1979 by action of Industrial Commissioner Rule 500-4.24. Claimant filed a petition for review and notice of appeal on August 30, 1979.

At the hearing it was agreed that the basic issues were whether the period during which compensation is payable can be definitely determined; if so, what is that period; and whether or not a commutation is in the best interests of the claimant. As it was generally agreed that the basic dispute at present was more of procedure than substance, the following solution was presented and agreed.

Claimant shall file an original notice and petition (form 100) for review-reopening. The original notice and petition for commutation (form 9) previously filed shall be merged with that action when filed.

Defendants shall continue to make payment of benefits currently being paid and shall not move to dismiss claimant's petition for review-reopening on account of payments being continued.

WHEREFORE, upon claimant's filing of a form 100 initiating a review-reopening proceeding, the petition for commutation shall be deemed merged with the petition for review-reopening and all agreements reached at the appeal hearing will be in force and effect. A date will then be set for a hearing before a deputy industrial commissioner in which all issues involved in this merged proceeding will be adjudicated.

* * *

Signed and filed this 30th day of October, 1979.

ROBERT C. LANDESS
Industrial Commissioner

No Appeal.

JOHN M. PETERSON,

Claimant,

vs.

3M COMPANY,

Employer,

and

TRAVELERS INSURANCE COMPANY,

Insurance Carrier,
Defendants.

Review-Reopening and Arbitration Decision

This is a proceeding in review-reopening and arbitration brought by John M. Peterson, the claimant, against his employer, 3M Company, and the insurance carrier, The Travelers Insurance Company, to recover additional benefits under the Iowa Workers' Compensation Act on account of injuries he sustained on October 23, 1972 and on June 9, 1977 respectively.

* * *

The issues to be determined with respect to the review-reopening proceeding are:

(1) Whether the proceeding is barred by Code section 85.26(2), the three year statute of limitations (formerly Code section 86.34);

(2) Whether the defendants are estopped from raising the statute of limitations defense;

(3) Whether sick pay benefits during 1977 and 1978 (after the statute of limitations ran with respect to the "last" payment of compensation in April of 1973) were payments made in lieu of compensation for the October 23, 1972 injury and whether the claimant is entitled to reopen the case within three years from the date of such payments; and if the claimant is not so barred;

(4) The nature and extent of claimant's disability, if any.

The issues to be determined with respect to the arbitration proceeding are:

(1) Whether the claimant sustained an injury in the course of and arising out of his employment with defendant-employer;

(2) Whether there is a causal relationship between the alleged injury and the disability; and if so,

(3) The nature and extent of claimant's disability, if any.

At the beginning of the hearing the parties stipulated that the claimant was absent from work on January 25, 1977; June 9, 1977 (three-fourths hour); June 28, 1977 (one point five hours); July 21, and July 22, 1977; August 1 - 5, 1977 (inclusive); December 16, 1977; and February 21, 1978 (two hours). The parties did not stipulate to causal connection between such absences and the injury dates in issue.

Thirty-one year old claimant testified he began working for defendant-employer on August 24, 1970 as a warehouseman. On October 23, 1972 he experienced sharp lower back pain while removing and swinging a 60 pound pallet from staker forks and onto some other pallets. He advised his supervisor, Tom Timmons, and then went to Dr. Anderson's office for x-rays and a prescription of pain pills and muscle relaxers.

Claimant, who denied prior back problems of any nature, recalled missing about one day of work immediately following that injury. He was put on light duty work. A week after the injury, Dr. Anderson taped claimant's back. Dr. Anderson referred him to Dr. Grant who initially prescribed a back support but eventually performed surgery. Claimant was hospitalized on February 26, 1973 for tests and from March 5, 1973 through March 10, 1973 for surgery.

Claimant returned to work on March 19, 1973 for four hours a day and performed light office work. He returned to full days in April of 1973 but remained on light duty work in the damaged carton area. In April of 1974 he returned to his former duties of order filling. Claimant testified that his back still bothered him but he was no longer under any weight restrictions.

According to the claimant, the defendant-employer did not advise him of the existence of permanent partial disability benefits and that he might be eligible for them. He recalled a few discussions with Steve Lauderbaugh, general foreman for defendant-employer, regarding what he would receive in the way of workers' compensation benefits and income maintenance. Such discussions took place mainly around the time of surgery. He also talked to Lauderbaugh after doctor visits and when submitting certain medical expenses for payment. Claimant testified that he still takes Valium and Empirin No. 3 today and to his knowledge the company still pays this medical expense.

Although claimant was unsure of the number of absences he had from work in 1975 and 1976, he recalled five times when absences were related to the back problem but were not reported as such to the company. Claimant explained that he felt he was under pressure not to have absences related to his back problem. On cross-examination claimant denied that because of his seniority his reduction in pay would have amounted to $.60 an hour for six months at which time he would return to regular pay. (During his deposition claimant indicated that he would have had to take a cut in pay for a bare minimum of six months.) On cross-examination he admitted he did not see a doctor for his back problem from 1974 until 1977 but rather "just lived with the problem."

Claimant stated that in late January of 1977 he strained his back while lifting wide belt boxes. He reported the matter to his supervisor and then sought medication from Dr. Grant. Claimant recalled losing one day of work because of the incident and receiving sick pay for such time loss. He saw Dr. Grant again in February of 1977 and a couple times after that.

According to the claimant he had been put on light duty work after the January 1977 incident. However, in June of that year he was requested to lift a carton weighing 60 pounds. He felt a recurrence of back pain at that time and therefore missed some work to get a prescription filled. He recalled taking off some hours later in June to see Dr. Grant. Then, upon Dr. Grant's advise, he took off work five days in August for which he received sick pay. On cross-examination claimant agreed that he received sick leave pay and not workers' compensation benefits for the lost time and that he understood such payments were covered under the wage plan, not under the workers' compensation program.

On April 7, 1978 claimant voluntarily terminated his employment with defendant-employer. Although he had taken off only a couple hours in February of 1978 for his back condition, he had been on light duty for a year and, according to the claimant, the defendant-employer had been strongly suggesting that he change into lower paying jobs and different shifts because it was unfair to maintain him at his present pay level and light duty while other employees were doing more than he did for less pay.

During cross-examination the claimant, who appeared uneasy and extremely cautious in answering defense counsel's questions, maintained that he was aware of workers' compensation coverage for medical expenses and temporary time loss. He continued to allege that he was unaware of benefits for permanent partial disability even though he signed a receipt attached to the Employer's Report of Benefits Paid which form contains two references to permanent partial disability. He stated that he first became aware of permanent partial disability via a discussion with his wife's friend. Thereafter, his attorney obtained a report from Dr. Grant regarding permanent partial disability. He explained that prior to that time no one had advised him he had a permanent "disability" although he had known his "problem" was permanent. That is, Dr. Grant advised him at the time of surgery that the problem probably would be with him always.

On redirect, the claimant pointed out that he signed the receipt mentioned on cross-examination while he was in a company office. He did not read it over, no one read it to him and there was no conversation about the contents. He added that to the best of his recollection, nothing of substance was discussed regarding his medical condition.

Claimant's deposition testimony, taken on January 18, 1979, is substantially similar (in most aspects of the case) to his testimony at the hearing. During the deposition, claimant did elaborate that he was not merely contending that the defendants did not advise him of the existence of permanent partial disability benefits but that the defendant-employer actually knew he was permanently disabled and concealed such fact from him. He felt that because he had back surgery, the defendants should have assumed he has a permanent partial disability. However, he did not feel that he likewise should have assumed he had a permanent partial disability.

Although claimant also indicated at the deposition that Dr. Grant "told me basically that the injury would always be with me and that it would limit to some extent what I could do," he maintained that he was not aware of the fact that he had a permanent disability until early 1978 when he had the discussion with his wife's friend who was a claims adjuster for an insurance company in Des Moines.

James K. Anderson, presently office personnel manager for defendant-employer, testified that he has been involved in personnel matters since the time of claimant's injury in 1972. His office receives reports of work injuries from the first line supervisors, sends all relevant information and bills to the insurance carrier and disburses any workers' compensation benefits received from the carrier. He does not contact treating physicians. Sometimes the general supervisors do so. Anderson does rely on any information the employee's doctor may give regarding the nature and extent of the disability. Such information is forwarded to the carrier for determination of compensation. Anderson has access to an employee's absence reports contained in department personnel files and payroll records maintained by the payroll clerk. When an individual leaves the defendant-employer, his personnel file is transferred to Anderson's office.

Anderson explained that absence reports are required for any absence and that the first line supervisor, who is responsible for making out such records, relies upon the information given by an employee or someone on behalf of an employee regarding any particular absence. He also explained that there was no distinction between the concept of sick pay and the income maintenance program which was designed to cover the employee who is off work because of sickness or injury. The disability need not be permanent and the injury need not be work-related. When an employee is off work and is receiving workers' compensation benefits, income maintenance pays the difference between the employee's usual wage and the amount of the workers' compensation benefits. Anderson makes no determination regarding what type of payment or benefit an employee receives.

Anderson went through claimant's varied records and determined the following: at no time after the workers' compensation benefits were terminated in April of 1973, did claimant report time loss due to back problems related to the 1972 injury or receive any sick pay benefits in lieu of workers' compensation; claimant reported pulling or twisting his back while lifting cartons at work on January 24, 1977--claimant was off work on January 25, 1977 for which he received sick pay benefits; claimant reported hurting his back while picking up a box on June 9, 1977--he was off three-fourths of an hour to pick up a prescription and received pay for a regular eight-hour day; on June 28, 1977 claimant was off work one and one-half hours for a doctor's appointment for which he received sick pay benefits; on July 21 and 22, 1977 claimant was off for back problems classified under sickness rather than injury and received sick pay benefits; records indicated that from August 1 through 5 of 1977 claimant was off for sickness, not injury, and that he received sick pay benefits; on December 16, 1977 claimant was off for a back problem--neither sickness nor injury was specified--he received sick pay benefits.

In a report dated February 1, 1973 and addressed to defendant-employer (Steve Lauderbaugh general foreman), John A. grant, M.D., states:

> He lifts approximately 40 lb. or less at work. A long discussion was held regarding the anatomical aspects of spondylolysis with spondylolisthesis and discussion was held regarding possible surgery. With the limited heavy lifting required in his job, I suggested the possibility of a Gill procedure. Other than this no specific treatment was given.
>
> It is my feeling that this man has recurring lumbosac-

> ral distress related to spondylolysis with spondylolisthesis and the requirement for some lifting and bending at work. It is possible that he may never be completely free of some discomfort as this is a defect in the low back of long standing. Possible surgery is considered or living with the symptoms. Other than this, there is little to offer.

In a report dated February 12, 1973 and addressed to Lauderbaugh, Frank A. Ubel, M.D., medical consultant for the company, states:

> * * * From now on he should have a job which does not entail repeated bending or stooping or heavy lifting (over 25 pounds). Because of the nature of his problem, the restrictions should be on a permanent basis.
>
> As soon as his symptoms subside, he will undoubtedly be able to stop his medication. You have placed him in a ideal job at this time, namely light duty.

In response to questioning by claimant's counsel with respect to these letters, Anderson pointed out that the congenital defect rather than the injury appeared to him to be the cause of claimant's problem at that time. Anderson pointed out that both letters were written before the claimant pursued surgery. He noted that claimant was released to return to regular duties at some point after surgery. [In a letter dated March 17, 1973 and addressed to Lauderbaugh, Dr. Grant reports that claimant "underwent laminectomy and excision of a loose fragment due to spondylolysis with spondylolisthesis on March 5, 1973." He recommended half days from March 19 through April 2, 1973, and a 25-30 pound weight restriction, and bending, twisting and standing limitations during the first six to eight weeks of work. Then in a report dated February 27, 1974 and addressed to Lauderbaugh, Dr. Grant states that he saw the claimant on February 26, 1974 and recommended that claimant resume his regular work but that he gradually work into the extremes of heavy lifting. Dr. Grant noted claimant might encounter difficulty with repetitive lifting but "I think if reasonable caution is used and he is allowed to gradually increase the amount of heavy work he is called upon to do, that he should ultimately be able to resume what he was capable of prior to surgery."]

In a letter dated March 21, 1975 and addressed to the defendant-insurance carrier, Dr. Grant states that he reviewed questioned prescriptions submitted by the claimant and that less than ten tablets per month was not unusual for claimant's problem. "This man has a back problem which has been somewhat relieved by surgical procedure, but his back is not normal and he may have to continue to take some pain medication off-and-on indefinitely."

In a letter dated July 22, 1977 and addressed to defendant-employer (Don Pilgrim, general supervisor), Dr. Grant states that he last saw the claimant "on 6-28-77 with a history of recurring muscle spasm." He reports seeing the claimant approximately once a year for back pain since a "Gill procedure" was performed in 1973. He felt claimant's present symptoms "are associated with the anomalous configuration of low back and represent primarily muscle spasm." Dr. Grant recommended that claimant not lift over 30 - 40 pounds on other than an occasional basis. He advised against repeated bending and twisting and against prolonged standing. "If he can have some control over the amount of lifting, twisting, bending and prolonged standing, I think he can perform a useful service and can remain active. His present symptoms suggest primarily a recurring muscle spasm." Anderson testified that he did not recall the defendant-employer taking any stand regarding a permanency issue after receiving this letter. The restrictions appeared similar to those mentioned by Dr. Ubel.

In an orthopedic statement dated September 27, 1978, Dr. Grant states:

> This gentleman, currently age 30, has been seen off and on in my office since November of 1972 for back problems. His orthopedic diagnosis is spondylolysis with minimal spondylolisthesis. In 1973 he underwent myelography followed by a so called "Gill procedure" which involves removal of the loose lamina from the area of L-5. He has continued to work but with recurring and chronic symptoms of his low back. Based on the Manual of Orthopedic Surgeons in evaluating permanent physical impairment published by the American Academy of Orthopedic Surgeons, I would estimate his percent of whole body permanent physical impairment and loss of function to the whole body as a result of his back condition at 25 percent.

Anderson testified that such report contained the first medical suggestion of any permanent disability. Anderson added that the claimant's service of the Original Notice and Petition in the present matter was the first indication the defendant-employer received of claimant's belief he was entitled to permanent partial disability benefits. Anderson stated that the claimant never asked the company about any permanent partial disability benefits, nor suggested he had a permanent problem related to the 1972 injury, nor requested his medical records which would have been made available to him upon request. Anderson thought the claimant voluntarily decided to leave the defendant-employer because he had secured a position as an insurance salesman.

Dr. Grant, who specializes in orthopedic surgery, testified that he first saw the claimant on November 2, 1972 upon the referral of Dr. DeWayne Anderson. He was aware of the work-related injury on October 23, 1972 in general terms. Dr. Grant noted that Dr. Anderson's x-rays revealed "condition in the lumbosacral spine called spondylolysis with spondylolisthesis" which he described:

> * * * spondylolysis refers to a defect in the normal structure, usually of the fifth lumbar vertebra, which provides a certain degree of instability. And the spondylolisthesis has reference to a forward displacement of the fifth lumbar vertebra.
>
> There is some argument whether this is a congenital deformity or an acquired deformity. By congenital, I mean something present at birth, or whether during

early years of life the defect is acquired. At any rate, it's a relatively well-known orthopedic condition and is picked up on x-ray. And this is what the situation was here. It was demonstrated by his x-ray.

Dr. Grant reported that a myelogram performed on February 28, 1973 was essentially normal. He explained the surgery performed on the claimant on March 5, 1973:

> * * * in a Gill procedure we remove a loose piece of bone from the fifth lumbar vertebra. This loose piece is the result of this defect we talked about earlier. It doesn't seem to have a great deal to do with ability of your spine to hold you up, except this loose fragment is an abnormal situation and sometimes by removing it, we can provide a significant amount of relief for people with chronic back pain.

After Dr. Grant released the claimant to return to his previous type of work in February of 1974, he did not see the claimant again until December 12, 1974. He took a back x-ray which was essentially unchanged from the earlier x-rays (except for the removal of the loose piece of bone).

Dr. Grant next saw the claimant on February 1, 1977. He had filled a prescription for the claimant on January 25, 1977. "The history was that a week earlier after work, his back began to tighten up and he had severe symptoms but he continued to work." Claimant reported little difficulty prior to that episode. Dr. Grant was not aware of any work injury on or about January 24, 1977. His partial examination of the claimant revealed normal objective findings. He treated the claimant with a muscle relaxer and an anti-inflammatory medication.

On June 28, 1977 claimant returned to Dr. Grant's office with complaints of muscle spasms. Dr. Grant was not aware of any work injury on or about June 9, 1977. Dr. Grant suggested lighter work. Then when claimant returned on July 29, 1977, Dr. Grant suggested taking some time off work. Claimant was seen again on February 21, 1978 for back pain and stiffness. On April 18, 1978 claimant still had occasional symptoms but had quit work with defendant-employer. Dr. Grant did not see the claimant again.

Dr. Grant testified that since the claimant had no prior back problems he was of the opinion that the condition for which he treated the claimant in November of 1972 was related to the October 1972 work injury. Although he agreed that claimant's inherent instability, the sponylolysis with spondylolisthesis, was not caused by the 1972 incident, he felt that the concept of any disability was not meaningful until the claimant began having symptoms of back trouble. Based on his understanding of back problems, claimant's history and the x-ray findings, Dr. Grant was of the opinion that claimant had a 25 percent permanent partial disability to the body as a whole:

> When I arrive at a figure of 25 percent, it's based partially on the fact that he has chronic and recurring and fairly frequent back distress. It's based on a known abnormal finding on x-ray, which we think correlates with chronic back pain. And it's based on the apparent -- partially on the apparent aggravation of his chronic symptoms by having to lift and twist repeatedly.

He acknowledged that the inherent instability was considered in such figure but indicated that he could not specify what portion of the 25 percent was attributable to such instability. He relied upon the *Manual of Orthopedic Surgeons in Evaluating Permanent Physical Impairment* which takes into account x-ray findings and symptoms in addition to ranges of motion.

The claimant has the burden of proving by a preponderance of the evidence that the injuries of October 23, 1972 or June 9, 1977 are the cause of his disability on which he now bases his claim. *Bodish v. Fischer, Inc.,* 257 Iowa 516, 133 N.W.2d 867 (1965). *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).

The record as a whole reveals that the claimant reported injurying himself on June 9, 1977 to the defendant-employer but not to Dr. Grant. He was off work on June 9, 1977 only long enough to get a prescription filled. He saw Dr. Grant on June 28, 1977 for what is described as a muscle spasm. Dr. Grant was of the opinion that claimant's onset of back problems of a permanent nature was referrable to the 1972 injury. There is no medical evidence that the disability on which claimant bases his present claim is causally related to any work injury other than the October 23, 1972 incident.

Claimant signed an employee's receipt which indicated that the last payment of temporary total disability benefits for the October 23, 1972 injury was made on April 3, 1973. Under Code section 86.34 (1971) [present Code section 85.26(2)], claimant is required to reopen his case for additional disability benefits within three years of the last payment of weekly compensation benefits. In the present case, such date would be April 3, 1976. Claimant filed his application for review-reopening on March 17, 1978.

Although it is recognized the reopening proceedings can be maintained on a proper showing that facts relative to an employment connected injury existed but were unknown and could not have been discovered by the exercise of reasonable diligence as expounded in *Gosek v. Garmer and Stiles Company,* 158 N.W.2d 732 (1968), it is not shown that such an action may be maintained after the expiration of three years from the last payment of weekly compensation. *Freeman v. Luppes Transport Company, Inc.,* 227 N.W.2d 143, 149 (1975); *Bergen v. Waterloo Register Company,* 151 N.W.2d 469, 472 (1967); *Secrest v. Galloway, supra,* 168, 173; *Tebbs v. Denmark Light & Telephone Corp.,* 230 Iowa 1173, 1176 (1941).

To defeat the bar of the statute of limitations, claimant argues either that sick pay benefits made on the dates stipulated to were in lieu of compensation and were made recently enough to avoid the three year bar or, in the

alternative, that the defendants are equitably estopped from raising the statute of limitations because they knew of claimant's alleged permanent partial disability and concealed such fact from him.

With respect to claimant's first argument, the defendants contend (1) that such payments were not made in lieu of compensation; (2) that even if such payments were so made, such fact defeats the statute of limitations bar in an arbitration proceeding but not in a review-reopening; (3) that even if such payments could defeat the three-year statute of limitations, the defendant-employer did not know that the period of disability was the result of a work-related injury and that likewise the claimant did not believe such payments were so intended; and (4) that such payments were made after the statute of limitations had already run (on April 3, 1976). All of these points need not be addressed since the record viewed as a whole supports a finding that the sick pay benefits in 1977 and 1978 were not made in lieu of compensation for the 1972 injury.

The industrial commissioner has found "that there must be evidence that either the employer intended payments to be on account of a workers' compensation liability, or that the employee believed them to be so intended for a payment to be construed as a payment of compensation under Iowa Code section 86.13." *Ellis Ben Adamson v. Crossroads Ford, Inc. and Liberty Mututal Insurance,* Appeal Decision filed October 31, 1979. Mutual intent on behalf of the employer and employee is required--payments received must be considered as compensation for the employee's injuries. *H. Raymond Smith v. Walnut Grove Products et al,* 32nd Biennial Report of the Industrial Commissioner, page 70.

Mr. Anderson repeatedly testified that any sick pay benefits paid to the claimant after April 3, 1973 were intended for sickness or injury reported at the respective times of such payments. The defendant-employer had no idea that claimant's time off in 1977 and 1978 might in any way be related to the October 23, 1972 injury. The claimant likewise testified that he was aware he received benefits for time off in 1977 and 1978 from the sick pay program and not from workers' compensation. The record viewed as a whole reveals that the sick pay benefits in issue were not made in lieu of workers' compensation for an October 23, 1972 injury.

Regarding the doctrine of equitable estoppel, the Iowa Supreme Court in *Axtell v. Harbert,* 256 Iowa 867, 872, 129 N.W.2d 637, 639 (1964) set forth 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 party asserting equitable estoppel must prove all elements. *Dart v. Thompson,* 154 N.W.2d 82, 86 (Iowa 1967).

The record as a whole indicates that the defendant-employer did not know of any permanent partial disability that the claimant, according to Dr. Grant, sustained as a result of the October 23, 1972 incident. Mr. Anderson testified that the defendant-employer had no such knowledge. The letters that Dr. Ubel and Dr. Grant sent to the company could reasonably be interpreted to mean that any flareups of back trouble would be related to the inherent unstable back condition (which Dr. Grant could not attribute to the work injury). That is, the letters speak in terms of recurring temporary disability. Moreover, the letters contain no opinion regarding causal connection between such flareups and the 1972 injury as opposed to the underlying condition. What the defendant-employer saw was an employee who had an underlying back problem that became a noticeable problem after a work injury (aggravation) but which subsided at a point in time after surgery to such an extent that the employee was able to resume his former job duties in 1974. Then nothing was noted with respect to back troubles necessitating time off from work until late January of 1977 and June of 1977. The defendants had nothing to conceal with respect to a permanent partial disability matter.

The claimant on the other hand, by his own testimony, admitted that he had knowledge of the permanent nature of his back problem. Whether he was aware of the causal relatedness between the 1972 injury and the disability in issue is not known. As indicated above, the medical evidence, prior to Dr. Grant's September, 1978 report and later deposition, did not suggest such conclusions. Additionally, it is pointed out that claimant did sign a receipt of benefits which contained references to permanent disability. Likewise, the employee manual, which did not specifically mention permanent partial disability benefits, did implicity encourage employees to ask questions and seek additional information when necessary. Under the circumstances of this case, the claimant rather than defendant-employer, was in a position to know the true facts and to pursue the appropriate remedy.

WHEREFORE, it is hereby found that the claimant failed to sustain his burden of proving that the incident on June 9, 1977 is the cause of the disability on which he now bases his claim.

It is further found that the medical evidence indicates that claimant's present disability is causally related to the October 23, 1972 injury; however, claimant's action in review-reopening is barred by the three-year statute of limitations. That is, sick pay benefits in 1977 and 1978 are found not to have been made in lieu of workers' compensation for the October 23, 1972 injury.

Furthermore, it is found that defendant-employer did not have knowledge of any permanent partial disability as a result of the October 23, 1972 injury until the present action was filed, and Dr. Grant's September 27, 1978

medical determination was secured and accordingly that they did not falsely represent nor conceal material facts.

* * *

Signed and filed this 26th day of November, 1979.

LEE M. JACKWIG
Deputy Industrial Commissioner

No Appeal.

JAMES R. PHIPPS,

Claimant,

vs.

FARMHAND, INC.,

Employer,

and

UNITED STATES FIDELITY AND GUARANTY COMPANY,

Insurance Carrier,
Defendants.

Arbitration Decision

INTRODUCTION

This is a proceeding in arbitration brought by James R. Phipps, claimant, against Farmhand, Inc., employer, and United States Fidelity and Guaranty Company, insurance carrier, for benefits as the result of an injury on April 21, 1977. This case was consolidated for hearing with the case of James R. Phipps v. Farmhand, Inc., and Chubb-Pacific Indemnity Group and heard by the undersigned on December 22, 1978.

* * *

FACTS

Claimant, 37 years old, who started working for defendant as a machinist in October of 1971 or 1972, received an injury which arose out of and in the course of his employment with defendant on October 30, 1975. Claimant and two other employees were moving a jig rack. They had moved the rack as far as they could with a forklift and then proceeded to move it with a crowbar. The rack started to fall over. In trying to stop the rack from falling over, claimant used his hands and arms and felt a sharp pain in his lower back. Claimant reported the pain to his foreman. It didn't bother claimant anymore until later in the day when he started stiffening up. Claimant testified that the following day his wife had to help him out of bed. Claimant saw J. B. Paulson, M.D., on November 4, 1975, had x-rays taken and claimant was put in traction for four or five days. Claimant testified he left the hospital but really didn't feel any better. Claimant stated he was out of the hospital for approximately a week and had to go back into the hospital for six or seven days in traction. Claimant testified he felt much better than he did the first time he left the hospital. Claimant was then referred by Dr. Paulson to Carl O. Lester, M.D. Dr. Lester indicated x-rays showed claimant to have a grade 1 spondylolisthesis and acute lumbosacral strain. Dr. Lester saw claimant many times but claimant continued to have leg pain. Claimant returned to work for defendant-employer in the machine shop on February 17, 1976. Claimant continued to take therapy at a hospital and exercised. Claimant testified that from the time he discontinued his therapy his back and leg pain gradually got worse.

On April 21, 1977 claimant went back to Dr. Lester. Claimant stated he was unable to state any specific incident happened on or before that date that made his pain worse. On April 28 claimant went into the hospital, a myelogram was taken and it was decided that claimant would be scheduled for a laminectomy. On May 24, 1977 Dr. Lester performed a hemilaminotomy with a removal of disc L4-5 left and right side.

When claimant left the hospital he still had back pain, but the leg pain was alleviated. Claimant testified he went back to work around the first of September, 1977. The defendant-employer had moved its machine shop out of state so claimant became an assembler. putting together hammer mills. Claimant stated his new position required a certain amount of lifting. Claimant testified that although he had back pain, he got along all right until in April of 1978 when his pain again became gradually worse. July 26, 1978 was the last day claimant worked. Claimant saw Dr. Paulson who gave claimant a doctor's slip and referred claimant back to Dr. Lester. Dr. Lester had claimant doing exercises and had claimant try working, but claimant was only able to work a half day.

Claimant returned to the hospital, and on October 20, had a total laminectomy of the posterior elements on the lamina on L5 and scar tissue on L4 was removed. Claimant testified he still has back pain and has not been able to return to work.

ISSUES

The issues presented by the parties at the time of hearing were whether or not claimant received an injury which arose out of and in the course of his employment; the causal connection between that injury and any disability; and the extent of that disability.

APPLICABLE LAW

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. *McDowell v. Town of Clarksville,* 241 N.W.2d 904 (Iowa 1976); *Musselman v. Central Telephone Co.,* 261 Iowa 352, 154 N.W.2d 128 (1967). 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, the testimony of an expert must be taken in its entirety along with all other testimony bearing on the issue. *Burt v. John Deere Waterloo Tractor Works,* 247 Iowa 691, 73 N.W.2d 732 (1956).

ANALYSIS

Based on the foregoing principles and the evidence presented, it is determined that claimant has failed to prove he received an injury on April 21, 1977 which arose out of and in the course of his employment. Claimant's testimony

indicated no injury occurred on that date.

Q. Mr. Phipps, did something happen on April 21st of 1977?

A. Just that I went back to the doctor.

Q. Anything else, sir?

A. No.

Q. What caused you to go back to the doctor?

A. I kept getting worse and worse and finally the 21st of April I decided to go back to the doctor.

Although Dr. Lester mentions a second injury, it is obvious from claimant's testimony that no second injury took place. (In this regard see companion case and decision.)

WHEREFORE, IT IS found claimant failed to prove he received an injury which arose out of and in the course of his employment on April 21, 1977.

* * *

Signed and filed this 10th day of October, 1979.

DAVID E. LINQUIST
Deputy Industrial Commissioner

Appealed to Commissioner: Affirmed
Appealed to District Court: Pending.

LESLIE D. PHIPPS,

Claimant,

vs.

MAHASKA COUNTY,

Employer,

and

LIBERTY MUTUAL INSURANCE COMPANY,

Insurance Carrier,
Defendants.

Appeal Decision

Defendants appeal a proposed decision in arbitration wherein claimant was awarded temporary total disability benefits.

* * *

Claimant was hired by the Mahaska County Care Facility as a farmhand under a government WIN program on May 29, 1978. Claimant was to work from 8:00 a.m. to 5:00 p.m., five days a week. He was also given the opportunity of living in a trailer located on the farm, if he so chose.

On June 2, 1978 at approximately 2:30 a.m. a fire broke out in the trailer, injuring claimant. Claimant testified that he had finished his work day on June 1 at 5:00 p.m. He and his wife ate supper and spent the evening moving their furniture into the trailer. They went to bed before midnight and claimant woke up at 2:30 a.m., discovering the fire.

The issue on appeal is whether claimant's injury arose out of and in the course of his employment.

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 section 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 required 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 (Iowa 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).

In 1A Larson, *Workmen's Compensation Law,* section 24.40, at 5-194 (1976), the following general rule is stated:

> When residence on the premises is merely permitted, injuries resulting from such residence are not compensable 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.
>
> 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.

As a case supporting what Larson believes to be the better view, he cities *Wilson Cypress Company v. Miller,* 157 Fla. 459, 26 So.2d 441 (1946). The employer in *Wilson* furnished a house boat for such employees as wished to sleep there. An employee was sleeping in the house boat and lost his life when it was destroyed by fire. The court said:

> The law is well settled to the effect that when the contract of employment contemplates that the employee shall sleep on the employer's premises, as an incident to the employment, and is injured while not engaged on a purely personal mission, the injury is compensable. [Citing cases]

> In this case Miller [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 . . . .

Defendants contend the deputy was in error in finding that the trailer was intended for occupancy by the farmhand. The following excerpts from the testimony of Robert Kelly clearly indicate that he contemplated the use of the trailer by the claimant:

Q. And who hired the Claimant?
A. I did.
Q. On what terms?
A. On what terms?
Q. What compensation?
A. He was hired as farm hand at $3 an hour.
Q. Any side benefits?
A. Living quarters at $30 per month.
Q. And that included utilities?
A. Yes, sir.
Q. And where were the living quarters located?
A. On the premises.
Q. Did you know at that time that the Claimant intended to move his family into these quarters?
A. At what time?
Q. At the time he was hired?
A. The day he was hired, he was to move in?
Q. Did you know he intended to use this for his family quarters?
A. Yes, sir.
Q. And what did that $30 a month cover, what kind of utilities?
A. The heat and lights and water and the mobile home.

* * *

A. No, I didn't suggest they had to live there. No. I made an offer.
Q. Okay. To whom did you make the -- make the offer?
A. To him and also the lady from WIN.
Q. Okay. And what did you tell him about the living quarters?
A. I told him that the living quarters would be $30 a month for the living quarters, also the heat and lights and water *would help subsidize his wages.*

The defendants further contend that claimant was required to work a 40-hour week and was not "on call." Defendants further argue that claimant did not need to be close at hand to care for the farm animals after normal working hours.

Defendant's farm consisted of 320 acres, described as including 160 acres plow ground, 65 head of cattle and 180 head of hogs. As the deputy noted in his decision, there is constant need for supervision of livestock on any farm. Claimant was expected to work overtime on occasion and was impliedly "on call," as the following testimony of Kelly clearly indicates:

Q. How many hours a week was he hired for?
A. 40-hour week.
Q. And was overtime discussed?
A. Yes.
Q. And during the course of his employment, he did work some overtime; did he not?
A. A little.
Q. And this was primarily working as a farm hand?
A. Yes.
Q. Under whose supervision?
A. Mine and his alone.

* * *

Q. Mr. Kelly, I believe you stated that the Claimant worked under your supervision and under his own supervision; correct?
A. Yes, sir.
Q. What do you mean under his own supervision?
A. Well, he was the farm hand, and he was supposed to do whatever come natural on a farm. Because there's lots and lots of days that I'm not there.
Q. And those days he worked under his own supervision?
A. Yes, sir.

A Nebraska case which is very similar to the case sub judice is *Bourn v. James,* 216 N.W.2d 739 (Neb. 1974). The court found that an employee injured by fire while asleep in a trailer located on the employer's ranch was entitled to compensation. The employee was not required to live on the premises, but the employer's house and the trailer were available for his use. The employee was responsible for the care of the cattle, but if the cattle needed attention at night he was to notify the employer. The defendant was away on business frequently and was not at home on the night of the accident. The court found that there was a fair inference from the testimony that the employee was "on call" while on the premises if his services were needed. The court stated "[t]here was a clear benefit to the defendant from having the plaintiff live on the premises and it was reasonably incident to his employment as a caretaker and laborer at the yards."

Applying the foregoing principles to the evidence in this case, it is clear that defendant employer derived a substantial benefit from having the claimant live on the premises. The deputy properly held that claimant was in the course of his employment at the time of his injury.

* * *

Signed and filed this 31st day of January, 1980.

ROBERT C. LANDESS
Industrial Commissioner

No Appeal.

WALTER PITZ,

Claimant,

vs.

A. Y. McDONALD MFG. CO.,

Employer,

and

INSURANCE COMPANY OF NORTH AMERICA,

Insurance Carrier,
Defendants.

Appeal Decision

This is a proceeding brought by defendants appealing a proposed decision denying defendants' petition for declaratory ruling and motion to expunge certain material from the claimant's file. As such, defendants challenge two commissioner procedures: (1) opinion letters sent by nonadjudicatory personnel to claimants upon their request for advice before the initiation of a contested case proceeding, and (2) inclusion of such letters in a claimant's file, which subsequently may be examined by a hearing officer when the matter becomes a contested case.

Claimant sustained an injury arising out of and in the course of employment on November 22, 1977 and suffered disability for the following six weeks and five days. A memorandum of agreement was filed and weekly compensation was paid to the claimant during his disability at a rate excluding incentive pay.

Apparently, claimant could increase his hourly rate of pay by producing work in excess of a standardized figure. On January 4, 1978, during the claimant's disability, a representative of the International Association of Machinists and Aerospace Workers called a deputy commissioner to ask whether incentive pay could be included in gross earnings as the basis for workers' compensation. The deputy referred the matter to the assistant industrial commissioner. The assistant commissioner and the union representative conversed on the telephone about the matter on January 5, 1978. Finally, on January 9, 1978, the union representative wrote the assistant commissioner, posing a hypothetical of a worker receiving incentive pay and asking whether such pay may be included in the base rate for workers' compensation. The letter stated that the matter involved Pitz, an incentive worker, who was presently off work. On January 16, 1978 the assistant commissioner responded to the letter, stating that he believed that incentive pay did not fall within the definition of premium pay so as to be excluded from computation of gross earnings for workers' compensation rate purposes. Subsequently, the claimant filed a petition for a review-reopening, disputing the defendants' failure to include incentive pay in computing his disability pay. The letters from the union representative and the assistant commissioner, along with all other documents in the claim file of this claimant, have been placed in the contested case file in this agency. This is the same procedure that has been followed in this agency for longer than the present incumbency.

Defendants requested a declaratory ruling that the assistant commissioner's letter be declared void as a declaratory ruling which failed to comport with chapters 4 and 5 of the Industrial Commissioner's Rules as well as constitutional provisions and which prejudiced defendants by its presence in the claimant's file. In a separate motion, defendants requested that the letters of both the assistant commissioner and the union representative be expunged from the claimant's file. The proposed ruling denied both requests. This ruling is affirmed.

As to the petition for a declaratory ruling, initially, the discretionary nature of such rulings should be emphasized. Chapter 5 of the Industrial Commissioner's Rules incorporates applicable rules of civil procedure. One such rule is Iowa Rule of Civil Procedure 265, which provides: "The court may refuse to render a declaratory judgment or decree where it would not, if rendered, terminate the uncertainty or controversy giving rise to the proceeding." Since a declaratory ruling as to the effect of the assistant commissioner's letter would not terminate the claimant's cause of action, it is within the discretion of this agency to deny the petition for a declaratory ruling.

The reason for the fact that defendant's requested declaratory ruling would not affect the outcome of this case is that the letter from the assistant commissioner has no legal effect. Thus, granting petitioner's request to void the letter would constitute the futile exercise of voiding a nullity. The letter was not a declaratory ruling. The reason the letter was not a declaratory ruling is that the request for the opinion from the assistant commissioner was not stated in the form of a request for a declaratory ruling. The only decisions having legal, binding effect are those brought in the form and manner of a contested case proceeding or rulemaking, as set out in the applicable statutes and rules adopted pursuant thereto.

Although the letter has no binding legal effect as to the proper treatment of claimant's incentive pay, by their allegation of prejudice, defendants may be also contending that its mere presence in the claimant's file may have some *sub silentio* evidentiary effect upon the hearing officer's decision. Thus, defendants claim that the letter must be removed to eliminate its potential prejudicial effect.

Defendants' claim of prejudice is without merit. The Administrative Procedure Act implicitly recognizes the nonprejudicial nature of general intra-agency communication. Although section 17A.17 prohibits the decision-maker of a contested case from communicating with anyone regarding any issue of fact or law in the case "except upon notice and opportunity for all parties to participate," it also obviates the notice and participation requirements for intra-agency communication. Specifically, it states:

> However, without such notice and opportunity for all parties to participate, individuals assigned to render a proposed or final decision or to make findings of fact and conclusions of law in a contested case *may communicate* with members of the agency, and may have the aid and advice of persons other than those with a personal interest in, or those engaged in prosecuting or advocating in, either the case under consideration or a pending factually related case

involving the same parties.

Iowa Code §17A.17(1) (1977) (emphasis added). Thus, communication with personnel who serve a prosecutorial or advocate function is presumed prejudicial. However, communication with other, non-interested agency personnel, such as the assistant industrial commissioner, is not presumed prejudicial. Rather, it is implicitly recognized as helpful to personnel responsible for rendering the decision in a contested case. *See also* Iowa Code §17A.14(5) and §86.17(1) (1977).

Moreover, even if the letter were considered potentially prejudicial, defendants have not given the hearing officer the opportunity to provide the requisite statutory safeguards to prevent any prejudice. Section 17A.14 of the Iowa Administrative Procedure Act provides that:

> [p]arties shall be notified at the earliest practicable time, either before or during the hearing, or by reference in preliminary reports, preliminary decisions or otherwise, of the facts proposed to be noticed and their source, including any staff memoranda or data, and the parties shall be afforded an opportunity to contest such facts before the decision is announced unless the agency determines as part of the record or decision that fairness to the parties does not require an opportunity to contest such facts.

If fairness does require prior notice and an opportunity to be heard regarding any official notice to be taken of facts in the letter, ample time remains for such safeguards to be provided. On the other hand, if the deputy commissioner who will render the proposed decision does not intend to accord any evidentiary weight to the contents of the letter or for other reasons finds no unfairness inherent in taking official notice of the letter, he may so determine as part of the record and dispense with the requirement of providing an opportunity to contest the letter's contents. In neither case would the defendants be denied a fair hearing. *(See Western Union Division, Commercial Telegraphers' Union, A.F. of L. v. United States,* 87 F. Supp. 324, 333 (D.D.C. 1949), in which the court rejected the plaintiff's argument that the FCC denied him a fair hearing by its cognizance of correspondence from the Justice Department bearing upon an issue of the case because the commission stated that it had given no consideration to the correspondence in arriving at its final decision.)

WHEREFORE, it is found:

That defendants have as yet suffered no prejudice by the presence of the letter in claimant's file.

THEREFORE, it is ordered:

That defendants' petition for a declaratory ruling that the letter be declared void and motion that it be expunged from claimant's file are denied.

Signed and filed this 14th day of March, 1979.

ROBERT C. LANDESS
Inudstrial Commissioner

No Appeal

BERNUS DEAN PLAYLE,

Claimant,

vs.

ROLSCREEN COMPANY,

Employer,

and

LIBERTY MUTUAL INSURANCE COMPANY,

Insurance Carrier,
Defendants.

Review-Reopening Decision

This is a proceeding in review-reopening brought by Bernus Dean Playle, the claimant, against his employer, Rolscreen Company, and the insurance carrier, Liberty Mutual Company, to recover a medical expense pursuant to Code Section 85.27 on account of an injury he sustained on December 28, 1972.

* * *

Review of the relevant case history reveals that an April 25, 1975 review-reopening decision found that as a result of the industrial injury, the fall from a forklift platform on December 28. 1972, claimant had sustained a number of disabilities including a need for corrective eyeglasses. At that time, it was also found that the claimant had sustained an industrial disability of seventy percent (70%) of the body as a whole. The present review-reopening proceeding commenced with the filing of an original notice and petition on April 12, 1978. Although paragraph 2 on said petition was checked suggesting that a review-reopening per se was sought and paragraph 3 regarding Code section 85.27 benefits was left blank, claimant indicated in paragraph 33 that the dispute in the case concerns defendants' "[r]efusal to pay for third pair of glasses." Accordingly, since the claimants are not seeking additional weekly compensation but merely a subsequent medical expense, the merits of defendants' allegation in paragraph 8 of their answer regarding the applicability of the statute of limitations found in Code section 85.26 need not be considered. Indeed, subsection 2 of said section specifies that no statute of limitations exists with respect to an action for medical benefits if, as in the present case, there have been payments made pursuant to a memorandum of agreement and/or an award and where the amount has not been commuted. By order of a deputy industrial commissioner filed on August 26, 1975, the commutation of the earlier awarded amount was partial, not full; and, therefore, claimant's right to further benefits pursuant to Code Section 85.27 is not curtailed. (Note that the second sentence of section 85.26(2), Code of Iowa 1977, is not found in section 86.34, Code of Iowa 1971, the predecessor of Code section 85.26(2). Said provision regarding the statutory limitations on medical benefits was added to Code section 85.34 in

1973. However, before such amendment, section 85.27 contained the provisio that no statutory limitation period would apply to medical benefits. Such proviso was struck from section 85.27 in 1973.)

As indicated in the stipulation as to the facts, the defendants have already "provided the claimant with at least two pair of eyeglasses since December 28, 1972, upon proper prescription by qualified physicians." On November 7, 1977, the claimant paid Dr. George R. Anton $82.00 for two pair of glasses. Claimant contends he is entitled to reimbursement; defendants contend that eyeglasses are a prosthetic device and by statute the defendants are not required to furnish more than one permanent prosthetic device.

The issue to be determined is whether Code section 85.27 contemplates that a claimant is entitled to more than one pair of eyeglasses when the need to wear corrective glasses in the first instance was found to be directly attributable to the compensable industrial injury.

The relevant portion of section 85.27, Code of Iowa, 1971, which has not been amended to date, reads:

> " . . . The employer shall also furnish reasonable and necessary crutches, artificial members and appliances but shall not be required to furnish more than one permanent prosthetic device."

Eyeglasses have been considered medical appliances which must be furnished when necessary for physical recovery from an industrial injury. See The IOWA LAW OF WORKMEN'S COMPENSATION 80 (1967 monograph series published by the Center For Labor And Management, the University of Iowa). Thus, the limitation set forth above would in general apply to any corrective glasses that are in fact permanent; however, the limitation would not apply if over a time claimant's eyesight deteriorates due to a compensable injury and a change in the eyeglass prescription is necessary to meet the change in medical condition. *See and compare* 1B LARSON'S WORKMEN'S COMPENSATION, §42.12 at 7-348 wherein it is stated that regarding an existing prosthetic device that was provided as a benefit related to a compensable injury and that is in need of replacement, "[t]he normal rule, by statute and sometimes by judicial decision, is that if competent medical testimony indicates that an appliance needs to be changed or replaced, the initial obligation to provide suitable appliances carries through to the point of also covering the replacement."

As indicated above, "permanency" is the concept controlling the applicability of the limitation on prosthetic devices set forth in Code section 85.27. According to the stipulation and attachments thereto, Dr. Henry H. Gurau, M.D., an ophthalmogolist, examined the claimant in January 1974 and reported that "[v]isual acuity was 20/20 in each eye with glasses. Examination of the eye motility showed a slight paralysis of the right lateral rectus muscle." Dr. Gurau indicated no change in condition. Likewise, Dr. George R. Anton, vision specialist, examined claimant on July 11, 1977 and reported that the claimant had been a patient of his for several years, that he found the claimant "to be myopic with a high degree of double vision, and that he did not foresee the claimant being able to go without his glasses any time in the future. Again Dr. Anton was silent regarding any change in the condition of claimant's eyesight. Furthermore, the statement for the prescription claimant received does not indicate whether it was a different prescription from any which defendants previously paid.

The record viewed as whole does not allow the undersigned to find that the claimant has sustained a change in eyesight in the first instance, nor that any such change would be causally connected to the industrial injury.

THEREFORE, the claim for reimbursement of said amount is hereby denied.

* * *

Signed and filed this 28th day of March, 1979.

LEE M. JACKWIG
Deputy Industrial Commissioner

No Appeal.

AUDREY L. PORTWOOD,

Claimant,

vs.

SNAP-ON TOOLS CORPORATION,

Employer,

and

NEW HAMPSHIRE INSURANCE GROUP,

Insurance Carrier,
Defendants.

Ruling

NOW on this day the matter of defendants' motion to dismiss and claimant's resistance thereto come on for determination.

A proposed decision in arbitration was filed in this matter on December 11, 1979. Claimant's notice of appeal and petition for review was filed on January 7, 1980.

Defendants assert, as a basis for their motion, that claimant's appeal was not timely filed. Industrial Commissioner Rule 500-4.27 (86, 17A) states:

> Except as provided in 4.2 and 4.25, an appeal to the commissioner from a decision, order or ruling of a deputy commissioner in 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.

Claimant contends the time for filing was extended by the Christmas and New Year's holidays as a matter of law as

well as by a question of fact. Iowa Code section 4.1(22) reads:

> Computing time -- legal holidays. In computing time, the first day shall be excluded and the last included, unless the last falls on Sunday, in which case the time prescribed shall be extended so as to include the whole of the following Monday, provided that, whenever by the provisions of any statute or rule prescribed under authority of a statute, the last day for the commencement of any action or proceedings, the filing of any pleading or motion in a pending action or proceedings or the perfecting or filing of any appeal from the decision or award of any court, board, commission or official falls on a Saturday, a Sunday, the first day or January, the twelfth day of February, the third Monday in February, the last Monday in May, the fourth day of July, the first Monday in September, the eleventh day of November, the fourth Thursday in November, the twenty-fifth day of December, and the following Monday whenever any of the foregoing named legal holidays may fall on a Sunday, and any day appointed or recommended by the governor of Iowa or the president of the United States as a day of fasting or thanksgiving, the time therefor shall be extended to include the next day which is not a Saturday, Sunday or such day hereinbefore enumerated.

The last day for filing the appeal fell on Monday, December 31, 1979, a date not provided by law to allow an extension. Even if it were, it would not allow extension for a week but only to the next day which is not a Saturday, Sunday or enumerated day.

THEREFORE, defendants' motion to dismiss claimant's notice of appeal and petition for review is sustained.

Signed and filed this 22nd day of January, 1980.

ROBERT C. LANDESS
Industrial Commissioner

Appealed to District Court: Pending.

LUCIOUS PRINCE,

Claimant,

vs.

CORN SWEETENERS,

Employer,

and

IDEAL MUTUAL INSURANCE COMPANY,

Insurance Carrier,
Defendants.

Ruling

Be it remembered that on May 3, 1979, the claimant herein filed an application for further orders pursuant to §85.39, Code of Iowa. Said application states that Dr. Donald Castle, a neurologist in Cedar Rapids, Iowa, will examine the claimant pursuant to the undersigned's previous ruling of March 15, 1979. (Said order noted that defendants at that time did not resist the employee's basic request for a §85.39 independent examination and approved the employee's request.) Now claimant alleges that "[i]n order to accomplish a thorough examination of the Claimant, Dr. Castle may have to conduct various tests, hospitalize the Claimant, order x-rays, and/or seek consultation advice from other specialists, and, further, treat the Claimant, including prescribing medicine or drugs." Accordingly, claimant asks that the ruling of March 15, 1979 be enlarged to authorize the foregoing and the reasonable cost thereof at defendants' expense.

On May 8, 1979, the defendants herein filed a resistance to claimant's application for further orders pursuant to §85.39, Code of Iowa, alleging that they were informed by counsel for claimant that claimant was examined by Dr. Castle on Monday, April 30, 1979, that the additional matters set forth in claimant's May 3, 1979 application are beyond the scope of §85.39, Code of Iowa, that "[a]ny examination outside the scope of §85.39, Code of Iowa, or any matters beyond the scope of said section for which Dr. Castle renders treatment, services or otherwise to Claimant are at the expense of the Claimant and not at the expense of the Employer and Insurance Carrier . . . ," that the order of March 15, 1979 did not authorize the present matters requested by claimant, that the claimant is entitled to one examination pursuant to §85.39, Code of Iowa, and that the Industrial Commissioner has no jurisdiction or authority to grant the Commissioner has no jurisdiction or authority to grant the relief prayed for in the application herein under consideration.

In *Jean K. Shannon vs. Department of Job Services and the State of Iowa,* 33rd Biennial Report of the Industrial Commissioner, p.p. 98-99, the Iowa Industrial Commissioner, discussed certain aspects of §85.39, Code of Iowa, in deciding an appeal by defendants from a deputy industrial commisssioner's order to pay expenses of an examination under said section for the reason that defendants deemed said expenses to be unreasonable and for treatment rather than evaluation.

> 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 cannot be determined on the face of the bill.

* * *

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.

WHEREFORE, it is found that claimant may be entitled to a §85.39 examination entailing one or more of the matters enumerated in claimant's application; however, which matters are related to the evaluation process and which respective expenses are reasonable will have to be determined upon submission of supportive evidence.

THEREFORE, it is ordered that the defendants will be required to pay only those expenses which claimant proves to be reasonable and related to Dr. Castle's examination for evaluation purposes pursuant to §85.39.

Signed and filed this 14th day of May, 1979.

LEE M. JACKWIG
Deputy Industrial Commissioner

No Appeal.

LARRY EUGENE QUINN,

Claimant,

vs.

PEPSI COLA GENERAL BOTTLERS,

Employer,
Self-Insured,
Defendant.

Appeal Decision

Claimant has appealed from a proposed review-reopening wherein he was found to have a permanent partial disability of 15% to the body as a whole.

* * *

The issue on appeal is the extent of claimant's permanent partial disability.

The deputy found that claimant had a permanent partial disability of 15% of the body as a whole. In arriving at his determination, the deputy considered the evaluation of claimant's permanent disability as given by William R. Boulden, M.D. Dr. Boulden thought claimant had a permanent partial disability of 20%. Dr. Boulden arrived at this rating by giving 5% disability for restrictions in motion, 5% disability for an exploratory laminectomy and 10% because of claimant's work history. There was no foundation evidence laid to qualify Dr. Boulden as an expert on the effect claimant's disability will have on his earning capacity. Therefore, Dr. Boulden's determination of an additional 10% permanent disability because of claimant's work history cannot be considered. It is thereby found that claimant has a functional disability of 10% due to the work-related injury.

However, functional disability is merely a factor to be considered in determining industrial disability which is the reduction of earning capacity. Consideration must also be given to the injured employee's age, education, qualifications, experience and inability to engage in employment for which he is fitted. *Olson v. Goodyear Service Stores,* 255 Iowa 1112, 125 N.W.2d 251 (1963); *Barton v. Nevada Poultry,* 253 Iowa 285, 110 N.W.2d 660 (1961). *See Becke v. Turner-Busch, Inc.,* Appeal Decision (Industrial Commissioner January 31, 1979).

Claimant contends that the deputy made a finding of permanent partial disability without a separate finding of industrial disability. All the facts in the record which are relevant to a determination of industrial disability were discussed in the last paragraph on page three of the deputy's proposed decision. The deputy's determination of 15% permanent partial disability to the body as a whole was the industrial disability finding. Functional disability was only one factor among many which was considered by the deputy in arriving at an industrial disability rating.

On review of the record, there is no reason to change the deputy's determination of industrial disability. There is no doubt that claimant is suffering much pain and his ability to move around has been limited; however, there are no apparent objective findings of physical injury. Based on these considerations and the other factors of industrial disability discussed in the deputy's proposed decision, claimant has a permanent partial disability of 15% to the body as a whole.

* * *

Signed and filed this 21st day of November, 1979.

ROBERT C. LANDESS
Industrial Commissioner

Appealed to District Court: Pending.

EDWARD RADA,

Claimant,

vs.

ROGER J. CROW, SR. and DAVENPORT NURSING HOME,

Employer
Defendants.

Ruling and Order

BE IT REMEMBERED that on July 12, 1979 defend-

ants herein filed a motion to dismiss on the ground that no employer-employee relationship existed between the defendants and the claimant. Said motion stated that the claimant received no compensation from the defendant Home nor did defendant Home benefit from any work the claimant may have done. Said motion conceded that claimant had performed custom work for defendant Crow who does business as The Old Factory Flea Market but denied that claimant was thereof an employee and alleged defendant Crow did not direct or instruct the claimant in the performance of the work done by claimant. Attached to the motion were checks marked "custom work" according to the defendants, but which appear to the undersigned to be marked "contract work". No resistance was filed. On July 10, 1979 the defendants requested a hearing on the motion.

This matter came on for hearing before the undersigned at the Iowa Industrial Commissioner's Office in Des Moines, Iowa, on August 14, 1979. Defendant Crow was present represented by defendants' attorney, Harold C. Lounsberry. Claimant did not appear. Defendant Crow wished to present evidence in the form of his own testimony in support of the motion. This was not allowed by the undersigned.

Defendants argue that because no resistance was filed, the allegations in the motion to dismiss should be taken as being true and undisputed, and accordingly, the undersigned should find that there is no employer-employee relationship between the defendants and the claimant.

In *Reidiger v. Marrland Development Corp.,* 253 N.W.2d 915, 916-917 (Iowa 1977) the Iowa Supreme Court reiterated the following case law governing a motion to dismiss.

> Under our rules such a motion serves the same purpose as a demurrer formerly did. *Bales v. Iowa State Highway Comm'n.,* 249 Iowa 57, 62, 86 N.W.2d 244. 247 (1957).
>
> * * *
>
> A motion to dismiss must stand or fall on the matter alleged in the petition. It can neither rely on facts not alleged (except those of which judicial notice may be taken) nor may it be aided by an evidentiary hearing. *Stearns v. Stearns,* 187 N.W.2d 733, 734 (Iowa 1971); *Ke-Wash Company v. Stauffer Chemical Company,* 177 N.W.2d 5, 9 (Iowa 1970); *Herbst v. Treinen,* 249 Iowa 695, 699, 88 N.W.2d 820, 823 (1958). It is true we entertained the *Stearns* appeal despite the improper procedure followed there, but only because the importance of settling the custody of children impelled us to do so. No such persuasive circumstances appears in the present case.
>
> The trial court in the case now before us held an evidentiary hearing. Its ruling on the motion was virtually a decision on the merits. That is not the function of a motion to dismiss.
>
> We said as much in *Harrison v. Allied Mutual Casualty Company,* supra, 253 Iowa at 731, 113 N.W.2d at 702-703, where this appears.:
>
> "A motion to dismiss assumes the truth of facts well pleased in the pleading attacked but is not a proper vehicle for the submission of affirmative defenses. The trial court, in an obvious and ordinarily commendable effort to reach an ultimate decision, went beyond the boundary of the limited problem involved [by considering facts not alleged in the petition.] While we approve of prompt disposition of ultimate issues, we cannot sanction disregard of proper methods in determining controverted facts."

In *Bindell v. Iowa Manufacturing Co. of Cedar Rapids,* 197 N.W.2d 552, 554-555 (Iowa 1972) the Iowa Supreme Court attempted to clarify the uncertainty existing regarding the construction of a pleading that has been the object of a motion to dismiss:

> . . . it is now well settled that where a doubtful pleading is attacked by motion before answer doubt will be resolved against the pleader. This rule is qualified by the additional provision that if the petition does allege ultimate facts upon which plaintiff might recover and states a claim under which evidence may be introduced in support thereof, the petition should be construed in the light most favorable to the plaintiff with doubts resolved in his favor and the allegations accepted as true. *Bigelow v. Williams* (Iowa), 193 N.W.2d 521, 523, 524; *Wolfswinkel v. Gesink* (Iowa) 180 N.W.2d 452, 457; *Nelson v. Wolfgram* (Iowa), 173 N.W.2d 571, 573, and citations.

Finally, in *Turner v. Thorp Credit, Inc,,* 228 N.W.2d 85, 88 (Iowa 1975) the Iowa Supreme Court distinguished a "speaking motion" from a "motion to dismiss" by setting forth the following relevant portions of Iowa Rule 104 of Civil Procedure:

> "Every defense in law or fact to any pleading must be asserted in the pleading responsive thereto, if one is required, or if none is required, then at the trial, except that:
>
> "* * *
>
> "(b) Failure to state a claim on which any relief can be granted, may be raised by motion to dismiss such claim, filed before answer.
>
> "* * *
>
> "(d) Such motions must specify wherein the pleading they attack is claimed to be insufficient."

and by citing the following principles:

> In considering a motion to dismiss the pleading attacked must be examined to determine whether it appears to a certainty the pleader has failed to state a claim on which any relief may be granted under any state of facts which could be proved in support of the claims asserted in the pleading. *Freese v. Lemmon,* Iowa, 210 N.W.2d 576, 579; *Rick v. Boegel,* Iowa, 205 N.W.2d 713, 715, and citations.

"A motion to dismiss may not be supported by its own allegations of fact, not contained in the petition under attack." *Rick v. Boegel,* supra, 205 N.W.2d at 715. See also *Egan v. Naylor,* Iowa 208 N.W.2d 915, 916; *Raley v. Terrill,* 253 Iowa 761, 765, 113 N.W.2d 734, 736; Blackburn, Thirty Years of Motion Practice * * * Drake L. Rev. 447, 458, 459.

Motions to dismiss for failure to state a cause of action must clearly specify wherein the pleading attacked is insufficient. Rule 104(d) R.C.P.; *Rick v. Boegel,* supra, 205 N.W.2d at 715.

WHEREFORE, it is hereby found that like the defendants in the *Turner* case, the defendants herein rely on the assertions of their motion rather than on any insufficiency of claimant's petition.

It is further found that claimant's petition on its face alleges an employer-employee relationship exists. Resolution of whether such allegation is true or what in effect is a denial of such allegation in the motion to dismiss is true depends upon a factual determination on the merits after the answer is filed and the issues are joined.

THEREFORE, defendants' motion to dismiss filed July 12, 1979 is hereby overruled. Pursuant to Industrial Commissioner Rule 500-4.9(4)(a), the defendants are ordered to answer or otherwise plead within ten (10) days after notice of this ruling and order.

Signed and filed this 17th day of August, 1979.

LEE M. JACKWIG
Deputy Industrial Commissioner

No Appeal.

DENNIS R. RAPP,

Claimant,

vs.

EAGLE MILLS, INC.,

Employer,

and

AETNA LIFE & CASUALTY, INC.,

Insurance Carrier,
Defendants.

Arbitration Decision

This is a proceeding in arbitration brought by Dennis R. Rapp, claimant, against his employer, Eagle Mills, Inc., and the insurance carrier, Aetna Life & Casualty, Inc., to recover benefits under the Iowa Workers' Compensation Act on account of an injury he sustained on October 18, 1977.

* * *

The issues to be determined are whether the alleged injury occurred in the course of and arose out of employment, whether the alleged disability is causally connected to the alleged injury, and the nature and extent of the alleged disability. The defendants have raised an affirmative defense of notice pursuant to Code section 85.23.

Claimant alleges an injury on October 18, 1977 when, as he threw a roll of plastic weighing about 65 pounds over his head, he slipped and his back popped. Claimant testified that he told his supervisor Dennis Reed about the incident on the same day and that he was authorized to see Dr. Harding. Claimant was admitted to the hospital on October 24, 1977 for therapy and traction. Claimant worked three days in the first week of 1978 and five during the second. Claimant stated he was unable to get out of bed on the following Monday and then alled the doctor and also Reed. He was rehospitalized for therapy and traction in February 1978.

Currently, claimant complains of an inability to bend or to lift and to stand or to sit for prolonged periods. He noted back and leg pain and numbness in his arm.

Claimant testified that around 1970 he injured his middle to upper back while lifting a track car in the course of working for the Chicago Northwestern Railroad. At that time he was off work for seven to ten days. He considered the injury minor. Claimant saw Dr. Wesselink, a chiropractor, for his back in 1976.

In May 1977 claimant, while he was on vacation, slipped when jumping a fence and landed wrong. At about the same time he was injured during a ballgame when another player accidentally hit claimant's low back with his knee. Claimant indicated he had no problems with his back after these injuries, lost no work on account of either injury, and did not remember seeing a doctor on account of these May injuries. Claimant apparently related both incidents to Dennis Reed but denied telling Reed that he was going to a chiropractor on account of either injury.

In December 1977, claimant slipped and fell on the ice. Claimant's spouse verified his complaints.

Defendants presented the testimony of Dennis Reed, claimant's immediate supervisor, who recalled claimant's coming to him on two or three occasions during the summer prior to the incident to say he was taking the afternoon off to go to a chiropractor. While Reed remembered that claimant had come to him on October 18, 1977 to say that his back was bothering him and that he was going to the doctor, he maintained the claimant did not tell him about a work-related injury. Reed related the following conversation which occurred after October 1977 with claimant:

> . . . he came in to the office and said, 'What about workmen's comp?' And I said, 'What about workmen's comp?' And he said, 'Well, wouldn't this cover it?' And I said, 'Well, no, you weren't hurt on the job.' And he said, 'Well, I just thought I would try.'

Reed suggested that claimant had injured his back at the ballgame and claimant responded, " 'Well, I just thought I

would try to get it covered on workman's comp.' " Reed did concede that he knew about the roll of plastic incident about a week after the alleged fact when the claimant was in the hospital. Reed testified, "Somebody said that he had hurt his back by putting a roll of plastic up on the bagger, and I said, 'Well, he never told me anything about it.' " Reed testified that upon claimant's attempted return to work, claimant told Reed his back felt good. When the claimant did not return to work on Monday after two weeks of working, Reed assumed claimant was going to his biweekly doctor's appointment. When claimant did not return after a few more weeks went by, the defendant employer terminated his employment.

Defendants called Roger Slater, a foreman and a co-employee of claimant, who recollected claimant's jumping a fence and thereafter favoring his shoulder. Slater remembered being told that claimant was seeing a chiropractor during the summer of 1977. He was not aware of claimant's claim of an on-the-job injury until possibly three or four weeks after the alleged injury.

Claimant told both Dale A. Harding, M.D., and L. J. O'Brien, M.D., of the plastic lifting incident.

Dr. O'Brien saw claimant during the hospitalizations. His summary dictated November 12, 1977 gives a final diagnosis of "[d]isc disease of the lumbosacral spine between the 4th and 5th lumbar vertebra." February 8, 1978 dictation by the doctor reports a diagnosis of "[i]nterver-tebral disc disease." X-rays taken of the lumbosacral spine showed no change from the previous x-rays.

Dr. Harding saw claimant periodically. Although he noted that claimant had back problems since May 1977, the doctor wrote that claimant's "present injury and problem is related to his lifting in 10-18-77." In relation to permanency, Dr. Harding recorded, "It would appear that the back difficulty is apparently permanent unless at some time in the future a surgical treatment seems to be indicated." His rating was 15 percent of the body as a whole.

The claimant has the burden of proving by a preponderance of the evidence that the injury of October 18, 1977 is the cause of his disability on which he now bases his claim. *Bodish v. Fischer, Inc.,* 257 Iowa 516, 133 N.W.2d 867 (1965). *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)

Regarding the notice provisions in the Iowa Code, the Iowa Supreme Court in Hobbs v. City of Sioux City, 231 Iowa 860, 2 N.W.2d 275, 276 (1942) stated:

> The purpose of the statute is to enable the employer to investigate the facts pertaining to the injury. Actual knowledge of the employer or his representative does away with the necessity of notice. Knipe v. Skelgas Company, 229 Iowa 740, 748, 294 N.W.880; Franks v. Carpenter, 192 Iowa 1398, 1403, 186 N.W. 647. ***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.

By his own testimony, Dennis Reed, defendant employer's plant supervisor or assistant general manager, had actual knowledge of a possible work related injury within a week after claimant's first hospitalization. Reed stated that he did not at anytime thereafter question the claimant about the matter. The defendant employer did not bother to investigate the situation at that time. Accordingly, the defense of lack of notice is without merit.

Another defensive argument appears to be that claimant sustained any truly disabling injury in one or both of the May 1977 incidents, that he continued to seek chiropractic care thereafter, and that no true injury occurred on October 18, 1977. However, as indicated earlier, both Dr. Harding and Dr. O'Brien were aware that claimant had some back problems in May 1977. Dr. Harding, claimant's treating physician from the date of the injury to the date of the hearing, is of the opinion that " . . . although he had a previous history of back discomfort, he had continued to work with it and his present injury and problem is related to his lifting on 10-18-78." In another report, Dr. Harding states:

> . . . we have no way of knowing whether this is the same pain that he had back in May or whether it is a completely different pain and whether it is a different cause. Obviously it is not the same pain because he continued to work all the time with the discomfort he had from May and whatever happened the day that he did his lifting caused a new or different or at the least a change in the problem so that he now could no longer work. And, the date as near as we know as this happened had been in 10-18-77 . . . .

No medical opinion to the contrary is stated by the other doctors who treated the claimant. Dr. William A. Baird does suggest that the claimant may have evidence of arthritis.

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. *Nicks v. Davenport Produce Co.,* 254 Iowa 130, 115 N.W.2d 812 (1962). *Yeager v. Firestone Tire & Rubber Company,* 253 Iowa 369, 112 N.W.2d 299 (1961).

Claimant has sustained his burden of proving that the injury of October 18, 1977 is the cause of the disability on which he now bases his claim.

Dr. Harding is the only medical expert to rate claimant's impairment. He states that the difficulty at present appears to be permanent unless surgical intervention would be indicated in the future. He gives a functional rating of 15 percent to the body as a whole.

Functional disability is an element to be considered in determining industrial disability which is the reduction of

earning capacity, but consideration must also be given to the injured employee's age, education, qualifications, experience and inability to engage in employment for which he is fitted. *Olson v. Goodyear Service Stores,* 255 Iowa 1112, 125 N.W.2d 251 (1963); *Barton v. Nevada Poultry,* 253 Iowa 285, 110 N.W.2d 660 (1961).

Claimant is presently 34 years old, married and the father of three children. He has a tenth grade education and at the time of hearing was attempting to attain a G.E.D. which he expected to receive in May or June 1979. Upon leaving high school because he "[j]ust didn't like it," claimant worked two to three years for a creamery and then a year on an assembly line. In 1966 or 1967, claimant began working for defendant-employer, first as a mixer man for two years and then as a foreman. He left defendant-employer in 1968 or 1969 because he was "[j]ust disgusted with the job." Claimant next tended bar part-time and worked for the Chicago Northwestern Railroad for three months. Upon leaving the railroad because he did not want to join the union, claimant returned to defendant employer as a foreman in 1970 or 1971. With the exception of the few days claimant worked in early 1978 he has not worked since the date of the injury. He has made no attempt to find work of any kind. Dennis Reed testified that claimant regularly took advantage of defendant employer's policy of allowing employees to take Friday afternoons off without pay if the workload was light as opposed to staying and receiving pay.

Claimant's unabashed lack of motivation weighs heavily in the undersigned's rating of industrial disability. On cross-examination, he conceded that a statement he made during his deposition regarding having pain approximately two times a week when he gets up in the morning was correct. He stated he did not have pain free days but admitted he did not have pain all the time. Although he had testified Dr. Harding told him not to bend, to lift or to throw, he conceded that Dr. Harding told him he could lift between 20 and 25 pounds but he has not attempted to do so. (Earlier he testified that his job with defendant employer sometimes required lifting 33 to 50 pounds.) He testified he has no trouble walking. He has curtailed all activities around the home except riding the lawn mower for short periods of time. During the day he watches T.V. He also does school work for the once-a-week class. He has not read the want ads. He weighed approximately 200 pounds at the time of the accident and weighed 217 pounds at the time of the hearing. He stated he went on the diet suggested by Dr. Harding but gained back the lost weight.

On redirect examination claimant testified that Dr. Harding had not released him to return to work. Dr. Hardings' reports conclude that "the type of work he (claimant) was engaged in at the time he received this injury could not be considered in his future plans for employment." However, Dr. Harding's office notes indicate frequent conversations held with claimant about the need to seek rehabilitation (notation for January 2, 1979 in claimant's exhibit No. 4 reveals claimant was learning to use a drill press in early 1979 at the Rehabilitation Center; however, no testimony concerning this was presented at the hearing. In the last entry on March 19, 1979 of claimant's exhibit No. 4, Dr. Harding states "[s]till must find some kind of employment that does not involve lifting or flare-up of the back." In another earlier report claimant's exhibit No. 3, Dr. Harding testified that claimant was 100 percent disabled from his previous employment and the length of disability depended on whether he got some further training so he could do something else and also on when the present discomfort would allow him to go back to work and do what he had been trained to do.

Despite what appears to be encouragement by his treating physician to return to some area of the work force, the undersigned detected absolutely no interest or concern on the part of the claimant regarding his present status, let alone his future situation. Claimant relied upon references to what he felt the doctor had advised him when he justified why he had not attempted to return to work or why he had not tried bending, lifting, etc.; he made no mention of the doctors' positive suggestions with respect to work. He testified that his wife has never been employed, that he and she are on A.D.C., that A.D.C. paid the doctor bills in evidence and that Blue Cross and Blue Shield paid for the hospital bills in evidence.

As indicated above, in claimant's exhibit No. 3, Dr. Harding alludes to the possibility that claimant may return to the work he has been trained to do some day. When, is not estimated. The claimant's effort to return in January 1978 apparently resulted in "some pain" according to Dr. Harding in a January 16, 1978 office note. At that time Dr. Harding told the claimant not to work. Claimant was referred to Dr. O'Brien and hospitalized in February 1978. He was fine in the hospital but discomfort allegedly resumed when he returned home. From then on a repeating pattern of treatment and complains begins without further hospitalization. In claimant's exhibit No. 4, Dr. Harding concludes that the back disability prevents claimant from considering his former work in his future plans for employment. In light of the man's attitudes discussed above, the undersigned is not convinced that this is necessarily the case. Apparently, the claimant did not at any time take any step to contact the employer about his alleged problem and perhaps a need for light duty. He appears content to not work whenever the chance arises whether it be taking Friday afternoons off without pay or listening to the doctor when told not to work -- but not when encouraged to try some type of employment.

This individual's attitude, as it is reflected in his total lack of effort to look for some suitable work, in his apparently negative response to rehabilitation programs, in his negative approach to dieting suggestions by his doctor, in his prior work approach or attitude and in his overall apathetic demeanor as a witness, is more of a detriment to his earning capacity than is any physical impairment he may have sustained as a result of the October 18, 1977 injury.

WHEREFORE, it is found that the claimant's loss of earning capacity as a result of his industrial injury is ten (10) percent of the body as a whole.

It is further found that claimant recuperated from the

injury upon his discharge from the hospital on February 13, 1978.

* * *

Signed and filed this 27th day of June 1979.

LEE M. JACKWIG
Deputy Industrial Commissioner

No Appeal.

LOWELL L. REEVER,

Claimant,

vs.

BAYARD CARE CENTER,

Employer,

and

ST. PAUL FIRE AND MARINE COMPANY

Insurance Carrier,
Defendants.

Arbitration Decision

INTRODUCTION

This is a proceeding in arbitration brought by Lowell L. Reever, claimant, against Bayard Care Center, employer, and St. Paul Fire and Marine Company, insurance carrier, fir benefits as a result of an injury on September 6, 1978.

* * *

FACTS

On September 4, 1978 claimant, who earned an income by mowing lawns and blowing snow, was contacted by Donald M. Eades, the administrator of the defendant-employer. Claimant testified that Mr. Eades requested him to come to the center the following morning and mow the yard. Claimant stated he told Mr. Eades he couldn't go the following morning because of the other work he already had lined up, but would be glad to be there the following day. Claimant testified that although he had his own equipment, the grass was too long for his equipment and so he used the lawnmower of the defendant-employer. As requested by Mr. Eades, claimant reported to him at 9:00 the morning of September 6, 1978. The defendant-employer's mower was sitting on the north side of defendant-employer's building and Mr. Eades started the mower for claimant. Claimant said the grass was six inches tall on the east side of the building. After about an hour's work, claimant was trying to remove the weeds from underneath the mower when the blade hit his hand. Claimant stated the blade went through his hand and tore off one finger. Claimant testified he drove the mower to the defendant-employer's building and was taken to the hospital.

ISSUES

The issues presented by the parties at the pre-hearing and hearing were whether or not claimant received an injury arising out of and in the course of his employment; whether there was a causal connection between any disability and the alleged injury; the extent of any disability; and whether the claimant was an employee of the defendant-employer.

APPLICABLE LAW

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. *McDowell v. Town of Clarksville,* 241 N.W.2d 904 (Iowa 1976); *Musselman v. Central Telephone Co.,* 261 Iowa 352, 154 N.W.2d 128 (1967).

Nelson v. Cities Service Oil Co., 259 Iowa 1209, 146 N.W.2d 261 (1967), held that a claimant had proved the initial burden of proving an employer-employee relationship by a preponderance of the evidence. Upon such proof a defendant may use evidence to negate the factual pattern or may allege an affirmative defense such as independent contractor status.

In *Usgaard v. Silvercrest Golf Club,* 256 Iowa 453, 127 N.W.2d 636 (1964), the court discussed the elements required to establish an employer-employee relationship: (1) employer's right to select or employ at will; (2) responsibility for the payment of wages by the employer; (3) right to discharge or terminate the relationship; (4) right to control the work; (5) is the party sought to be held as employer responsible party in charge of work of or whose benefit the work is being performed; (6) the intention of the parties who are creating the relationship; (7) the customary outlook taken by the community towards similar working relationships.

In *Nelson, supra,* the court enumerated some elements constituting a test as to whether an individual is an independent contractor: (1) the existence of a contract or 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 job is part of the regular business of the employer.

ANALYSIS

The conclusion which must be reached by claimant's own testimony is that he is in the business of mowing lawns. Claimant testified he had mowed lawns for several years and had a number of regular "customers." Claimant stated he told Mr. Eades he would not be able to mow the yard the following morning which indicates claimant controlled the progress of the work. The fact that defendant didn't talk to claimant regarding how claimant was going to complete the job would also indicate claimant controlled the progress of the work. Defendant-employer did furnish claimant with the mower but only after claimant indicated he chose not to use his own equipment. Claimant indicated he was expecting to be paid by the hour but indicated that

was his customary practice. Claimant stated he usually got paid by check or cash. If a "customer" paid by cash they would not have documentation for reporting the same as wages for Social Security or income tax purposes. Under this set of facts, although claimant may have met his initial burden of proving an employer-employee relationship, defendant met his burden in showing claimant was in fact an independent contractor.

* * *

Signed and filed this 5th day of November, 1979.

DAVID E. LINQUIST
Deputy Industrial Commissioner

Appealed to Commissioner: Dismissed.

LAWRENCE REINERT,

Claimant,

vs.

MIDWEST PAVING CO., INC.,

Employer,

and

WESTERN CASUALTY & SURETY CO.,

Insurance Carrier,
Defendants.

Appeal Decision

NOW ON THIS DAY the matter of claimant's appeal to the commissioner from ruling on special resistance and defendants' resistance thereto comes on for determination.

On June 27, 1979 claimant filed an original notice and petition. Defendants filed a special appearance alleging that proper proof of service was not filed. Claimant filed a resistance, and on July 13, 1979 a deputy industrial commissioner entered an order allowing the parties fifteen days to submit affidavits. No affidavits were filed. On August 1, 1979 the deputy entered an order sustaining defendants' special appearance.

It is noted that the proof of service filed with this agency is sufficient. The return of service notices came with a cover letter from claimant's attorney indicating that there were four copies of the notice and petition served on Midwest Paving and Western Casualty and Surety Co. by certified mail return receipt. Although it is unfortunate that no affidavit was submitted at the time it was requested in the July 13 order of the deputy, the affidavit now in the file would indicate that the proper service was made.

* * *

Signed and filed this 3rd day of October, 1979.

ROBERT C. LANDESS
Industrial Commissioner

No Appeal.

DONALD R. RICHARDSON,

Claimant,

vs.

BUREAU OF ENGRAVING,

Employer,

and

ARGONAUT INSURANCE COMPANIES,

Insurance Carrier,
Defendants.

Appeal Decision

This is a proceeding brought by claimant, Donald R. Richardson, and defendants, Bureau of Engraving, employer, and Argonaut Insurance Co., insurance carrier, appealing a proposed arbitration decision wherein claimant was found to have sustained a two percent permanent partial disability to the body as a whole.

* * *

On reviewing the record, it is found that the deputy industrial commissioner's proposed findings of fact and conclusions of law are proper with the following modification.

In a stipulation filed by the parties on April 6, 1978, it was agreed that if claimant was found to have sustained an injury arising out of and in the course of his employment, the extent of temporary disability or healing period was 20 weeks. Viewing the record as a whole, it is determined that claimant is entitled to the 20 weeks of healing period benefits.

In the proposed decision of the deputy industrial commissioner, it was found that claimant had sustained a two percent permanent partial disability to the body as a whole as the result of damage to his voice due to his employment. This finding is affirmed.

It should be noted that the injury need not be the sole proximate cause if the injury is directly traceable to the disability. *Langford v. Kellar Excavating & Grading, Inc.*, 191 N.W.2d 667 (Iowa 1971). 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 Stated 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).

Defendants have also alleged in an amendment to their answer filed February 27, 1978 that claimant's action is barred under §85.16(1), Code of Iowa, due to his willful intent to injure himself.

Iowa Code §85.16(1) states: 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." Case authority primarily refers to the willful intent to injure oneself in the context of suicide. *Schofield v. White,* 250 Iowa 571, 95 N.W.2d 40 (1959). *Reddick v. Grand Union Tea Co.,* 230 Iowa 108, 296 N.W. 800 (1941). In *Everts v. Jorgensen,* 227 Iowa 818, 289 N.W. 11 (1939), the commissioner defined *willful* as "governed by will without yielding to reason.

Defendants contend that claimant willfully intended to injure himself by continuing to smoke after being advised not to do so; however, claimant is alleging an injury as a result of his excessive talking at work, not his smoking. The talking was a necessary part of the furtherance of the employer's business and in no way can be considered pursued with the intent to injure himself. If the willful intent was based upon failure to follow medical advice, it should be noted that R. H. Duewall, M.D., claimant's family physician, testified that he had not advised claimant to quit smoking. On the contrary, he testified, "I think if a man enjoys a smoke, he ought to be allowed to do it if he wants to." (Transcript, page 40, lines 8-10)

On the facts of this case, it is determined that claimant's action in continuing to smoke does not constitute a "willful intent to injure himself" as contemplated by the statute.

* * *

Signed and filed this 26th day of September, 1978.

ROBERT C. LANDESS
Industrial Commissioner

Appealed to District Court: Dismissed

JAMES HOWARD ROACH

Claimant,

vs.

HUBINGER COMPANY

Employer,

and

LIBERTY MUTUAL INS. CO.

Insurance Carrier,
Defendants,

Arbitration Decision

This is a proceeding in arbitration brought by the claimant, James Howard Roach, against his employer, The Hubinger Company, and its insurance carrier, the Liberty Mutual Insurance Company, because of injuries sustained on June 15, 1978.

The companion cases of Nelson v. Hubinger and Liberty Mutual and Roach v. Hubiner and Liberty Mutual were heard at the same time, although they were not officially consolidated for hearing. The body of each decision will be identical. It should be noted that the undersigned visited the premises of the Hubinger plant and saw the scene of the accident and surrounding area.

* * *

The issue in the Nelson case is whether claimant sustained an injury which arose out of and in the course of the employment. If proved, further issues concern the causal connection between the injury and the condition of ill being, and the nature and extent of the injuries. In the Roach case the only issue heard was whether or not claimant sustained an injury which arose out of and in the course of employment. If claimant prevails on that issue, another hearing will be held on causal relationship and damages. Claimants fell through a skylight in a canopy covering some railroad tracks. Certain questions are presented under the issue of arising out of and in the course of the employment. All such sub-issues pertain to whether or not claimants were in a prohibited place in violation of the employer's instructions to the extent that claimants could be deprived of compensation benefits. Thus the record contains evidence of claimants knowledge of no-smoking areas and the extent of their familiarity with the union contract and safety regulations.

The Hubinger Company is a large corn refining process plant in Keokuk, Iowa. Claimants are both young men who worked in a place called the refinery room. Nelson was learning the job from Roach. The work consisted of monitoring and working with certain gauges on the third floor and other duties concerned with the syrup refining process. As "B filter operators", their main area of work was on the third floor; however, other duties could cause them to be on the second, fourth, and fifth floors. The basic work area was a large rectangular room full of noisy machinery; several witnesses testified that the temperature was often over 100° on the third and fourth floors. The evidence showed that employees were given latitude as to when they took their regular breaks and the meal break. The latitude was occasioned by the fact that a monitoring of the machinery necessitated their being present at the control panel a good deal of the time.

There were two possible areas in which to take breaks, other than the accident site. One was on the first floor and would occasion a walk of some five minutes to and five minutes back. The other area was on the fourth floor which could be reached in a few seconds. (Both the third and fourth floors have been remodeled to some extent by the time undersigned visited the premises. Hence, the descriptions of the premises are from personal observation combined with witness testimony.) The break area on the fourth floor was hot but was in a kind of breezeway.

Claimants chose a third place in which to take a break on the accident date. Running parallel to the building is a canopy some hundreds of feet long which covers railroad tracks. The canopy is not a part of the building but does abut it. The canopy can be stepped upon by means of egress from the third floor. Claimants walked out on to the canopy and sat upon a plexiglass bubble which served as a skylight. The glass broke and both claimants fell some 30

feet to the area of the tracks below. Miraculously, they were not killed.

Of the nine witnesses, other than claimants, who testified on their behalf, eight were fellow workers who worked in that building. Of the eight, six testified that they went out onto the canopy for fresh air during break periods. Another, Richard Smith, testified that he once went out on the canopy to get a chair. Another, David Linnburger, took his breaks at times on the canopy; however, it appeared that his testimony concerned the year 1977, not as near the accident date as was the case with the six witnesses. A ninth witness, Philip Boltz, was not a fellow worker but did work in the maintenance department at Hubinger. He testified that he saw workers at times take their breaks on the canopy.

There is one area of controverted testimony which must be left unresolved. Both claimants and Merlin Wilson clearly testified that Gary Harris, the foreman, came on to the roof to give workers instructions; Harris denied this testimony and stated that any employee caught on the roof of the canopy would be reprimanded.

Gary L. Harris testified for defendants that he was the process foreman of refineries A and B at the time of the injuries. He stated that the work area was one of possible fire hazard because of carbon accumulation and dust. As to the claimant Nelson, Harris testified that he pointed out the break area on the fourth floor and told Nelson that it was the only smoking area between floors two and five. He was not so firm in his recollection as to claimant Roach because it had been longer since he first interviewed the latter.

As to the canopy being a prohibited place, Harris was quite definite. Again, he testified that he would have reprimanded any employee seen on the canopy. Specifically, he testified that he never saw Nelson or Roach on the roof and never gave permission for them to go there. Thus, one cannot necessarily resolve the discrepancy between the testimony of Harris and claimants.

Leroy E. Shepherd, supervisor of employee relations at the plant, testified as to when Nelson was hired. He stated that the employee would have been given a copy of the union contract and certain safety rules. The same would have applied to Roach, but since Roach had worked there longer, Shepherd had no personal knowledge or recollection of the hiring. Shepherd testified that when Nelson was hired they did not spend much time on safety and the plant rules because Nelson had been a summer employee on a prior occasion.

There was controversy in the record as to whether or not Roach and Nelson received copies of the union contract and safety regulations. They signed receipts to the effect that they did receive these items, and for the purposes of this decision, it is assumed that such was the case. Whether or not they read the contents of these pamphlets is another question.

John Hauenstein, the manager of training and safety at the employer testified for defendants. Since this witness's employment did not begin until October 1, 1978, he did not have extensive knowledge of the facts. However, he did testify that all employees would be under the union contract except that probationary employees do not gain seniority. Thus, in Mr. Hauenstein's opinion, Nelson was bound by the union contract with the employer. He also testified as to the fire hazard caused by smoking at the plant.

Claimants have the burden of proof. *Lindahl vs. Boggs,* 236 Iowa 296; 18 N.W.2d 607. With respect to the course of the employment, "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." *Buehner v. Hauptly,* 161 N.W.2d 170 at 172 (Iowa, 1968). Further, at 172, the opinion states, "It is sometimes a thin line which divides a finding that the ultimate act itself is prohibited from one that the act was proper and was merely performed contrary to instructions." See also *Stahle v. Holtzen Homes* 33rd Report of the Iowa Industrial Commissioner, p. 157 (1978), and Larson on Workmen's Compensation, Vol. 1A pp. 6-22 through 6-26.

In the case at hand, despite a spirited defense, it takes no great leap of faith to find that there was no clear prohibition against claimants' being on the canopy roof at break time. There is considerable evidence that several employees made it a practice to go there. It seems inconceivable that some representative of the employer did not know of this practice. And, whether the employer knew of it or not, no steps were taken to prevent the practice. Thus might Nelson and Roach see no wrong in taking their break period atop the canopy?

Further, although the union contract and safety rules may be construed to prohibit such a practice, the continued use of the canopy by the employees weakens the prohibition and dims the distinction between what the employees could and could not do. The means of egress to the canopy were two: First, there was a window which screen swung away. Second, there were large screens about 12 feet wide and 10 or 12 feet high. There was a dispute in the testimony as to when the latter screens were removed prior to the injuries. Despite this dispute, it is clear that the employees' practice of taking breaks on the canopy was fairly common. There were no signs which would emphasize that these screens were meant to be barriers.

Thus, it cannot be said that there existed any distinct prohibition against the employees going upon the canopy. Without such a prohibition, it is clear the injuries arose out of and in the course of the employment.

With respect to the claimant, Nelson, the issue of diability is also to be determined. In this regard, the depositions of Senen R. Dalisay, M.D. and Thomas B. Summers, M.D., a neurologist, were considered. Dr. Dalisay described Nelson's injuries:

> He sustained a ruptured liver; ruptured right leaf of the diaphragm, L-E-A-F, of the diaphragm; fracture of fourth to seventh right rib (sic) along the--well, fracture of the base of the metacarpal bone, middle finger.
>
> Abrasions on both upper extremities, right arm and forearm and also of the left palm; laceration of the left thenar eminence, T-H-E-N-A-R; fractured radial styl-

oid process left; possibility concussion. (p. 6)

Despite these severe injuries, there is no evidence of any permanent disability. Both doctors indicate claimant's recovery was satisfactory and the word "permanent" does not appear with respect to the disability. Thus, claimant's disability is temporary.

* * *

Signed and filed at Des Moines, Iowa this 21st day of June, 1979.

BARRY NORANVILLE
Deputy Industrial Commissioner

No Appeal.

BERLE M. ROBINSON,

Claimant,

vs.

DEPARTMENT OF TRANSPORTATION,

Employer,

and

THE STATE OF IOWA,

Insurance Carrier,
Defendants.

Appeal Decision

Defendants have appealed from a proposed arbitration decision wherein claimant was awarded running temporary total disability for a heart attack suffered on February 14, 1976. Claimant filed a cross-appeal on the issue of permanent total disability.

* * *

The issues presented on appeal are whether the claimant gave notice of the occurrence of the injury as required by Iowa Code section 85.23, and if sufficient notice was given, whether claimant is permanently and totally disabled as a result of the February 14, 1976 heart attack.

Claimant was employed by the Department of Transportation as a Right-of-Way Agent II at the time of his heart attack in February 1976. Specifically, claimant worked as a relocation assistance agent and helped people find new homes when a government project required them to move elsewhere.

For several weeks prior to his February 1976 heart attack, claimant was working on the Cedar Rapids Airport expansion project which, according to the testimony of several witnesses, was quite controversial in that area. A problem arose when one of claimant's co-workers telephoned a Mr. Cuhel, and was told by Cuhel never to set foot on his property. Claimant and the co-worker, Robert Maresh, wrote about this threat, along with a rumor that Cuhel kept a loaded shotgun, in a report known as a 13-B Plan that was approved by claimant's superiors and eventually sent to the federal government.

On Monday, February 9, 1976, claimant was told that he was to see an attorney in Iowa City by the name of Mr. Meardon about the relocation report. Meardon was representing several relocatees in the Cedar Rapids Airport expansion project including Mr. Cuhel. Claimant and coworker, Maresh, met with Meardon on Wednesday, February 11, 1976. Maresh testified that claimant seemed nervous before the meeting and that both were apprehensive about the meeting because of Meardon's reputation for being a tough attorney when representing relocatees. The meeting was cordial and friendly, however Meardon insisted that comments about Mr. Cuhel be removed from the report. Claimant and Maresh told Meardon it was beyond their power to remove the comment, but they would see what they could do and the meeting ended. Claimant's immediate supervisor, Robert Garrard, later testified that he did not consider either the meeting to be a "big deal," or the pressure exerted by Meardon to be abnormal. However, Garrard was aware that claimant tended to worry too much about his job.

On the return trip to Cedar Rapids after the meeting, claimant started experiencing chest pain so he took several nitroglycerin tablets for relief. Claimant had two previous heart attacks unrelated to his employment with defendant in 1970, and carried nitroglycerin tablets in case of pain. Garrard had been aware of these prior heart attacks. Claimant testified that he did not feel well the rest of the week and continued taking nitroglycerin. There is no evidence in the record that Garrard or any other supervisor was aware of claimant's discomfort.

Claimant returned to the home office in Ames on the afternoon of Friday, February 13, 1976, and talked with Mr. Sweitzer who was the director of the office of Right-of-Way. Claimant testified that he thought Sweitzer blamed claimant for the whole problem with Cuhel and Meardon and that Sweitzer was concerned that Meardon might sue the state. There is no evidence in the record that Sweitzer might have had any knowledge about claimant's discomfort.

After the meeting with Sweitzer and while driving home, claimant experienced increased chest pains and took six to eight nitroglycerin tablets. Claimant stated that he felt worse when he got home and thought he was having another heart attack. The chest pains continued the next day, Saturday, February 14, 1976, and claimant finally went to a hospital about six p.m. The medical diagnosis of claimant's condition was angina and acute myocardial infarction.

The employer-defendant was notified on the following Monday that claimant had suffered a heart attack, but was not told that the condition was work-related. Claimant testified that he believed the heart attack was work-connected when he entered the hospital, however he did not think it was compensable because it did not occur while he was working for his employer as he went to the hospital on Saturday.

There is no evidence in the record that claimant's

treating physician, Dr. Marshall, ever informed claimant about a possible causal connection between his heart attack and his employment. Dr. Marshall did warn claimant about the possible stresses and problems that might be involved if claimant should return to work. Dr. Marshall wrote this warning in a letter dated August 10, 1977 which is marked as claimant's exhibit A. However, this letter does not amount to requisite notice to either claimant or defendant-employer that the February 14, 1976 heart attack was work-related. It is merely a precautionary note as to what limitations the claimant has as a result of his past heart attack condition.

There is no evidence in the record that defendant-employer had actual knowledge or received notice that claimant's heart attack was work-related until the petition instigating the present proceeding was filed on February 13, 1978.

Defendants have timely and properly raised the defense of notice under Iowa Code section 85.23. Since the injury occurred on February 14, 1976, the following version of section 85.23 applies:

> 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.

Iowa Code section 85.24 states that for notice to be sufficient it must "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," although the precise form of notice is not material. 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 . . . 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,* section 78.31(1976).

The purposes of the notice statute are to provide prompt medical care for the claimant and to provide an opportunity for the defendants to immediately investigate the circumstances of the accident. *Hobbs v. Sioux City,* 231 Iowa 860, 2 N.W.2d 290 (1942); *Knipe v. Skelgas Co.,* 229 Iowa 740, 294 N.W. 880 (1940); *Larson, supra* at section 78.30. If these purposes are satisfied, then under some circumstances, the employer cannot claim prejudice if the time limitation under the notice statute is not met. *Leminen's Case,* 353 Mass. 772, 233 N.E.2d 894 (1968); *Smith v. Plaster,* 518 S.W.2d 692 (Mo. App. 1975). However, in Iowa if notice is not given within 90 days under section 85.23 then the injured employee is forever cut off from any right to compensation under the act and the "no prejudice" and "ignorance of fact or law" arguments are not applicable. OP Att'y. Gen. 26(1916). There must be an express "no prejudice to defendant" argument provided in the workers' compensation act in order that it may be invoked. *Thomas v. Griffin Wheel Co.,* 8 Mich. App. 35, 153 N.W.2d 387 (Ct. App. 1967).

However, in other states, under facts similar to the case *sub judice,* the courts have reached the same result whether or not a "no prejudice to defendant" argument was available to claimant. In *Griffith v. Coggins Granite Indus. Inc.,* 114 Ga. App. 537_____, 152 S.E.2d 15, 17 (1966), the court held that, "[m]ere knowledge that the employee had suffered a heart attack while he was off duty and had died would not be sufficient to put the employer on notice of an injury by accident arising out of and in the course of employment." The Georgia court reached this decision by applying Georgia Code section 114-303 which does permit a "no prejudice to defendants" argument. A similar result was reached by the Michigan Court of Appeals in *Lewis v. Chrysler Corp.,* 51 Mich. App. 723, 216 N.W.2 422 (1974). In *Lewis,* defendants had knowledge of claimant's amputation and disability, but this was held to be insufficient notice because defendants were not told that the injury arose out of and in the course of employment. The Michigan court was applying Michigan Statutes Annotated section 17.237 (381) which makes no mention of the "no prejudice to defendant" argument. In *McKinney v. Berkline Corp.,* 503 S.W.2d 912 (Tenn. 1974), the court held that mere knowledge by the employer of an injury did not satisfy the notice statute. Tennessee Code Annotated section 50-1001 does not mention the "no prejudice to defendants" argument, but it does allow for a reasonable excuse. The Tennessee statute appears to be a middle ground between the Georgia and Michigan statutes, but the same result is still reached.

It is found that the defendants neither had actual knowledge nor notice of claimant's contention that his injury arose out of and in the course of his employment until the petition instigating this proceeding was filed on February 13, 1978, despite the fact that employer-defendant knew by February 16, 1976 that claimant had suffered a heart attack.

The next question is when did the ninety day period begin to run under section 85.23. Iowa Code section 85.23 does not begin to run until the nature of the disease is made known to the claimant. *Jacques v. Farmers Lumber & Supply Co.,* 242 Iowa 548, 47 N.W.2d 236 (1951). Larson adds that claimant must be aware of the seriousness and probable compensable nature of the injury before a notice statute may commence to run. *Larson, supra,* section 78.41, cited in *Mousel v. Bituminous Material & Supply Co.,* 169 N.W.2d 763, 766 (Iowa 1969). However, claimant must exercise ordinary and reasonable care in discovering the nature of the trouble. *Mousel,* supra at 767. Larson states that:

> [T]he reasonableness of claimant's conduct should be judged in the light of his own education and intelligence . . . . [but] it is not necessary for the claimant to know the exact diagnosis or medical name for his condition if he knows enough about its nature to realize that it is both serious and work-connected . . . . [Also] 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. *Larson, supra,* section 78.41.

Claimant contends that he was not aware of the probable compensable nature of his claim until he saw his attorney in 1978. As quoted above, Larson speaks to the "probable compensable nature" issue in his treatise. In the present case, claimant testified that he believed that his heart attack was work-related when he entered the hospital in February 1976.

Claimant was aware of the nature of his condition shortly after he entered the hospital as he knew he had suffered a heart attack. Also he had to be aware of the seriousness of his condition by the fact that he was in the hospital and he had suffered heart attacks in the past.

It is found that the nature of claimant's disability was made known to him shortly after he entered the hospital in February 1976 and Iowa Code section 85.23 began to run at this point. Therefore defendants did not have actual knowledge or receive the requisite notice of an injury within the ninety day statutory period.

* * *

Signed and filed this 4th day of June, 1979.

ROBERT C. LANDESS
Industrial Commissioner

Appealed to District Court: Affirmed
Appealed to Supreme Court: Affirmed

RUTH ROSE,

Claimant,

vs.

WOODWARD STATE HOSPITAL-SCHOOL,

Employer,

and

THE STATE OF IOWA,

Insurance Carrier,
Defendants.

Remand Order

On November 16, 1979 Judge Robert O. Frederick remanded this case to the Iowa Industrial Commissioner "to take additional evidence relating to the issues of this case and including the additional evidence identified in Petitioner's Application For Leave To Present Additional Appropriate Evidence." The additional evidence sought to be presented is evidence that was acquired *after* the matter was heard and decided by this agency.

This agency cannot concur that evidence not even sought until subsequent to the final decision of the agency in a contested case proceeding can fulfill the requirement of demonstrating good reasons for failure to present it in the contested case proceeding before the agency. To so rule relegates the contested case proceeding to nothing more than a mere discovery proceeding. If the parties are allowed to submit additional evidence of the nature sought to be admitted here, the tendency will be for the parties to take their chances in the contested case proceeding and then accumulate a plethora of evidence directed at the deficiencies noted in the contested case proceeding. After acquiring such evidence and filing for judicial review, the parties may then contend that there was good reason for not presenting it in the contested case proceeding -- *the reason being that they hadn't sought it before!* Such a reason reduces the agency hearing to an absurdity.

It is not as if a remedy were not available for a further hearing before the agency, as an undetermined healing period was awarded and the degree of permanent disability left open for future determination. This contemplated that if agreement could not be reached between the parties a review-reopening could be filed with the agency. In effect, the remand order accomplishes the same purpose in this case, but as a precedence this agency does not concur that the remand from judicial review for the purpose of considering additional evidence not sought at the time of the contested case proceeding should be accepted procedure.

Appeal of the remand has not been taken, as the attorney for the respondent is the same as would represent this agency in such an appeal.

With these objections noted, this matter is remanded to a deputy for compliance with the order of the district court.

Signed and filed this 7th day of February, 1980.

ROBERT C. LANDESS
Industrial Commissioner

Reopened.

CHARLES C. ROSS,

Claimant,

vs.

SERVICE MASTER-STORY CO., INC.,

Employer,

and

AID INSURANCE COMPANY,

Insurance Carrier,

and

THE SECOND INJURY FUND OF IOWA,

Defendants.

Review-Reopening Decision

INTRODUCTION

This is a proceeding in review-reopening by Charles C. Ross, claimant, against Service Master-Story Co., Inc., employer, Aid Insurance Company, insurance carrier, and The Second Injury Fund of Iowa, for the recovery of benefits as a result of an injury on September 13, 1976.

* * *

FACTS

Claimant, who is 42 and divorced with two children as dependents, failed to complete a tenth grade education in Burrell, Kentucky. Claimant began working with his father in the oil field as a tool dresser at age 14 or 15. His duties included taking care of the equipment, handling heavy pipe, keeping equipment greased, climbing the drill rig to grease pulleys. At age 24 or 25 claimant worked at a service station in Florida pumping gas. Claimant testified that somewhere around 1962 he started working for Service-Master in the Fort Lauderdale-Miami area. His job consisted of cleaning and installing carpet. In 1970 or 1971 claimant moved to Des Moines and again worked for Service-Master.

The testimony of claimant as well as the deposition of Dr. Flapan would indicate that claimant originally sprained his right wrist around 1957. In 1972 he reinjured his wrist when he fell on a piece of ice in his driveway. Claimant was seen by Dr. Flapan who took x-rays which showed an old fracture of claimant's carpal navicular, which had failed to unite. On March 22, 1972 Dr. Flapan attempted to unite the fracture by doing a bone graft. At the conclusion of Dr. Flapan's treatment in December 1972 claimant was not experiencing any difficulty with his wrist. Although the fracture failed to heal, Dr. Flapan noted that the wrist motion was almost normal and pronation and supination were unrestricted.

In 1976 claimant started working for defendant as crew chief. Claimant was responsible for cleaning and laying carpet, cleaning furniture, windows, walls and ceilings. Claimant drove a truck with all the necessary equipment. Claimant's salary was approximately $250 per week.

On September 13, 1976 claimant received an injury which arose out of and in the course of his employment when, while cleaning windows for Dr. Johnson in Ames, he slipped and fell off a ladder 12 to 15 feet unto a cement patio. Claimant was seen in the emergency room at Mary Greeley Hospital by Dr. Gitchell. The examination revealed that claimant had injured his right wrist and right heel and foot. After x-rays were taken, the doctor indicated the following:

> Made a diagnosis from the x-rays of a comminuted -- which means it's fragmented into more than one part -- distal radius fracture, which was also impacted with the articular surface fragmented into three or four fragments. I also noted that there appeared to be an old injury in the area of the wrist with some degenerative changes, degenerative arthritic changes in the radiocarpal joint. Also, evidence of changes in the carpal navicular with still presence of probable nonunion between the two fragments and cystic degenerative change.
>
> * * *
>
> In viewing his x-rays of his heel, he had a calcaneal fracture, which is the main heel bone, with some displacement of the fracture fragments and the joint beneath the ankle bone and the heal bone had some displacement and some flattening of this joint. He had kind of just crunched his heel bone down and flattened it out to some degree.

Claimant testified that on February 23, 1977 he began to work part-time and near the end of June began to work full-time when released by his doctor. Claimant later stated that the doctor wouldn't release him but he went back to work for defendant on his own.

Claimant testified he presently has pain in his wrist and pain in his foot when he is upon it for any length of time. Claimant wears a slip over elastic support on his foot. Claimant stated that his ankle swells and so does his wrist once in awhile. Claimant's boss occasionally sends him home in the late afternoon because of claimant's ankle, but claimant gets paid for a full day's work and has no intention of leaving the defendant. In the spring of 1978 claimant returned to Dr. Flapan because he did not understand why his pain was greater than after his operation. Claimant has not taken any pain pills in the last three months.

ISSUES

Although the issues are not stated in the stipulation the undersigned believes the pertinent issues are whether there is a causal relationship between the claimant's disability and work injury, the extent of claimant's permanent partial disability and whether or not claimant is entitled to recover from the Second Injury Fund.

APPLICABLE LAW

The claimant has the burden of proving by a preponderance of the evidence that the injury of September 13, 1976 is the cause of his disability on which he now bases his claim. *Bodish v. Fischer, Inc.,* 257 Iowa 516, 133 N.W.2d 867 (1965). *Lindahl v. L.O. Boggs,* 236 Iowa 296, 18 N.W.2d 607 (1945). A possibility is insufficient; a probabil-

ity is necessary. *Burt v. John Deere Waterloo Tractor Works,* 247 Iowa 691, 73 N.W.2d 732 (1956). 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).

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. *Nicks v. Davenport Produce Co.,* 254 Iowa 130, 115 N.W.2d 812, (1962). *Yeager v. Firestone Tire & Rubber Company,* 253 Iowa 369, 112 N.W.2d 299 (1961). In *Ziegler v. U.S. Gypsum Co.,* 252 Iowa 613, 620, 106 N.W.2d 591 (19) the Iowa Supreme Court said:

> It is, of course, well settled that when an employee is hired, the employer takes him subject to any active or dormant health impairments incurred prior to his employment. If his condition is more than slightly aggravated the resultant condition is considered a personal injury within the Iowa law.

Section 85.64 of the 1975 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 devision 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 . . . .

Section 85.34(s) states:

> 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 500 weeks and shall be compensable as such . . . .

It is further clear that the claimant has sustained an industrial disability which is defined in *Diederich v. TriCity Railway Co.,* 219 Iowa 587, 593, 258 N.W.2d 899 (1935), 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.

ANALYSIS

Based on the foregoing principles, it is found that claimant has shown that his disability is causally connected to the injury he received on September 13, 1976. This causal connection is shown not only by claimant's testimony but the testimony of Dr. Gitchell in which he indicates that these were the kind of injuries one would expect from a fall like claimant's.

A more difficult question is the extent of claimant's disability as a result of his injury. Dr. Flapan rated claimant's injury at 22 percent permanent partial impairment to the right upper extremity while Dr. Gitchell is of the opinion that the wrist was about the same as pre-injury status. More weight is given to the testimony of Dr. Flapan in that he had examined claimant's wrist prior to the injury in question and in attempting to make a rating, he actually measured claimant's range of motion. Dr. Flapan also stated " . . . the wrist doesn't appear the same as it did in 1972. He had no deformity whatsoever in 1972, of his wrist. He has now an obvious growth deformity that anyone can see." In rating claimant's disability to his ankle and foot, Dr. Gitchell gave claimant a disability rating of 16 percent of the lower extremity. Dr. Flapan was of the opinion that claimant had a 19 percent permanent partial disability to the lower extremity.

Claimant is 43 years old, failed to complete a tenth-grand education and is not qualified to do anything outside of manual labor. Claimant worked in the oil fields but his job required him to climb as well as lift heavy pipe. The record would indicate that claiman has some experience as a carpet layer and has cleaned furniture, windows, floors, walls and ceilings for many years. Claimant testified that he intends to keep on working for defendant and in the stipulation it is shown that claimant would probably have some security in that he is an officer and part owner in the defendant. Based on the above as well as claimant's functional impairment, it is determined that claimant has received a twenty-five percent permanent partial disability to the body as a whole.

The final question which has been raised by the parties is whether or not the Second Injury Fund is liable for any of claimant's present disability. Dr. Flapan testified that after operation in 1972 an examination showed that the claimant's wrist was almost normal and pronation and supination were unrestricted. The claimant has not gone back to see Dr. Flapan and testified that he had no pain or loss of use of his wrist until the 1976 injury. Therefore, it is found that claimant did not have any permanent disability arising out of the 1972 injury.

* * *

Signed and filed this 18th day of May 1979.

DAVID E. LINQUIST
Deputy Industrial Commissioner

No Appeal.

JOSEPHINE ROSS,

Claimant,

vs.

SIOUX QUALITY PACKERS, DIVISION of ARMOUR & COMPANY,

Employer,
Self-Insured,

and

THE SECOND INJURY FUND OF IOWA,

Defendants.

Review-Reopening Decision

This is a proceeding in review-reopening brought by the claimant in connection with an industrial injury that occurred on November 15, 1976.

* * *

Two issues require resolution in this matter. The first issue being the nature and extent of the claimant's disability, if any, that she incurred as a result of the industrial injury of November 15, 1976. Secondly, as to whether or not the injury sustained by the claimant November 15, 1976 brings her within the purview of the Second Injury Fund as contained in §85.63.

There is sufficient evidence contained in this record to make the following statements of facts:

Claimant's age, 54, married, completed the sixth grade, began her employment career for the defendant Armour & Company, in 1945. The claimant fell at her work station on February 20, 1975. As a result of that fall a hearing was held before Deputy Industrial Commissioner Alan R. Gardner, wherein the claimant was awarded five percent (5%) permanent partial disability for the functional impairment sustained by her to the right upper extremity.

The claimant testified that she was unable to perform acts of employment until June 1, 1976. On November 15, 1976 the claimant fell at her work station again alleging that she injured her knees, hip and shoulders and her right upper extremity. The defendant Sioux Quality Packers made appropriate payments for a period of disability beginning on November 16, 1976 and ending on December 20, 1976. The claimant has not performed any acts of gainful employment since that date.

The issue requiring determination is the nature and extent of the claimant's disability as it relates to the injury of November 15, 1976.

Claimant has been under the treatment of her personal physician, William H. Johnson, M.D., of Omaha, Nebraska, a fellow of the American College of Surgeons who describes claimant as being totally and permanently disabled. His diagnosis as contained in his most recent report of April 9, 1978, being the first page of joint exhibit 1, is as follows: "Chronic sprain left elbow. Carpal tunnel syndrome left hand and wrist, postoperative status. Hypertensive heart disease."

The company retained physician, Albert D. Blenderman, M.D., an orthopedic surgeon, examined the claimant January 14, 1977. His diagnosis is as follows: "1. Mild cervical ligament strain. 2. Contusion left knee superimposed on pre-existing arthritis. 3. Healed radial head fracture, left elbow, asymptomatic."

Claimant, in describing the pain that she is suffering from when an attempt is made to resume her employment, testifies on page 13, line 6 of the transcript of proceedings as follows:

> But it hurt so bad I had to lay my knife down and use my right arm all the time. Then I had to walk around and hang the meat up, we put the trimmings in a bucket, fill up the bucket. It weighed thirty pounds and fill it up. Then you had to walk around to lift and I couldn't do it.

Claimant further complained of discomfort in her left shoulder and left knee. None of the examining physicians are able to find a basis for the claimant's subjective complaints as they relate to foot, knee and arm complaints.

The claimant has the burden of proving by a preponderance of the evidence that the injury of November 15, 1976 is the cause of the disability on which she now bases her 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 cutting edge of the controversy presented by this record is the weight that is to be given to the opposing medical opinions that are contained in this record. Due to his experience as an orthopedic surgeon the weight of the testimony of Albert Blenderman, M.D., is given the greater weight in this decision.

There being an absence of proof disclosing a permanent injury to another member as contemplated by §85.64, no award under the Second Injury Fund is possible.

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

1. That the claimant sustained an industrial injury on November 15, 1976.

2. That as a result of the aforesaid industrial injury, the claimant was unable to perform acts of gainful employment from November 16, 1976 until January 14, 1977 for a period of eight weeks and four days.

3. That the source of the claimant's inability to perform acts of gainful employment is found to be conditions that are unrelated to the industrial injury under consideration such as the pre-existing arthritis and hypertension.

4. That this record fails to contain sufficient evidence connecting the claimant's complaints of numbness in the left arm and fingers together with the subjective complaints of discomfort in the claimant's left shoul-

der to the industrial injury.

WHEREFORE, it is ordered that the defendant pay the claimant a period of temporary total disability of a duration of eight weeks four days . . . .

* * *

Signed and filed this 6th day of September 1978.

HELMUT MUELLER
Deputy Industrial Commissioner

No Appeal.

SUSAN K. ROSS,

Claimant,

vs.

RALPH ROSS & DARLENE ROSS,

Employer,

and

INSURANCE COMPANY OF IOWA,

Insurance Carrier,
Defendants.

Arbitration Decision

This is proceeding in arbitration brought by the claimant, Susan K. Ross, against Ralph Ross and Darlene Ross, alleged employers of claimant's decedent, Craig Ross, and the Insurance Company of Iowa, the insurance carrier, to recover compensation under the Iowa Workers' Compensation Act by virtue of an alleged industrial injury which occurred on September 20, 1977.

* * *

The record consists of the testimony of Susan K. Ross; the testimony of Dennis D. Ross; the testimony of Ralph Ross; the testimony of Richard Jaacks; the deposition of Lee Barnes; and claimant's exhibits one through nine inclusive.

Claimant's decedent, Craig Ross, died on September 20, 1977 as a result of injuries received in a motor vehicle accident. Claimant's decedent was the son of Ralph and Darlene Ross, the defendants. Dennis Ross was the brother of Craig Ross. Susan K. Ross was married to Craig Ross on November 29, 1975, and was married to him at the time of his death, and as surviving spouse, is conclusively presumed dependent. See §85.42, Code of Iowa. Meghan Sarah Ross was born on October 1, 1976 and is the daughter of Susan and Craig; Chad Douglas Svendsen was born on February 17, 1968 and is the son of Susan and her former husband, Douglas Elmer Svendsen.

Craig, Dennis, and Ralph Ross all farmed in the Estherville area. Craig farmed land near Estherville. The farm was 320 acres and farmed on a share basis with one Niel Hand as lessor, for the trust of Craig's Aunt Hazel. Ralph and Darlene Ross held title to 280 acres about 20 or 25 miles from Craig's farm. Dennis Ross, another son, farmed 320 acres within three miles of the Ralph Ross farmstead. "Dennis' farm" was held by the "Ross Trust" with Ralph Ross as trustee for unspecified beneficiaries. This farm was also farmed by Dennis on a share basis with the Trust.

The nature of the relationship between Craig, Dennis and Ralph was close, based upon their familial and occupational ties. Ralph Ross, having farmed for all his life, had acquired much equipment incident to a farming operation. Dennis has farmed for 8 years and Craig for 3 or 4 years. Dennis was in his early thirties and Craig was 27 at the time of his death.

Ralph Ross would supply equipment, know-how, and labor to the two sons' farms. Dennis and Craig would provide labor to the farm of Ralph Ross. Ordinarily, Ralph Ross would make the day-to-day decisions with regard to the apportionment of time, labor and equipment on an informal basis, and all three farms would be farmed by the three men with each man taking the fruits of the harvest which were grown on his land. For greater efficiency, there would be a division of labor. Craig would often grind feed for himself and his father. Dennis, however, bought processed feed. Craig would often leave his farmstead in the early morning to help farm at Dennis' or his father's. When Craig was in the vicinity of his father's, he would eat lunch there. Dennis would ordinarily eat lunch at his own farm when work was being done at his farm or his father's farm. Naturally, no accounting was made of the value of services or meals, but it can be fairly said that some value can be attributed to these items, both in consideration of occupational and familial relationships. No money changed hands. Richard Jaacks worked intermittently for Ralph Ross. He is employed at a local supermarket and for many years has worked on the Ross farmsteads on his day off and during his vacation.

On September 20, 1977, Craig Ross left his farmstead and proceeded to Ralph's farm. He ground feed for his father's use, and later went to Dennis' farmstead to see if it was necessary to assist Dennis in combining. When Craig arrived at Dennis', he jumped aboard the combine where a discussion was held between Dennis and Craig while combining continued. It was ultimately decided that Craig would return to his father's, eat lunch, and grind more feed. This discussion took place between about 11:00 A.M. and 11:30 A.M. While Craig was going back to his father's he was involved in a motor vehicle collision with one David Brandt, and Craig died from injuries which he received in that collision.

The Insurance Company of Iowa had issued a policy of Workers' Compensation Insurance to Ralph and Darlene Ross, said policy being effective from January 1, 1977 to January 1, 1978. This policy was admitted into evidence as claimant's exhibit 5.

The issue for determination is whether the claimant's decedent was excluded from coverage under the Iowa Workers' Compensation Act by operation §85.1(3), Code of Iowa, or was included by operation of §85.1(5), Code of Iowa.

Prior to January 1, 1974, persons engaged in agriculture were excluded from coverage under the Workers' Compensation Act. After that date certain employees were covered. §85.1(3) was amended so that at the time of the death of claimant's decedent, this subsection provided as follows:

> 3. Persons engaged in agriculture, insofar as injuries incurred by employees while engaged in agricultural pursuits or any operations immediately connected therewith whether on or off the premises of the employer, except:
>
> a. This chapter shall apply to such persons not specifically exempted by paragraph "b" of this subsection if at the time of injury such person is employed by an employer whose total cash payroll to one or more persons other than those exempted by paragraph "b" of this subsection amounted to one thousand dollars or more during the preceding calendar year.
>
> b. The following persons or employees or groups of employees shall be specifically included within the terms of the exception from coverage of this chapter provided by this subsection:
>
> (1) The spouse of the employer and parents, brothers, sisters, children and stepchildren of either the employer or the spouse of the employer; and
>
> (2) Any person engaged in agriculture as a farm operator or spouse of such farm operator or parents, brothers, sisters, children and stepchildren of either such farm operator or spouse while exchanging labor with another farm operator or spouse of such other farm operator or parents, brothers, sisters, children, and stepchildren of either such other farm operator or spouse for the mutual benefit of any or all such persons; and
>
> (3) The president, vice president, secretary, treasurer, of a family farm corporation and their spouses and their parents, brothers, sisters, children and stepchildren of such officers and their spouses who are employed by such corporation, the primary purpose of which, although not necessarily the stated purpose, is farming or ownership of agricultural land, and while such officer or person related to the officer is engaged in agricultural pursuits or any operation immediately connected therewith whether on or off the premises of the employer.

The claimant's decedent was a child of the employer. He was, therefore, excluded from coverage under §85.1(3). §85.1(5) provides that the individuals mentioned as being excluded by operation of §85.1(3)(b) may be included provided a specific inclusion is in the provisions of the policy. The testimony and evidence elicited reveals that no such provision or endorsement was present.

This tribunal is vested with the power to decide law questions that arise in matters properly before it. *Travelers Insurance Company v. Sneddon,* 249 Iowa 393, 86 N.W.2d 870. The court in *Bair v. Blue Ribbon Inc.,* 256 Iowa 660, 129 N.W.2d 85 held that the proper forum for the determination of the liability of an insurer under a voluntary endorsement to a workers' compensation policy providing benefits to one not deemed an employee under the Workers' Compensation Act was in District Court, and not in the industrial commissioner's office. *Bair,* however, does not touch the issue present in the instant case since *Bair* involved a dispute regarding the inclusion of a class which was, by definition, excluded from coverage. In the instant case the excluded class (family members engaged in agriculture) is permitted to be included within the Act by operation of §85.1(5). In *Bair* no such election for coverage was permitted to be made under the provisions of the Act then in effect. It is held that this tribunal has the jurisdiction to adjudicate whether an endorsement or coverage existed in the instant case.

It is held that the policy of Workers' Compensation Insurance which existed in the instant case did not specifically include that class of persons which included claimant's decedent.

WHEREFORE, it is found that the claimant failed to sustain her burden of proof.

* * *

Signed and filed this 18th day of October, 1978.

JOSEPH M. BAUER
Deputy Industrial Commissioner

Appealed to Commissioner: Affirmed
Appealed to District Court: Pending.

SUSAN K. ROSS,

Claimant,

vs.

RALPH ROSS and DARLENE ROSS,

Employer,

and

INSURANCE COMPANY OF IOWA,

Insurance Carrier,
Defendants.

Appeal Decision

This is a proceeding brought by claimant appealing a proposed decision in arbitration wherein claimant was denied benefits under the Iowa Workers' Compensation Act.

* * *

Claimant's first argument on appeal is that "exclusion of family member -- farm labor in the workers' compensation act is unconstitutional as a denial of equal protection of the law under the U.S. and Iowa Constitutions." This agency has previously held that no ruling will be made on the constitutionality of the statute it is charged with administering. Administrative agencies must presume the laws under which they operate to be valid, and they must wait

for a judicial determination to invalidate challenged legislation. *Welter v. Zelezny,* Iowa Industrial Commissioner, (Decision filed Nov. 29, 1977).

Claimant's second argument is that "claimant's decedent was not excluded from coverage under the Iowa Workers' Compensation policy purchased by the employer." As claimant correctly points out, the opinion of the Iowa Supreme Court in *Travelers Insurance Co. v. Sneddon,* 249 Iowa 393, 86 N.W.2d 870 (1957) at 395, ____, stated that "the industrial commissioner has only such powers as are expressly conferred by statute and those reasonably to be implied therefrom." It is believed that this pronunciation allows the commissioner to interpret contracts, but not to reform them. This extends also to what claimant refers to as the "dominate purpose" rule for to make such a finding would be for the purpose of reforming the insurance contract, which is beyond the jurisdiction of this agency. *Bair v. Blue Ribbon, Inc.,* 129 N.W.2d 85 (Iowa 1964).

* * *

THEREFORE, IT IS ordered that claimant take nothing from these proceedings.

* * *

Signed and filed this 5th day of February, 1979.

ROBERT C. LANDESS
Industrial Commissioner

Appealed to District Court: Pending.

DIANE ST. GERMAIN,

Claimant,

vs.

COLLINS RADIO

Employer,
Self-Insured,
Defendant.

Ruling

BE IT REMEMBERED that on June 14, 1979 defendant herein filed an application for permission to amend its answer filed February 20, 1979 and the amendment to answer. Said amendment raised a statute of limitations defense pursuant to Code section 85.26. No resistance by the claimant herein has been filed to date.

Iowa Rule 88 of Civil Procedure provides that:

> 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. Leave to amend, including leave to amend to conform to the proof, shall be freely given when justice so requires.

A court should be liberal in permitting an amendment of an answer to raise the statute of limitations defense. *Conklin v. Towne,* 204 Iowa 916, 216 N.W.264 (1927).

WHEREFORE, defendant's application for permission to amend its answer is hereby approved.

Signed and filed this 27th day of June 1979.

LEE M. JACKWIG
Deputy Industrial Commissioner

No Appeal.

CAROL J. SAILER,

Claimant,

vs.

THE QUAKER OATS COMPANY,

Employer,

and

IDEAL MUTUAL OF NEW YORK,

Insurance Carrier,
Defendants.

Arbitration Decision

This is a proceeding in arbitration brought by the claimant, Carol J. Sailer, against her employer, Quaker Oats Company, and its insurance carrier, Ideal Mutual of New York, as a result of an alleged injury of April 28, 1977.

* * *

Although the pre-hearing order mentioned only the extent of disability as an issue, at the hearing the parties changed the nature of the issues and it was agreed that they were as follows:

1. Whether claimant sustained an injury which arose out of and in the course of the employment.
2. If so, whether there is a causal connection between that injury and any subsequent disability.
3. The extent of permanent partial disability, if any.

The claimant testified that on April 28, 1977, she was cutting cases of cereal open on the seventh floor of the Quaker Oats plant in Cedar Rapids. In so doing, she cut her finger and started out for the first aide room. Because the elevators were not working, she went to a manlift. On the way down, at the fourth floor, she felt light headed and remembers nothing further until she woke up in the hospital at 8:00 A.M., some four hours later. She was told that she was found on the floor in the basement some six feet from the manlift. When she woke up in the hospital, she had pains in her back and a head injury, including some broken teeth.

She was treated by two dentists, by William Basler, M.D., a Dr. Geelan, Gary Van Slyke, M.D., and Gerald J. Shirk, M.D. She also saw a psychiatrist on the recommenda-

tion of Dr. Shirk.

Claimant testified further that when she returned to work her back continued to bother her and that it was still causing her problems (a degree of constant pain) at the time of the hearing. In her work, she must lift bags weighing up to 100 pounds.

She denied any prior back injury and denied that she was suffering from the results of a fall she had had at work prior to the injury date.

The documentary evidence shows that on January 9, 1976, claimant injured her left knee when she fell while roller skating. The personnel file shows that on August 3, 1976, she hurt her back and left wrist when she slipped on a slippery floor; on October 9, 1976, she slipped and fell "flat on her back"; on October 17, 1976, she sprained her neck when she slipped in a puddle of water.

A personnel report also shows that on January 6, 1977, she injured her shoulder and that the diagnosis was muscle spasm. On May 24, 1977, W. R. Basler, M.D. saw claimant and stated that the "impression is Myofacial Pain Syndrome of the cervical, thoracic and lumbo-sacral [sic] spine, inner ear disease, anxiety-depression reaction (possibly secondary to the above). Prognosis guarded." Dr. Basler also saw claimant on June 2 and 18, 1977.

On May 26, 1977, Dr. Van Slyke signed a return-to-work slip showing care from May 25 to May 26, 1977 and a return-to-work date of May 31, 1977. On May 31, 1977, Dr. Basler signed a return-to-work slip for that date with the restriction that claimant should avoid the manlift. Claimant missed some more time from work, some seven days, and on July 11, 1977, Dr. Basler returned her to work.

There is no record of the treatment or opinion of a treating physician at the time of the injury.

Dr. Naden, a qualified orthopedic surgeon, saw claimant twice, both times for an examination, on January 22 and November 28, 1979. His written report of the January 1979 examination concluded that claimant had sustained multiple injuries in her fall and that she had healed and recovered "to a maximum degree without any further necessity of medical treatment." As to the disposition, Dr. Naden says:

> At the present time I feel that this woman's examination concerning her head, neck and back was within normal limits and I found no evidence of any significant physical impairment with these structures. This woman states that she cannot perform to the same capacity that she was able to pre-injury and I think the problem here is due to a chronic lumbosacral strain. I am unable to relate this to anything more than just an overweight condition with poor posture. It is conceivable that the injury could have aggravated this pre-existing condition.

At the examination of November 28, 1979, the diagnosis is: "My diagnosis here would be post-traumatic lumbosacral strain secondary to a minor injury while on the job."

The deposition showed that Dr. Naden took a history, did a physical examination and took x-rays. As to his January, 1979 diagnosis, he states:

> Well, I think probably what happened here is that I think initially she probably had strained her back one way or another at the time of the injury, but as far as I am concerned I felt she had probably recovered from it completely within, say, like a six to eight-week period of time (p. 10).

Dr. Naden did not believe that the diagnosis in November of 1979 was contradictory (p. 11), and that claimant had recovered from the work injury. Throughout the deposition, Dr. Naden referred to claimant's condition of overweight as contributory to her low back problems and as being a cause of back strain.

After the deposition, claimant's attorney had a discussion with Dr. Naden in the presence of defendants' attorney. Defendants' attorney objected to any further questioning of the doctor on the basis that it would be impeachment of claimant's own witness. Defendants' objection is overruled because it appears Dr. Naden was defendants' witness.

In the further cross-examination this question appears: "Do you presently feel that you could give her a two or three percent permanent partial disability as a result of her traumatic injury?" (p. 25) Dr. Naden testified that the rating would be two percent based on "sequelae of having an acute injury to her lower back, similar to what she had. Now, this would include some fibrosis and scarring tissue in her lower back as a result of this injury" (p. 25).

On June 20, 1979, Dr. Geelan reported the following diagnosis as a result of the history, physical examination, and x-rays:

> Due to the traumatic injury, the patient auffered [sic] much spinal structural deviation from the normal. Posterior partial vertebral subluxations were found though x-ray, orothopedic [sic] and neurologic instrumentation examination and motion palpation at cord levels, 5th lumbar, 6th & 10th Thoracic, and 7th Cervical. Due to these misaliged [sic] vertebrase an improper nerve supply, neuralgia, evolved to associated musculature, organs, tissues and cells; therefore, producing health related symptoms. A loss of the normal motion, function and health.

As a result of the injury, Dr. Geelan accessed a permanent partial disability rating of seven percent of the body as a whole.

In his deposition, Dr. Geelan testified that he first came in contact with the claimant in "about 1976 sometime" for purposes of "health maintenance care" (p. 4). Within about one month of the injury, Dr. Geelan treated claimant for her injuries. In response to a question as to the nature of the symptoms, he stated:

> Complete loss of -- well, a loss of motion of the lumbar spine, a loss of freedom of movement of the lumbar spine while -- like in walking or working or carrying on her normal activities. No longer was she freely movable. She had restrictions and couldn't move as well as she had in the past. Bruises, just tissue

bruises from the fall of both the lumbar spine and cervical spine, neck, shoulders, et cetera. Other symptoms related to the lumbar spine were internal symptoms, functions, body functions all of a sudden weren't working as well as what they had. Taking into note that your nervous system is basically what we're dealing with here -- (pp. 6 and 7)

As to objective symptoms, Dr. Geelan stated:

> When you make the statement you had a loss of the normal structure of a person's spine, that can be verified on motion, palpation, movement of that patient, normal ranges of motion, orthopedic examination, orthopedic checks, x-ray, et cetera, and just physical examination (p. 7).

In the deposition, Dr. Geelan repeated the estimate of seven percent disability to the body as a whole as a result of the injury.

There is testimony on cross-examination as to whether or not claimant injured herself in a fall in 1976. This cross-examination was based in part on a report of Dr. Sherman (Dr. Geelan's partner) said report being marked exhibit 8 at the Geelan deposition. At the end of the deposition, claimant's attorney objected to the report becoming a part of the record, stating it was hearsay. That objection is sustained. (The deposition contains three exhibits, 1, 2, and 8. These are attached to the deposition, and there is no indication of what happen to exhibits 3-7, if they ever existed.)

It should be added that an August 31, 1979 report by T. R. Sherman, D.C., which was admitted as a part of the record at the time of the hearing, stated that as of December 1978 he did not anticipate clamant would have any permanent disability as long as she continued "periodic spinal corrections."

The first question is whether claimant's injury arose out of and in the course of the employment. The record is not clear as to exactly how far she fell. She states she began to feel dizzy at the fourth floor; the first report of injury states that she fell from between floors one and two to the basement. The Iowa Supreme Court has not ruled on the compensability of idiopathic falls. Here, claimant fainted for an unknown reason and fell from the manlift to the concrete floor. With respect to this type of injury, Professor Larson states:

> The basic rule, on which there is now general agreement, is that the effects of such a fall are compensable if the employment places the employee in a position increasing the dangerous effects of such a fall, such as on a height, near machinery or sharp corners, or in moving vehicle. *Arthur Larson, Workmen's Compensation Law,* §12.10, pp. 3-254 to pp. 3-256.

According to Larson, of the 24 states that have ruled on the question, 21 favor compensability and 3 deny it. In addition, the federal rule and the rules in England and Scotland favor compensability.

That rule will be followed in this case. Here claimant clearly comes within the rule as she was on a height and riding a dangerous machine. Thus it is found that claimant's injury arose out of and in the course of her employment.

The claimant has the burden of proving by a preponderance of the evidence that the injury of April 28, 1977 is the cause of her disability on which she now bases her claim *Bodish v. Fischer, Inc.,* 257 Iowa 516, 133 N.W.2d 867 (1965). *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 testimony. *Bradshaw v. Iowa Methodist Hospital,* 251 Iowa 375, 101 N.W.2d 167 (1960).

In this case there perhaps is a mixed question of causal relationship and extent of disability rather than separate questions. The matter of cause will be handled on the assumption that a permanent disability exists. Defendants stressed certain prior incidents of claimant having back problems, and one assumes this evidence was developed for purposes of questioning causal connection as well as for impeachment. The record clearly shows that claimant did have some prior episodes of low back problems but there was no evidence that said problems were anything but temporary and minor. Claimant's disinclination to concede what was merely a matter of record may be laid to a zealous desire to show that her back disability was soley attributable to the April, 1977 injury; further, though, this lack of frankness did not appear to extend beyond the matter of prior back injuries. On the whole, claimant's testimony is of sufficient weight to convince one that the prior back problems were not disabling and that her April 28, 1977 injury still causes pain. Both the reluctant Dr. Naden and Dr. Geelan do connect up the injury with a certain extent of disability.

Functional disability is an element to be considered in determining industrial disability which is the reduction of earning capacity, but consideration must also be given to the injured employee's age, education, qualifications, experience and inability to engage in employment for which he is fitted. *Olson v. Goodyear Service Stores,* 255 Iowa 1112, 125 N.W.2d 251 (1963). *Barton v. Nevada Poultry,* 253 Iowa 285, 110 N.W.2d 660 (1961).

Industrial disability is defined in *Diederich v. Tri-City Railway Co.,* 219 Iowa 587, 593, 258 N.W.2d 899 (1935), 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 *Martin, 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. * * * *

See also *McSpadden v. Big Ben Coal Co.,* filed by the Iowa Supreme Court January 23, 1980 and *Blacksmith v. All-American, Inc.,* filed March 19, 1980. In *McSpadden,* the court emphasizes that functional disability, while a consideration, has not been the final criterion of industrial disability. In the instant case, though, the functional impairment appears to be the greatest of claimant's problems. Indeed, the other considerations of age, education, etc., all work in favor of claimant's being able to increase her earning capacity as well as any other worker. Here, with respect to functional disability, one finds two rather low ratings, those being two percent by Dr. Naden and seven percent by Dr. Geelan. The other main factor favoring an industrial disability of some extent is that claimant's work involves lifting heavy objects. Albeit she may or may not continue such employment, her work history thus far shows a tendency toward heavy work. There is no evidence that her earning capacity has been or will be reduced because the employer believes she is disqualified from any type of work. See *Blacksmith, supra.*

Although claimant's evidence did not disclose much information about the other factors of industrial disability, one sees that she is 28 years old and that she is well spoken and intelligent, suggesting at least a high school education. Considering all of the factors of industrial disability it is found that claimant has a permanent partial disability to the body as a whole of four percent for industrial purposes.

The parties stipulated that the bills for medical and allied services were fair and reasonable and that certain amounts had been paid by the Prudential Insurance Company toward these bills. To save costs, the undersigned did not order a transcript and perhaps missed something of the stipulation. However, the notes do not indicate that the Prudential payments were such as would qualify under §85.38, Code as a credit, and there was no stipulation and no evidence that the bills were for charges for necessary treatment. The purpose of the compensation law is to provide payment for such bills, and the parties should work this out among themselves.

* * *

Signed and filed at Des Moines, Iowa this 26th day of March, 1980.

BARRY MORANVILLE
Deputy Industrial Commissioner

No Appeal.

MICHAEL SAYLOR,

Claimant,

vs.

SWIFT & COMPANY,

Employer,
Self-Insured,

and

SECOND INJURY FUND,

State of Iowa,
Defendants.

Review-Reopening Decision

This matter came on for hearing at the offices of the Iowa Industrial Commissioner in Des Moines, Iowa, on July 27, 1979 and was fully submitted on September 26, 1979.

* * *

The issues for resolution are:

1) What is the nature and extent of claimant's disability?

2) Is the claimant entitled to Second Injury Fund benefits?

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

Claimant received an injury arising out of and in the course of his employment on or about September 5, 1978. He was lifting acetylene tanks and while so doing, he fell down and landed in a kneeling position. Claimant stated that he had extreme pain in his right knee. He was treated by R. W. Hoffmann, M.D., who noted that the *left* knee was swollen and that a lateral collateral ligament was quite loose. An appointment was made with William R. Boulden, M.D., an orthopedic surgeon, who saw claimant on September 12, 1978. His diagnosis was that the claimant had degenerative arthritis of the left knee and internal derangement of the left knee. Claimant was admitted to Lutheran Hospital on September 17, 1978. An arthroscopy of the left knee was performed revealing degenerative arthritis of the medial compartment of the left knee and a lateral cartilage tear of the lateral compartment of the left knee. This was thought to be of recent origin because of blood inside the knee joint.

Because of the right knee complaints, an arthoscopy of the right knee was also performed which revealed a cartilage tear in the medial meniscus of the right knee, also thought to be of recent origin.

Surgery was performed on the left knee on September 18, 1978 (lateral meniscectomy) and the claimant was released from the hospital on September 21, 1978. It was recommended that claimant have surgery on his right knee *in futuro,* but this was never performed. On September 28, 1978 the stitches were removed. Some "usual postoperative" complaints were voiced. Dr. Boulden concentrated on the left knee. Claimant was released to return to work on October 16, 1978 and claimant did so but had to leave because his left knee started swelling and giving out on him. The right knee also hurt, but the main problem was with the left knee. On October 24, 1978, Dr. Boulden mentioned that claimant might have to be retrained for more

sedentary activities. Claimant was again seen in December of 1978 and February of 1979. Compensation payments were terminated on November 8, 1978, apparently on the basis of the permanent impairment ratings given by Dr. Boulden that claimant had a 50 percent impairment to the left leg (subjective). On December 15, 1978 Dr. Boulden felt claimant had a 10 percent permanent partial impairment because of the September 1978 injury. A five percent permanent partial impairment was ascribed to the right knee because of the injury.

Claimant has not returned to gainful employment.

On August 14, 1979 claimant was examined by Donald W. Blair. Dr. Blair felt that claimant had a five percent permanent partial impairment to the right lower extremity. He also felt claimant had a *total* impairment to the left lower extremity of 25 percent, 10 to 15 percent of which pre-existed the September 1978 injury. He felt that the disability rating to the right knee pre-existed the September 5, 1978 injury. This conclusion is apparently based on a report from the University of Iowa Hospitals dated July 1, 1974 in reference to the right knee. This report states that the disability to the right knee is "not more than" five percent based upon a medial meniscus problem. However, claimant testified that he didn't have any right knee problems or surgery as reported by the University. This testimony, coupled with the testimony of Dr. Boulden with regard to the recency of the right knee injury, leads the undersigned to the conclusion that claimant's prior *right* knee problems did not cause him problems or permanency.

A brief summary of the various problems had by the claimant is in order to resolve the question of eligibility for Second Injury Fund benefits:

1) Football injury, autumn 1970 resulting in left medial meniscus surgery in April 1971.

2) Car accident resulting in left knee injury (no surgery).

3) Fall of 1971--football injury resulting in removal of free bodies in the medial and lateral compartments of the left knee.

4) June 1972--workers' compensation injury at Weissman Steel Supply to the left knee resulting in a 20 percent permanent partial impairment to the left leg. Surgery was performed to repair a fracture in the supracondylar area of the left knee.

5) March 1973 surgery--arthrotomy and partial synovectomy, left knee.

6) June 1973--left thigh injury.

7) January 1974--left knee injury.

8) 1978--back injury

Before we approach the eligibility for Second Injury Fund benefits, it must be determined what the employer's obligation is in the instant action.

The claimant has the burden of proving by a preponderance of the evidence that the injury of September 5, 1978 is the cause of his disability on which he now bases his claim. *Bodish v. Fischer, Inc.,* 257 Iowa 516, 133 N.W.2d 867 (1965). *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).

While a claimant is not entitled to compensation for the results of a pre-existing injury or disease, the mere existence at the time of a subsequent injury is not a defense. If the claimant had a pre-existing 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. *Nicks v. Davenport Produce Co.,* 254 Iowa 130, 115 N.W.2d 812 (1962). *Yeager v. Firestone Tire & Rubber,* 253 Iowa 369, 112 N.W.2d 299 (1961).

Based on the foregoing principles, it is found that claimant has established his claim to permanent partial disability compensation for the September 5, 1978 injury. We have followed the testimony of Dr. Boulden as outlined above and find that permanency exists to both legs because of this injury. Dr. Boulden's testimony with regard to the recency of the right knee injury is most persuasive.

Prior to 1974, Iowa Code section 85.34(2)(s) read:

> 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.

Iowa Code section 85.34(2)(u), unnumbered paragraphs one and two, read and still reads:

> 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.
>
> 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.

Prior to 1973, Iowa Code section 85.34(3), unnumbered paragraph one, regarding permanent total disability, read:

> Compensation for an injury causing permanent total disability shall be upon the basis of sixty-six and two-thirds percent per week of the employee's average weekly earnings, but not more than a weekly benefit amount, rounded to the nearest dollar, equal to forty-six percent of the state average weekly wage paid employees as determined by the Iowa employment security commission under the provisions of section 96.3 and in effect at the time of the injury provided that 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 for a period not to exceed five hundred weeks.

When a claimant has suffered specific injuries, the statutory provision as to compensation controls. When the injuries consist of general bodily injuries, the percentage of disability must be computed and fixed, and should be evaluated from an industrial and not exclusively a functional standpoint. *Martin v. Skelly Oil Co.,* 252 Iowa 128, 106 N.W.2d 95 (1960). Industrial disability is the reduction of earning capacity, not merely functional disability. *Barton v. Nevada Poultry Co.,* 253 Iowa 385, 110 N.W.2d 660 (1961). It appears that if the disability is encompassed by a specific scheduled injury, the disability is to be determined from a functional standpoint. If the disability is not scheduled, the disability is determined from an industrial standpoint, where consideration may be given not only to functional impairment but also to the injured employee's age, education, 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 (1963).

Under the old law all three sections quoted above must be considered together in relating an injury to both legs caused by the same accident to an industrial disability. Under section 85.34(2)(s), prior to 1974, an injury to both legs, "shall equal a permanent total disability." Iowa Code section 85.34(2)(u) provided that if the actual disability was less than the total disability provided for in specified sections of the Code, the disability could be proportionately diminished. Thus, a proportionate share of permanent disability under section 85.34(2)(s), Code of 1971, could be determined when appropriate.

Section 85.34(3), Code of 1971, concerns permanent total disability, which is the permanent total disability referred to in section 85.34(2)(s). The Iowa Supreme Court has consistently held that for injuries outside of the specific schedules the determination is industrial disability--reduction of earning capacity, and not mere functional disability. *Dailey v. Pooley Lumber Co.,* 233 Iowa 758, 10 N.W.2d 569 (1943). It appears, then, that an injury to two legs caused by the same accident was entitled to be evaluated industrially under the old law. Pursuant to section 85.34(2)(u), Code of 1971, such an industrial disability would also be proportionately diminished if it was less than a total disability. The claimant would be entitled to have the disability to his legs determined industrially under sections 85.34(2)(s), 85.34(2)(u) and 85.34(3) had not the Code of Iowa, in respect to those sections, been amended in recent years.

During the 1973 session the Sixty-Fifth General Assembly amended Iowa Code section 85.34(3) to delete the words "for a period of time not to exceed five hundred weeks" from the end of unnumbered paragraph one of the section. By this action a permanent total disability is to be compensated weekly during the period of the employee's disability. This amendment created the situation where an employee who had lost, for example, both legs or a leg and a foot in a single accident would be compensated during the period of his disability with no five hundred week limitation. The Sixty-Fifth General Assembly addressed this situation and proceeded to amend Iowa Code section 85.34(2)(s) to read:

> 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 five hundred weeks and shall be compensated as such, however, if said employee is permanently and totally disabled he may be entitled to benefits under subsection three (3) of this section.

Under Iowa Code section 85.34(2)(s) as it now stands, the loss of both legs or a leg and a foot caused by the same injury is no longer compensated as if it were a permanent total disability unless it is, in fact, such. If an injury to both is anything less than a permanent total disability, under Iowa Code section 85.34(2)(s) the disability is compensated as a scheduled disability using the five hundred week schedule.

An injury to both legs caused by the same accident, as is the case here, does not fall under the "other" category of permanent partial disability entitling the employee to a body as a whole disability pursuant to Iowa Code section 85.34(2)(u). Such an injury falls explicitly within Iowa Code section 85.34(2)(s). If the injury proves to be anything less than a permanent total disability, under Iowa Code section 85.34(2)(s) the injury is compensated on a five hundred week schedule. The record indicates that claimant has not suffered a permanent total disability, so claimant's injury to his legs, caused by the single accident in this case, is a scheduled disability under Iowa Code section 85.34(2)(s). Thus, claimant's injury should not be evaluated from an industrial disability standpoint, but rather from a functional impairment standpoint only.

It is, therefore, found that claimant suffered a six percent permanent partial impairment to the body as a whole as a result of the September 5, 1978 injury entitling him to 30 weeks of compensation from defendant-employer.

Section 85.64, Code of Iowa, states:

> 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.

This section entitles claimant to additional compensation when, as here, claimant has previously lost the use of one member and loses another such member.

In the instant case claimant had a previous loss to the left leg and now has a loss to the right leg (in addition to an additional loss to the left leg). Nothing in Section 85.64 bars the applicability of the statute if the injury happens to be to two such members.

When the industrial commissioner, in a Second Injury Fund case, finds as to claimant's present condition an industrial disability to the body as a whole, he must also make a factual determination as to degree to body as a whole caused by the second injury. *Second Injury Fund v. Mich Coal Company,* 274 N.W.2d 300 (Iowa 1979). The record indicates that until the September 1978 injury, the claimant was gainfully employed at a variety of occupations.

The factual issue in this case concerns the inquiry whether Saylor's present disability results from the September 1978 injury, in which event Swift & Company bears the costs, or results from a combination of the prior injuries and the September 1978 injury, in which event the Second Injury Fund bears the cost of disability which would have resulted if there had been no pre-existing disability.

The evidence before the undersigned indicates that at the present time:

1) Claimant suffered an injury to his left leg on September 8, 1978 which resulted in a loss thereto of 10 percent. As a result of the same injury he lost five percent to the right leg.

2) A 10 percent permanent partial impairment was attributed to the left leg prior to the injury of September 8, 1978 although a 20 percent loss thereto was previously paid pursuant to the Iowa Workers' Compensation Law.

The greater weight of the evidence, while apparently indicating that the ultimate result of claimant's disability resulted from the 1978 injury, clearly indicates to the undersigned that any industrial disability which claimant has can be related to the combination of the prior injuries and the 1978 injury, in which event the Second Injury Fund bears the costs of disability which would have resulted if there had been no pre-existing disability. In order to correctly determine the liability, it must be determined what industrial disability it had.

Functional disability is an element to be considered in determining industrial disability which is the reduction of earning capacity, but consideration must also be given to the injured employee's age, education, qualifications, experience and inability to engage in employment for which he is fitted. *Olson v. Goodyear Service Stores, supra; Barton v. Nevada Poultry, supra.*

Claimant, presently age 26 and single, has some post high school education particularly in the field of electronics. His prior work experience involves heavy labor and at the present time he is unemployed. After looking at the medical history in this case, if would appear that the claimant's likelihood of engaging in such labors again is nill. The claimant wishes to return to school in hopes that his eventual reemployment will involve duties of a more sedentary nature. Based upon the principles of industrial disability cited above, it is found that claimant is disabled for industrial purposes, to the extent of 30 percent of the body as a whole.

The excess payments due to claimant will be borne by the Second Injury Fund since the cumulative results of the second injury are caused as much, if not more, by the pre-existing condition as by the instant injury. A 20 percent loss to the left leg will be apportioned to prior conditions and injuries. The result then can be seen in the following computation:

30 percent of the body as a whole	150 weeks
less	
20 percent of the left leg	44 weeks
less	
6 percent of the body as a whole	30 weeks
REMAINDER	76 weeks

* * *

Signed and filed this 24th day of October, 1979.

JOSEPH M. BAUER
Deputy Industrial Commissioner

No Appeal.

CAROL SCHAEFER,

Claimant,

vs.

WINNEBAGO INDUSTRIES, INC.,

Employer,

and

GREAT AMERICAN INSURANCE CO.,

Insurance Carrier,
Defendants.

Review-Reopening Decision

This is a proceeding in review-reopening brought by the claimant, Carol Schaefer, against her employer, Winnebago Industries, Inc., and its insurance carrier, Great American Insurance Company, for additional benefits as a result of an injury which occurred on January 16, 1975.

* * *

Claimant's injury, which apparently occurred on January 16, 1975, but was admitted by the carrier as January 22, 1975, was to the right shoulder with pain radiating from

the neck to the hand. The injury occurred when the claimant pulled loose certain machine clamps that were being used to bend together wooden seat parts.

Defendants filed their answer to the petition for review-reopening on July 10, 1979 and raised by way of affirmative defense the statute of limitation Sections 85.23, Code of Iowa and 85.26, Code of Iowa. On February 11, 1980, defendants amended their answer by adding the affirmative defense of the three year statute of limitations contained in Section 86.34, Code of Iowa (1976) [sic].

It is apparent that the sole issue in this case is whether the three year statute of limitations in effect at the time of this injury, Section 86.34, 1973 Code of Iowa, bars recovery in this action.

By agreement of the parties the following facts were stipulated:

1. That claimant sustained an injury arising out of and in the course of her employment in January 1975.

2. On March 24, 1976 the workmen's compensation carrier paid by draft No. 25-088468 temporary total disability for a period of 4/7 weeks in the sum of $60.81 to the claimant which was negotiated on March 31, 1976.

3. That a memorandum of agreement was filed by the carrier and approved in April 1976.

4. That claimant's original notice and petition for review-reopening was filed with the Iowa Industrial Commissioner's office on May 2, 1979.

5. That the carrier, Great American Insurance Company has answered the petition asserting the three year statute of limitations as a bar to claimant's remedy to the review-reopening of her claim.

6. That defendants agree to pay the outstanding and unpaid medical and drug bills totaling $479.70.

The pertinent portion of Section 86.34 (1973 Code) provides:

> Any award for payments or agreement for settlement made under this chapter where the amount has not been commuted, may be reviewed by the industrial commissioner or a deputy commissioner at the request of the employer or of the employee at any time within three years from the date of the last payment of compensation made under such award or agreement . . .

Workers' compensation statutes must be liberally construed in keeping with their humanitarian objective. *Bousfield v. Sisters of Mercy,* 249 Iowa 64, 86 N.W.2d 109. The beneficent purpose is not to be defeated by reading something into it which is not there or by a narrow and strained construction. *Cedar Rapids Community School Dist. v. Cady,* 278 N.W.2d 298 (1979).

The three year statute of limitation with respect to review-reopening has been construed to be non-jurisdictional. *Paveglio v. Firestone Tire and Rubber Co.,* 167 N.W.2d 636 (1969); *Bergen v. Waterloo Register Co.,* 151 N.W.2d 469 (1967); that is, the bar of a review-reopening proceeding is an affirmative defense which must be specifically raised by means of a motion to dismiss, or where such a motion is inappropriate or overruled, by special assertion in a separate division of the responsive pleading to the claim for relief. *Secrest v. Galloway Co.,* 239 Iowa 168, 30 N.W.2d 793 (1948); See also *Pride v. Peterson,* 173 N.W.2d 549 (1970).

In this case the last payment of compensation (through February 9, 1976) was paid on March 24, 1976. (The draft was negotiated on March 31, 1976.) The three year limitation would have run by March 24, 1979. The petition to reopen was filed on May 2, 1979, and therefore was not timely. Therefore claimant is barred from pursuing her claim pursuant to Section 86.34, Code of Iowa (1973).

Any other interpretation of this section of the statute would make the language thereof meaningless. In enacting the limitation period the legislature clearly intended to preclude stale or old claims from unwarranted and continued prosecution.

* * *

Signed and filed this 21st day of February, 1980.

THOMAS R. MOELLER
Deputy Industrial Commissioner

No Appeal.

GEORGE SCHMITT,

Claimant,

vs.

WILLIAM J. GEAKE,

Employer,

and

STATE AUTOMOBILE & CASUALTY UNDERWRITERS and CONTINENTAL WESTERN INSURANCE COMPANY,

Insurance Carrier,
Defendants.

Order

NOW on this 7th day of February, 1979, the matter of claimant's notice of appeal and defendants William J. Geake, employer, and State Automobile & Casualty Underwriters, insurance carrier (hereinafter State Automobile & Casualty Underwriters), and defendants William J. Geake and Continental Western Insurance Co. (hereinafter Continental Western Insurance Co.), response to claimant's appeal come on for determination.

The deputy industrial commissioner filed his proposed arbitration and review-reopening decision on September 8, 1978. On September 12, 1978 an order was filed by the deputy correcting certain computational errors in the original decision as to transportation expenses. The order further noted that the original decision would stand as to all other aspects of the case.

This office received a letter from claimant on October 3,

1978 which expressed his dissatisfaction with the decision reached by the deputy industrial commissioner. There was no request for rehearing on appeal from the decision but a listing of some specific areas of nonacceptance of the results. On that same day, claimant's application for amended order filed by his attorney was received which sought the payment of a number of additional medical bills as well as corrections to the list contained in the decision of the deputy. State Automobile & Casualty Underwriters filed their resistance to this application on October 4, 1978 and Continental Western Insurance Co. filed their resistance on October 9, 1978. An order was filed October 17, 1978 wherein the relief requested was denied as being untimely filed except for an expert witness fee of $150.

Following a number of communications between claimant and this office, a letter was received from claimant on December 8, 1978 stating that he was no longer represented by counsel and requesting information as to how to appeal the decision of the deputy commissioner. A responsive letter was sent the same day indicating that since no notice of appeal was on file that the industrial commissioner had no power to hear an appeal. The letter further advised the claimant how to file for review-reopening.

On January 10, 1979 this office received a letter from claimant noting that he had expressed dissatisfaction with the deputy's decision in his letter filed October 3, 1978 and that due to the neglect of his attorney and his inability to get different counsel in this short period of time, the 20 days had passed. In other words, claimant felt his opportunity to appeal should be preserved as his letter received October 3, 1978 constituted sufficient notice of appeal and the 20 days passed through no fault of his own.

State Automobile & Casualty Underwriters responded to this letter on January 17, 1979 contending that the letter written by claimant was not a notice of appeal, and in the event it was found to be such, it was not filed within the 20 day period required by Industrial Commissioner Rule 500-4.27. They also filed an answer to claimant's original notice and petition on January 17, 1979. A special appearance filed by Continental Western Insurance Co. challenged the jurisdiction of the commissioner over the matter.

This office wrote to claimant on January 24, 1979 requesting claimant to respond to the filings by January 31, 1979. Claimant's response was received on January 29, 1979.

Assuming without deciding that claimant's letter to this agency filed October 3, 1978 was sufficient to constitute notice of appeal, the issue is whether or not the appeal was filed within the time period required.

Iowa Code section 86.24 provides for appeals of a deputy commissioner to the industrial commissioner.

86.24 APPEALS WITHIN THE AGENCY.

> 1. Any party aggrieved by a decision, order ruling, finding or other act of a deputy commissioner in a contested case proceeding arising under this chapter or chapter eighty-five (85) or eighty-five A (85A) of the Code may appeal to the industrial commissioner in the time and manner provided by rule. The hearing on an appeal shall be in Polk county unless the industrial commissioner shall direct the hearing be held elsewhere.
>
> 2. In addition to the provisions of section seventeen A point fifteen (17A.15) of the Code, the industrial commissioner may affirm, modify, or reverse the decision of a deputy commissioner or he may remand the decision to the deputy commissioner for further proceedings.
>
> 3. In addition to the provisions of section seventeen A point fifteen (17A.15) of the Code, the industrial commissioner, on appeal, may limit the presentation of evidence as provided by rule.
>
> 4. A transcript of a contested case proceeding shall be provided by the appealing party at his or her cost and shall be filed with the industrial commissioner within thirty days after the filing of the appeal to the industrial commissioner.

Rule 500-4.27 states:

> Appeal. Except as provided in 4.2 and 4.25, an appeal to the commissioner from a decision, order or ruling of a deputy commissioner in 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.

This rule adopted pursuant to the Iowa Code clearly states that the appealing party has 20 days in which to file a notice of appeal with the commissioner following the date on which the deputy commissioner's decision, order, or ruling is filed.

Iowa Code section 4.1(22) provides the method for computing time in applying Rule 500-4.27. It states in part:

> 22. Computing time — Legal holidays. In computing time, the first day shall be excluded and the last included, unless the last falls on Sunday, in which case the time prescribed shall be extended so as to include the whole of the following Monday . . . .

Thus, under Rule 500-4.27, the last day on which an appeal could be filed from the September 8, 1978 decision of the deputy industrial commissioner was September 28, 1978.

The Iowa Supreme Court in *Barlow v. Midwest Roofing Co.*, 249 Iowa 1358, 1360, 92 N.W.2d 406, 407 (1958) announced:

> The industrial commissioner can exercise only the powers and duties prescribed in the Workmen's Compensation Law. The legislature, of course, has the authority to create and restrict rights given workmen under the act, as well as to prescribe the power and duties of the commissioner. It must be conceded that the commissioner himself cannot extend or diminish his jurisdiction to act under this law.

Thus, Code of Iowa section 86.24 and Rule 500-4.27 are jurisdictional in nature. When the time prescribed for filing an appeal has passed, the commissioner no longer has jurisdiction to hear the appeal. In other words, the commissioner no longer has the power to act on the matter. As noted previously, the commissioner is limited to the exercise of those powers prescribed in workers' compensation law and cannot extend his jurisdiction to include matters expressly excluded by this law. *Barlow,* supra.

Even if claimant's letter is considered sufficient to be an appeal, it was not received by this office until October 3, 1978, it was not filed within 20 days of the deputy's September 8, 1978 decision as required by Rule 500-4.27. Based upon these considerations, claimant's request for an appeal must fail.

In the case sub judice, the deputy industrial commissioner also filed an "order" on September 12, 1978. The order merely corrected computational errors in the original decision as to transportation expense and also noted "that the decision rendered herein on September 8, 1978 should stand in all other respects."

The order amended the original decision and, regardless of its title, was in the nature of a nunc pro tunc order. The courts possess the inherent power to correct the record and enter a 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). In *Jersild v. Sarcone,* 163 N.W.2d 81 (1968), the Iowa Supreme Court stated that the purpose of a nunc pro tunc order or judgment is "to correct an obvious mistake or to make the record conform to an adjudication actually or inferentially made but which by oversight or evident mistake was omitted from the record." Thus, the use of the order assumes the existence of a prior judgment. Generally, notice is not 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).

More recently in *State v. Onstot,* 268 N.W.2d 219, 220, the Iowa Supreme Court stated:

> An order nunc pro tunc is allowed on a limited basis for the retroactive correction of errors or omissions in the form of prior orders. We explained such orders in *Ruth v. Clark, Inc.v Emery,* 235 Iowa 131, 134, 15 N.W.2d 896, 898 (1944):
>
> "* * * It is true that a court may make orders nunc pro tunc, but this is only done to *show now* what was actually *done then,* and its function is not to change but to show what took place. The application for an order to correct the record to show an application which was not made cannot be entertained. [Authorities]." (Emphasis added.)
>
> It is generally held an order nunc pro tunc cannot furnish the basis of extending the time in which to file an appeal. 5B C.J.S. Appeal & Error § 1956, p. 522; 4 Am.Jur.2d, Appeal and Error, § 293, pp. 783-784.
>
> Time for filing of this appeal was not extended by the so-called order nunc pro tunc. * * *

It is evident that the "order," as entitled by the deputy commissioner, did nothing but correct the amount of transportation expense awarded to claimant. This was necessitated by computational errors. The order did not alter the outcome of the case and was not prejudicial to the parties involved.

The general rule is that the entry of a nunc pro tunc order 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).

Therefore, the order filed September 12, 1978 is in essence a nunc pro tunc order which relates back to have validity from the date of the deputy's decision rendered on September 8, 1978. The nunc pro tunc entry does not act to extend the time for filing a notice of appeal of the deputy's decision under Rule 500-4.27. Thus, claimant failed to file his notice of appeal within 20 days of the deputy industrial commissioner's decision. As previously noted, this time requirement is jurisdictional in nature. Therefore, the industrial commissioner lacks the power to hear this appeal.

* * *

Signed and filed this 7th day of February, 1979.

ROBERT C. LANDESS
Industrial Commissioner

No Appeal.

GEORGE SCHMITT,

Claimant,

vs.

WILLIAM GEAKE,

Employer,

and

STATE AUTO & CASUALTY and CONTINENTAL WESTERN,

Insurance Carrier,
Defendants.

Arbitration and Review-Reopening Decision

These are proceedings in review-reopening and arbitration brought by the claimant, George Schmitt, against his employer, William Geake, and State Auto and Casualty (for an injury of February 24, 1977) and Continental Western (for an alleged injury of October 29, 1976), insurance carriers.

* * *

The issues for determination are as follows:

1. Did the claimant receive an injury arising out of and in the course of his employment on October 29, 1976, and if so, what disability, if any, resulted therefrom?

2. What disability, if any, resulted from the industrial injury of February 24, 1977?

3. What allowance should be made for medical expenses pursuant to §85.27, Code of Iowa?

4. How should the award, if any, be apportioned between the two insurers?

Claimant was employed by William Geake on October 29, 1976. Employer had a workers' compensation policy with Continental Western at that time. Claimant was lifting corn in a bushel basket and while lifting it he hurt his back. He noted pain and was treated by William Lindeman, D.C., who felt that the claimant had facet lamina syndrome of L5/S1 with associated myofascial fibrositis. The claimant, who missed four days of work, returned to his duties on November 5, 1976.

The claimant worked until February 24, 1977 without difficulty. On that date, he sustained an injury arising out of and in the course of his employment when he hurt his lower back while unloading a truckload of hay. He went to see Robert H. Mailliard, M.D., a family practitioner on February 25, 1977. Dr. Mailliard felt that the claimant had sustained a lumbar strain. The claimant was disabled from working from February 25, 1977 until March 3, 1977 when he returned to work. On March 25, 1977, he hurt his lower back at work and saw Dr. Mailliard who told him to refrain from working. The claimant did not work until April 11, 1977. On April 13, 1978, the claimant again was off work and on the next day saw Dr. Milliard, who still found no evidence of disc involvement.

The claimant was then seen by Anil K. Agarwal, M.D., an Omaha orthopedic surgeon, who admitted the claimant to the hospital for a myelogram which was negative. Dr. Agarwal thought that the claimant had chronic lumbosacral strain with a possibility of a lumbar disc syndrome.

The claimant returned to work on May 23, 1977 as a construction worker until quitting on September 15, 1977. He has not worked since. On that date he was seen by Horst G. Blume, M.D., a neurosurgeon, who did not find any evidence of a "sizable" ruptured disc and felt that the claimant had an irritation of the rami dorsalis nerves of the intervertebral joints. Dr. Blume told the claimant not to return to work and as of January 30, 1978 still felt that the claimant was disabled from working.

On October 31, 1977 the claimant was seen by Earl M. Mumford, an orthopedic surgeon. His examination culminated in his inability to form any concrete diagnosis. He thought that the claimant might have rheumatoid spondylitis, which exhibits itself in backache in the mid and low back area, stiffness and intermittent episodes of pain followed by gradual improvement. He recommended that the claimant take an HLAB 27 blood test which is a test which sometimes aids in the diagnosis of the condition. The test was negative.

The claimant had a discogram on November 1, 1977, performed by Dr. Blume who found that upon injection the pain reproduced was described as approximating the pain felt by the claimant when he first injured himself. Dr. Blume described the disc as disrupted with no leaking of dye to either side. The normal "H" structure could not be seen. The claimant was admitted to the hospital on March 14, 1978 for gravity traction treatment. The claimant now uses a home gravity traction unit. On April 10, 1978 the claimant was again examined by Dr. Mumford, who still felt that the claimant had rheumatoid spondylitis. Dr. Mumford feels that there is no proof by objective examination of any impairment.

Dr. Blume performed later medical examinations and felt that the claimant was partially disabled from heavy labor until June 29, 1978. He also felt that the claimant has "some" permanent disability to the body as a whole. As for the future, Dr. Blume forecasts denaturation of intervertebral joints of the lumbar spine if the traction is unsuccessful.

The claimant has the burden of proving by a preponderance of the evidence that the injuries of October 29, 1976 and February 24, 1977 are the cause of the 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.

Based on the foregoing principles it is found that the claimant has established his claim. All physicians relate the condition to the injuries of October 1976 and February 1977. Although Dr. Blume concedes some permanency of unspecified amount, Dr. Mailliard gave no opinion with regard to permanency and Dr. Mumford's opinion is unclear as to permanency. It is therefore found that the claimant has sustained his burden entitling him to temporary total disability compensation, and has not (because the evidence is not by a preponderance) sustained a claim to permanent partial disability compensation at this time. This temporary total disability compensation will run through June 29, 1978, when Dr. Blume testified that the claimant could do some work. This is the test for the cessation of temporary total disability compensation.

The next question which must be addressed is the payments due the claimant pursuant to §85.27, Code of Iowa. Section 85.27 allows for the payment of medical benefits to the extent of the cost of the care and the transportation. Defendants originally objected to the treatment afforded by Dr. Blume as being unauthorized. However, the defendants later paid transportation costs for Dr. Blume's treatment and paid for the home traction unit prescribed by Dr. Blume. This shows approval of the care being offered by Dr. Blume; and, therefore, the payments for the care afforded by Dr. Blume will be allowed. The claimant submitted the bills in a rather disorganized fashion. A bill of particulars attached to the exhibit would have permitted the undersigned to clearly ascertain the amount of the bills. Those expenses to be allowed are as follows:

Storm Lake Clinic	$ 10.00
Bedel's Drive In Pharmacy	9.68
Storm Lake Drug	6.55
Storm Lake Clinic	150.00
Bedel's Drive In Pharmacy	34.08

Walgreens	27.95
St. Luke's Medical Center	37.00
Shoe lift	1.85
Loring Hospital	376.00
National Limb & Brace	206.95
Loring Hospital	178.00
National Limb & Brace	140.00
Neurological Institute	444.00
St. Vincent Hospital	548.55
Neurological Institute	790.00
St. Vincent's	1,055.00

A collateral question which must be addressed is the ancillary medical expense to be allowed in this case. Industrial Commissioner's Rule 500-8.1 provides:

> 500-8.1(85) Transportation expense. Transportation expense as provided in sections 85.27 and 85.39 of the Code shall include but not be limited to the following:
>
> 1. The costs of public transportation if tendered by the employer or insurance carrier.
> 2. All mileage incident to the use of a private auto. The per mile rate for use of a private auto shall be the same as the State of Iowa reimburses its employees for travel.
> 3. Meals and lodging if reasonably incident to the examination.
> 4. Taxi fares or other forms of local transportation if incident to the use of public transportation.
> 5. Ambulance service or other special means of transportation if deemed necessary by competent medical evidence of by agreement of the parties.
>
> Transportation expense in the form of reimbursement for mileage which is incurred in the course of treatment or an examination, except under section 85.39 of the Code, shall be payable at such time as fifty miles or more have accumulated or upon completion of medical care, whichever comes first. Reimbursement for mileage incurred under section 85.39 of the Code shall be paid within a reasonable time after the examination.
>
> The industrial commissioner or a deputy commissioner may order transportation expense to be paid in advance of an examination or treatment. The parties may agree to the advance payment or transportation expense.

The important consideration is that the statute and rule provide for transportation expense. It does *not* have provisions for mattresses and phone calls. It only provides for transportation expense incurred for medical services. It does *not* provide for transportation costs in seeking public assistance and attending hearings and depositions or meals for family members unless family presence is necessary for treatment.

Accordingly, the following transportation expenses will be allowed:

Meals	$ 22.00
Mileage 1922 miles	
Claimant's exhibit 2 (9-29-77)	288.30
Mileage - Dr. Lindeman	14.40
Meals	13.50
Mileage - Dr. Mailliard	30.60
Mileage - Dr. Blume	
170 miles (10 trips = 1700 miles	
x .15) =	25.50
Meals	
14 x 4.50	63.00

The next (and last) question which will be addressed is the apportionment of these various expenses and compensation between the two insurers herein. The first insurer, Continental Western, should be solely liable for the four days of temporary total disability in November, 1976. The rest of the expenses and compensation should be equally divided between the two carriers, inasmuch as the physicians indicate that the causation of the injuries is to be considered in a continuum rather than individually.

* * *

Signed and filed this 8th day of September, 1978.

JOSEPH M. BAUER
Deputy Industrial Commissioner

Appealed to Commissioner: Dismissed.

RAYMOND P. SCHOTT,

Claimant,

vs.

TERSTEP COMPANY, INC.,

Employer,

and

AMERICAN MUTUAL INSURANCE COMPANY,

Insurance Carrier,
Defendants.

Review-Reopening Decision

This is a proceeding in review-reopening brought by Raymond P. Schott, the claimant, against his employer, Terstep Company, Inc., and the insurance carrier, American Mutual Insurance Company, to recover additional benefits under the Iowa Workers' Compensation Act on account of an injury he sustained on September 14, 1977.

* * *

The issues to be determined are whether the claimant's present disability is causally connected to the injury he sustained on September 14, 1977, and if so, the nature and extent of such disability. Certain medical expenses are in the issue.

Claimant, 56 years old, married, father of four grown children, and hard of hearing, testified that upon dependency discharge from the army in May of 1946 he began working as a farmer. Following a tragic accident in which the claimant's son was run over and killed by a tractor driven by the claimant, the claimant quit farming and became a carpenter in March of 1960. Claimant worked through the union hall. With the exception of losing the first joint of the left index finger in an injury early on in his carpenter career, claimant worked regularly and was, in his opinion, in excellent health until September 14, 1977 when, in the course of his employment for defendant contract, he was struck on the head by pieces of lumber falling from twenty feet above. He testified he received a lot of bruises from the injury along with a back problem, lung damage, and a misshapen dental plate.

Claimant related he was hospitalized at the time of the injury for 13 days and treated by Donald L. Biller, M.D., whom he had been seeing since the mid 1970's for a nervous stomach. Dr. Biller referred the claimant to John E. Sinning, Jr., M.D., for consultation. Dr. Sinning referred the claimant to Patrick G. Campbell, M.D., a psychiatrist. Although he recalled taking Valium since 1970, claimant had never seen a psychiatrist prior to the date of injury. He visited Dr. Campbell three times but failed to keep and to make any additional appointments. Claimant was of the opinion that Dr. Campbell left the matter of his return for further treatment up to him. Claimant could not remember whether he told Dr. Campbell about the tractor accident. He did tell Dr. Campbell that he was reluctant to go into crowded areas and had been so since before the date of the injury. However, claimant testified that he is not bothered by working with others.

Claimant was off work from September 14, 1977 until June 22, 1978 when he returned to the union hall and began working full-time on a job as a carpenter. He also worked some overtime which consisted of standing and watching concrete forms. Claimant noted that although his back was bothering him, he had hoped it would get better when he resumed work. However, because co-workers "babied" him and because the pain became worse when he tried to do his regular assignment, he decided he had to quit the job and did so in October of 1978.

A fellow employee recommended that claimant see H. Ronald Frogley, D.C. Claimant first went to the chriopractor in September of 1978. Dr. Frogley advised the claimant that there was nothing the doctor could do for him unless the claimant quit working. Claimant denied this was the reason why he quit working in October of that year. Claimant admitted that Dr. Sinning did not recommend Dr. Frogley and, in fact, knew nothing about claimant seeing Dr. Frogley until after the fact. Claimant also conceded he did not contact the defendant employer nor the defendant carrier prior to seeking out the services of Dr. Frogley. Claimant testified he last saw Dr. Frogley around October 20, 1978. Claimant felt Dr. Frogley assisted him on a temporary, not permanent, basis.

During the same time he was seeing Dr. Frogley, claimant pursued Dr. Sinning's suggestion of physical therapy at Mercy Hospital in Davenport. The treatment consisted of hot packs, massage, and use of the transcutaneous neural stimulator. Claimant did not find such therapy helpful. Claimant also followed Dr. Sinning's suggestion that he see a vocational rehabilitation counselor. He talked to Lloyd Morstead who advised the claimant that he would have to take a four year rehabilitative course in order to earn the same wages he was making at the time of the injury. Mr. Morstead noted that because of claimant's age (he would be 59 when he completed such retraining) no one would want to hire him. Thus, no program was offered by Mr. Morstead.

Claimant also recalled seeing Kedar N. Bhasker, M.D., four times at the defendants' request. He testified he was given test forms that were completed at home. Claimant recalled the doctor inquiring into his past history. Claimant had not seen Dr. Bhasker's report.

Claimant presently complains of worsening pain in the same area of the back. He cannot stand or sit for long periods of time. After two hours of working around the house, his pain extends to the hips, shoulders, and arms. He then sits in a recliner and uses heat and vibration for 15 to 30 minutes. Claimant further testified that he has trouble getting into and out of an automobile, that he has difficulty sleeping, and that he finds it almost impossible to lift anything of weight or to pick up anything off the floor. Claimant indicated that he has done a few odd, small carpenter jobs since October of 1978 but has had no regular employment. He watches the want ads but finds nothing he thinks he could handle. Claimant testified that his wife is not employed.

Claimant's wife verified his complaints. She noted that his only problem prior to the date of injury consisted of stomach problems. She commented that claimant does not express his feelings and that he accepted the death of their son much better than she did.

Donald L. Biller, M.D., who graduated from medical school in 1962 and has been in general practice in Iowa since that time, testified on behalf of defendants that he first saw claimant on November 11, 1975 for a flu vaccine. He next saw claimant on May 11, 1976 for complaints of chest and left arm pain and shortness of breath. Claimant was hospitalized on that date for about a week. He suffered from sleep disturbance, severe weight loss, and mental depression. Claimant advised Dr. Biller that he had been taking Valium on occasion. Dr. Biller testified that "Valium is an anti-anxiety agent and at times is used in the night-time for sleep disturbance." On cross-examination, the doctor stated that he prescribed Valium for claimant's anxiety and for the secondary characteristic of the drug, its muscle relaxant property. Dr. Biller consulted with Dr. Habak, a cardialogist, concerning the claimant's condition. A stress test was mildly positive. A technetium 99 macroaggregate albumin scan on the chest revealed a normal lung scan but some cardiac enlargement. Claimant was treated for anxiety and depression.

Dr. Biller saw claimant again on May 27, 1976 in the office. The anxiety was controlled and the Valium dosage was reduced. Claimant did not keep the appointment

scheduled for four weeks later. When claimant did return on November 12, 1976 it was for a flu vaccine. Claimant indicated he felt well.

Claimant was next treated by Dr. Biller in the emergency room on September 14, 1977 following the work injury. His scalp lacerations were sutured. Claimant was admitted to the hospital for traumatic injury. Chest x-rays were normal but revealed the heart to be slightly enlarged. The skull, back, cervical spine and abdomen were also x-rayed. The x-rays of the cervical spine showed a narrowing of the interspace below C-6 with some hypertrophic changes usually considered arthritic in nature. Dr. Biller testified that no definite evidence of trauma was observed yet later read from his file that "x-rays revealed a wedging fracture of the bodies of T-7 and T-9." Claimant did not sustain a lung injury despite the development of rales and wheezes in his chest. Claimant was instructed in home exercises and discharged from the hospital on September 27, 1977.

Dr. Biller recalled claimant stating on October 4, 1977 that he felt worse and experienced left shoulder pain in addition to the pain in the thorax. Dr. Biller thought this might be secondary to the injury. Dr. Biller saw claimant a few more times in October and November of 1977. He prescribed Dalmane, a mild sedative for sleep, and referred claimant to Dr. Sinning, orthopedic surgeon, who had been a consultant at the time of the September, 1977 hospitalization, for a determination regarding whether claimant could return to work. Then he did not see claimant again until October 19, 1978 for a flu vaccine. On November 6, 1978, Dr. Biller saw claimant for a cold and cough. Vocational rehabilitation was discussed. On December 4, 1978 claimant contacted Dr. Biller for Valium and sleeping pills. Dr. Biller indicated the dosage had increased since 1976. On April 6, 1979 Dr. Biller last saw the claimant who was complaining of a right earache and of a lesion on his hand.

Dr. Biller's opinion, based upon a reasonable degree of medical probability, was that as a result of the work injury claimant suffered a traumatic work neurosis which meant, according to Dr. Biller, that although his organic injury may have healed, he has displaced a feeling of fear to his organic body and has a real fear of returning to work. Dr. Biller did not know whether the traumatic work neurosis would improve but advised that the claimant should seek psychiatric care.

Dr. Sinning's diagnosis dated September 20, 1977 was "[c]ompression deformity, 7th and 9th thoracic vertebra (sic)." The dates on the exhibit copy of Dr. Sinning's office notes are partially obliterated. Generally, they indicate that physical therapy following claimant's discharge from the hospital on September 27, 1977 did not help him. Then, following a visit with Dr. Campbell, claimant initially improved and became more active. Apparently, he suffered a relapse in attitude after experiencing pain upon working around the house (cutting down a tree and yard work). Dr. Sinning advised him that the pain was probably a result of "mobilizing some tight areas". Sometime in 1978 claimant requested another evaluation before returning to work because he was concerned that heavy lifting might further damage his back. At that time, Dr. Sinning's comments include a note that the claimant reported he would be able to draw 200 weeks of compensation before returning to work. Further, claimant knew he could return to work at any time and his name was in at the hiring hall. Thereafter, claimant returned to work in June of 1978 and was seen at University Hospitals in July of 1978. The TNS was not implemented because claimant was able to continue successfully at work at that time. Then in October of 1978 he reported to Dr. Sinning that he "[t]old his foreman and fellow employees not to protect him anymore" and that he then found he was not able to continue his work because he was not able "to carry his full load" without increasing back pain. At that point, Dr. Sinning advised claimant had reached a maximum healing point (except that he still had the option of trying the TNS). Dr. Sinning estimated the permanent impairment at 15 percent of the body as a whole. He further advised claimant to seek assistance from vocational rehabilitation.

Clinical notes regarding the July, 1978 evaluation at University of Iowa Hospitals and Clinics reveal that claimant's main complaint at that time was of pain in the paraspinous muscles of the dorsal spine. Drs. Wheeler and Brand felt "his pain primarily now is secondary to soft tissue injury from the time of the accident. We have explained this to the pt. (sic), and that the fractures themselves are healing well." They also told the claimant he was not developing arthritis presently and that his pain would gradually improve over time. They recommended muscle relaxants and the TNS for persistent pain.

Claimant underwent five treatments for TNS evaluation/application in October of 1978. The progress notes directed to Dr. Sinning indicated no success.

In a letter dated November 13, 1978 Dr. Sinning reiterated his opinion of 15 percent permanent impairment to the body as a whole. He added:

> "[i]n terms of limitations, I would ordinarily not place any strict limitation on activity or lifting for a patient with well-healed, mid-thoracic compression fractures. It might be that a job with repeated bending and stooping might cause some backache or that very heavy lifting of more than 100 pounds might cause some increase in symptoms but ordinarily once the fractures have healed and the person has become fully active, that kind of protection is not necessary.

Patrick G. Campbell, M.D., completed medical school about 1959 and thereafter specialized in psychiatry. He first saw the claimant, a referral from Dr. Sinning, on February 6, 1978. In addition to deposition exhibits 1 and 2 which consisted of some of Dr. Sinning's notes and correspondence with respect to this man, Dr. Campbell spent two hours taking a history from the claimant. Dr. Campbell makes no mention of the tractor incident. He was aware of claimant's pre-injury treatment of at least ten years' duration for psychoneurosis, anxiety episodes, conversion symptoms and phobias. Dr. Campbell elaborated:

> ***We think of his basic problem as being anxiety and, basically this is kind of a morbid sense of fear

manifesting in a set of symptoms that we describe as characteristic of this. Sometimes this anxiety -- we use the word "conversion" because it seems to be converted into a symptom, another kind of symptom other than a pure anxiety, fear-type symptom; and he had, for example, symptoms of dizziness and symptoms of weakness. Now, these are more specific. Now, dizziness, he wondered -- and had considerable medical attention for these other symptoms which seemed to simulate a physical illness but was really a functional disturbance, what we call a conversion-type symptom. He also -- if you think of anxiety being displaced to something outside of the person, we call this a phobia, and he has fears in places like church and groups and going places. So he had some phobic symptoms that were disturbing in his lifestyle. This is more than just a minor little phobic thing, but it affected the way he lived.

* * *

***This man's history over ten years is one of shifting and varying degrees of difficulty. There are times when he had a lot of anxiety; there were times when he had a lot of concerns about dizziness and weakness and times when his phobic symptoms were pronounced, so -- and this is the course, generally, of psychoneurosis. It may wax and wane over a time.

Dr. Campbell proceeded to describe the two categories of difficulty claimant has had since the date of injury:

> The interesting -- the first set of symptoms were predominantly those what (sic) we call anxiety symptoms in that he felt most of the time in the morning extremely anxious as a man who shakes in the morning. He has kind of an inner sense of inpending doom when he gets up in the morning and this goes on part of the day. He had this most every day. Along with this, he would have what he called episodes when he felt dizzy, weak, tightness of the chest, an increased perspiration, tremor. These are some of the symptoms that we feel go along with an anxiety-type attack. Now, these symptoms he was having anywhere from a couple of times a day to three or four times a week. These symptoms had been going on recently. Now, he did indicate that these were much like the symptoms he has had for the last ten years except they were worse since he had the injury, and he felt this time now that all these symptoms were caused from the head injury. He thought he had brain damage from the blow on the head and that was having this kind of an effect on him; that he had trouble, you know, navigating and so forth, when he would have these spells. And between the spells he would feel a little bit better. So you have that one set of symptoms. And then the other had to do with pain; and his pain was so bad in his back that he would have to go rest if he thought he was going to have it. He just felt that he couldn't do anything with the pain and that despite what the doctors had said, he felt that he was severly maimed and damaged and that it was irreparable and that it hadn't gotten better at all since his accident, and that he didn't know that he was ever going to get better or ever could get better. But he was totally disabled with the pain, particularly in respect to any kind of effort; didn't make any difference what it was. It included even his recreational interests and things of that nature.

Conceding that claimant "had a good history of rather straightforward anxiety episodes," Dr. Campbell nevertheless emphasized that claimant's predominate problem was the "psychoneurosis, the conversion type, with the pain." Regarding the causation issue, Dr. Campbell thought there was certainly some association between the injury and the symptoms. He pointed out that the claimant did not have specific disabling symptoms prior to the date of injury.

On March 9, 1978 Dr. Campbell saw the claimant again and observed some improvement in the claimant's overall condition. Claimant felt better and was exercising. However, more anxiety was evident because claimant had shifted focus from his symptoms to going back to work. At that time claimant appeared to be developing a specific phobia of being in large groups or in large buildings. Dr. Campbell was somewhat optimistic about the prognosis.

Dr. Campbell last saw the claimant on April 20, 1978, at which time a marked change for the worse had taken place. Claimant dwelled on his pain and limitations. Dr. Campbell became pessimistic about the prognosis. He described the factors that go into such a prognosis:

> Well, first of all, must in general, you take a case that involves an injury at work or a public transportation, or something of this nature, the prognosis for those injuries is poor to begin with, rather than one that would occur at home that's unassociated with any type of remuneration, any type of gain -- monetary gain. The prognosis is affected by his age.
>
> * * *
>
> Well, I think you can sometimes work with a younger person; you have so much more time to do it, and if necessary, you can spend some years. But a younger person can modify their behavior; they can -- they have less fixed ideas; they invest more in trying to do something, you know, because of the long future ahead. There are a number of reasons that go into that. But it is generally considered to be a poor prognosis in terms of dealing with a psychoneurosis of this type in an older person. Another has to do with how able the individual is to be cooperative. This is not always just a conscious thing that a person is cooperative. There are many things that go into how a person is cooperative. And he just couldn't seem to cooperate very much with the treatment program. Another has to do with the gain. In this case he was a man who has been suffering from an intense kind of fear, a morbid sense of fear for years and at this point there seemed to be some gratification through what was happening to him, the attention from the physicians, the attention from, you know, in the way of monetary payment. I think this is hard to give up to

> an individual who has a long-standing kind of nervous problem, which he would have to do by going back to work. There's a certain kind of reassurance with his being sick.

Based on all of these factors, Dr. Campbell was of the opinion that it would be almost impossible for the claimant to resume work from an emotional standpoint.

> . . . he's not a young man who is willing to come into my office every week or go into the hospital and take a lot of time to get on top of this. I certainly recommended this to him every time he came in. I said, "Look, I'll help you with this", and we tried to work on this. "Let's do this." But this kind of unconscious resistance he has, so many things, I don't see that he's going to be able to work.

On cross-examination, Dr. Campbell reemphasized that the injury aggravated the pre-existing condition resulting in a disabling effect not formerly present in claimant's overall makeup. Dr. Campbell also reported that at the time of claimant's last visit, he recommened psychiatric treatment on a regular basis. In response to the question whether the passage of time since claimant's last visit would change his opinion regarding future psychiatric care, Dr. Campbell stated, "I'd really have to re-examine him today to know what's going on or to make any recommendations." This response takes on added meaning in light of the fact that claimant cancelled the June 26, 1978 appointment and hence Dr. Campbell did not have an opportunity to observe claimant after he had returned to work. Dr. Campbell earlier commented, "I thought the most important thing was his effort to return to work. I anticipated that, in talking with him, we wouldn't really know what was going to happen until he tried." From Dr. Campbell's testimony, it appears he was completely unaware of the fact that claimant did actually return to work. He opined that anxiety would prevent the claimant from returning to work. "As long as this man has his emotional problem he's having symptoms and when he has symptoms he gets -- he's playing that role, that he's a sick person and he's going to get attention for it." Dr. Campbell emphasized that this was an "unconscious attempt" for "dependency gratification".

In the spring of 1979, claimant underwent at the request of the doctors, four one-hour evaluation sessions with Kedar N. Bhasker, M.D., whose practice is limited to psychiatry. Dr. Vhasker initially comments in a report dated June 22, 1979 that the claimant came to the sessions reluctantly and expressed anger and bitterness toward the insurance company and some of the previous doctors. Dr. Bhasker devotes a page to claimant's history yet no mention is made of the tragic tractor incident. Additionally, claimant is reported to have three grown children rather than four. Regarding the pre-existing mental status and the effect the injury had on it, Dr. Bhasker writes:

> He denied any emotional problems before the accident. On further questioning admitted that he was taking Valium 10 mg. three times a day prescribed by his family physician but denies any anxiety and does not know why the doctor gave him the medication. This indicates that Mr. Schott has little capacity for introspection and indicates that he deals with problems by denying them.
>
> * * *
>
> His personality, (the type of dispostion he had before the accident) is rigid. Under stress he is likely to be stubborn and somewhat over assertive and is likely to misinterpret the intentions of other people. He is a dependent man who hides his dependency with a facade of over independence. He has a tendency to pay unnecessary attention and concern to small details and for that reason is obsessive. The accident and the consequent infirmity would aggravate the above personality characteristics in an effort to cope with stress. The other factor which is superimposed upon the personality characteristics is the fact of age with the general physical decline, which is to be expected with increasing age.
>
> The accident, the age factor and the prospect of uncertain future combined with his rigid personality is an unfortunate combination. He is therefore unable to cope with this stress and at present time shows marked depression and anxiety. The major portion of the anxiety is somatized to the back aggravating the pain that may already exist. Whereas a person with a more adaptable personality and younger age may have dealt with the situation differently and the outcome may have been happier.
>
> The psychological testing also comments on his depression shyness, seclusiveness, anxiety and physical tension. It indicates that Mr. Schott lacks insight and resists implications that his symptoms maybe (sic) related to emotional causes. It states that he shows passive dependence and that under pressure he may develop psychophysiologic symptoms, such as headaches and gastrointestinal disorders.

According to Dr. Bhasker, claimant's ability to return to work depends upon his personality style, age, and superimposition of the physical injury. He viewed the compensation and financial gain as another negative factor to rehabilitation. Dr. Bhasker was unable to predict if claimant would be able to return to work at a later date. Again, the report does not indicate that Dr. Bhasker was aware of claimant's return to work for a few months in mid-1978.

Lloyd Morstead, vocational rehabilitation counselor for 12 years, presently employed by the State of Iowa, testified that he met with the claimant in November or December of 1978. Morstead did not recall much about claimant's history generally or claimant's injury specifically. He testified that he did not attempt to obtain any social information about the claimant because, " . . . he (claimant) placed so much emphasis on the acute pain that he was feeling that it really wasn't necessary to go beyond that." Morstead quickly concluded that claimant was not a candidate for retraining because of claimant's stated feelings about this physical condition. On cross-examination, he admitted that after the interview he did no further

checking into claimant's situation and he conceded that his opinion was formed before he had any medical reports made available to him at a later date by claimant's counsel.

Morstead testified that he recalled claimant's age was 55 and that:

> . . . The job opportunities for an older man are somewhat limited. If a person is to be retrained, if he had two to five years of retraining, their productive work expectancy is very limited and it would be impossible to justify an expenditure for a prolonged training program on somebody with only a few years of work expectancy.

He could not elaborate on what a retraining program for the claimant would entail because he needed psychological and aptitude testing information. On cross-examination, Morstead reported that a training program for the majority of clients is less than two years.

Morstead did not recall whether the claimant advised him of the return to work for a few months in 1978.

Morstead concluded that he would not attempt to place the claimant unless the claimant was in therapy with Dr. Campbell and received a favorable recommendation.

The claimant must prove by a preponderance of the evidence that the injury is 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. *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 his disability, but only that it is directly traceable to an employment incident or activity. *Langford v. Kellar Excavating & Grading, Inc.,* 1001 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 Company,* 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).

The medical experts agree that the claimant's present disabling symptoms are causally connected to the injury on September 14, 1977. They further concur that the otherwise stabilized and manageable physical impairment and discomfort has been augmented by claimant's psychoneurosis of the conversion type with pain.

Although Dr. Campbell doubted successful results from forcing the claimant to undergo psychiatric treatment, he did indicate that he would have to reexamine the claimant in order to make recommendations as to future psychiatric care. Dr. Biller recommended that the claimant seek psychiatric care. The vocational rehabilitation counselor indicated that his office would deal with claimant only if treatment by Dr. Campbell had favorable results.

As indicated above, neither the experts in psychiatry nor the vocational rehabilitation counselor were aware of claimant's return to work from June 22, 1978 to October of 1978. The claimant did not present corroborating evidence regarding this inability to perform a satisfactory job for the defendant employer. The undersigned can glean from the record that the claimant is a proud man who set high standards for himself and who quit working when he felt he could not carry his full load. He shunned assistance from fellow workers because he felt they were "babying him." Whether he misconstrued the assistance and whether he pushed himself more than was necessary to carry a "full load" is uncertain in light of the offered psychiatric evaluations. It is noted that the defendants likewise did not present any evidence to show whether claimant was performing a satisfactory routine job prior to his insistence that others would not help him.

Psychiatrists have indicated claimant's conclusion that he is unable to return to the working force is being reinforced by the attention of the doctors and by the potential monetary gain from workers' compensation. Claimant apparently believed that he had 200 weeks of compensation coming to him for the injury.

The claimant's negative attitude towards his present and future employability was noticeably reinforced by the vocational rehabilitation expert who summarily determined he could not assist the claimant because of the claimant's age and physical complaints. This witness' opinion regarding claimant's employability is given no weight because it was not based on any thorough examination of the claimant's medical condition and sociological background, and because no independent testing for the evaluation of claimant's aptitude and skills was conducted by the so-called expert. Parenthetically, the undersigned finds the vocational rehabilitation counselor's negative attitude toward retraining someone of the claimant's age reprehensive in a period of time when those charged with the responsibility of placing or guiding people into avenues of the labor market should do as much as is humanely possible to foster acceptance by the general public of the recently extended maximum retirement age.

The ultimate goal of the workers' compensation law is to rehabilitate the injured worker. Accomplishing such result in the present case will surely fail if the claimant's negative attitude toward his employability is further reinforced by awarding a definitive number of weeks of permanent partial disability benefits at this point in time. Indeed some permanency is present as is evident from Dr. Sinning's rating of 15 percent of the body as a whole. What is not clear is whether claimant's overriding debilitating psychoneurosis can be cured by proper, "informed", and regular psychiatric treatment.

Claimant has the burden of proving when the healing period terminated. The present record reveals that Dr. Sinning determined claimant's physical condition stabilized

in October of 1978. Yet, claimant's psychoneurosis, as aggravated by the injury, has waxed and waned over the past two years, and is presently the disabling factor claimant and his doctors must deal with. Whether said factor can be mitigated and claimant's condition improved by further psychiatric evaluation and treatment, cannot be determined at this time. It may be that additional psychiatric care will be in vain and Dr. Sinning's determination of healing period will stand. Thus, ordering the defendants to pay healing period benefits while claimant's psychoneurosis is treated in an effort to further improve claimant's condition would be inequitable because the defendants would not be entitled to credit for any overpayment of healing period benefits against the permanent partial disability benefits. *Cecil McCombs v. Mercy Hospital and St. Paul Companies,* Appeal Decision filed January 31, 1979.

However, a conclusive finding with respect to claimant's industrial disability is deemed premature. Without further psychiatric evaluation and treatment, a final determination of claimant's loss in earning capacity would be speculative. Yet, in the opinion of the undersigned, the industrial disability the claimant sustained as a result of the September 14, 1977 injury, will be at least 20 to 25 percent of the body as a whole in accordance with the well-known factors that are considered in evaluating loss of earning capacity. *Olson v. Goodyear Service Stores,* 255 Iowa 1112, 125 N.W.2d 251 (1963); *Christopher B. Becke vs. Turner-Bush, Inc., and American Mutual Liability Insurance Company,* Appeal Decisions filed January 31, 1979.

* * *

Signed and filed this 31st day of August, 1979.

LEE M. JACKWIG
Deputy Industrial Commissioner

No Appeal.

JOSEPH G. SCHULTE,

Claimant,

vs.

IOWA STATE PENITENTIARY,

Employer,

and

STATE OF IOWA,

Insurance Carrier,
Defendants.

Order

NOW on this 14th day of July, 1978, the matter of claimant's Application for More Specific Order comes on for determination.

A hearing in this matter was held on May 8, 1978, in response to defendants' Request for Determination of Compliance and/or More Specific Order and in an attempt to quell the continuing dispute remaining between the parties. Notice of the hearing was sent to the parties on March 22, 1978. Claimant did not appear, nor anyone for him. Neither did he give notice that he would not appear prior to the time of the hearing nor has he since that time presented any good reason why he did not appear. Requesting a more specific order after failing to appear at the time specifically set aside for clarification of the original order does not appear just or proper.

THEREFORE, claimant's Application for More Specific Order is hereby denied.

Signed and filed this 14th day of July, 1978.

ROBERT C. LANDESS
Industrial Commissioner

No Appeal

MARJORIE E. SCHWEER, Surviving Spouse, and ROBERT L. SCHWEER, Surviving Son by His Natural Mother, MARJORIE E. SCHWEER,

Claimants,

vs.

McINTYRE OLDSMOBILE-CADILLAC, INC., BLUFFS TOYOTA AND TIM O'NEILL DATSUN, INC.,

Employers,

and

UNIVERSAL UNDERWRITERS INS. CO. for McINTYRE and RELIANCE INS. CO. for Bluffs Toyota and Tim O'Neill Datsun,

Insurance Carriers,
Defendants.

Appeal Decision

This is a proceeding brought by Defendants Bluffs Toyota, Inc., and Tim O'Neill Datsun, Inc., employers, and Reliance Insurance Company, insurance carrier, appealing a proposed decision in arbitration wherein defendant employers were ordered to pay burial expenses and weekly benefits to the surviving spouse of John L. Schweer, who died from a gunshot wound incurred in the course of his employment on July 22, 1977.

* * *

The issue requiring resolution is which of the defendant employers shall be required to pay benefits to claimant's surviving spouse. The parties have stipulated that "at the time of the death of John L. Schweer he was an employee of one or more of the following corporations: McIntyre Oldsmobile-Cadillac, Inc., Bluffs Toyota, Inc., or Tim O'Neill Datsun, Inc."

Defendant employers here involved are McIntyre Oldsmobile-Cadillac, Inc. (McIntyre), Bluffs Toyota (Bluffs) and Tim O'Neill Datsun, Inc. (O'Neill). McIntyre is insured by Universal Underwriters Insurance Co.; Bluffs and O'Neill, by Reliance Insurance Co. These dealerships are located in close proximity in a rather remote area off Interstate 80 and share Robert McIntyre as a common officer as he is president of McIntyre, secretary-treasurer of O'Neill and president of Bluffs. The dealers had continuing difficulty with theft and vandalism. In addition to property loss they suffered increasing insurance rates. On the weekend prior to the hiring of John Schweer, McIntyre had been both robbed and vandalized and O'Neill had lost a truck and other items.

Tim O'Neill's (O'Neill) answer to interrogatories set the stage for the hiring of claimant's decedent thusly:

> In early June 1977 while at a luncheon Bob McIntyre of McIntyre Oldsmobile-Cadillac, Inc., Jim Duffack of Bluffs Toyota, Inc. and Tim O'Neill of Tim O'Neill [sic] Datson, Inc. had discussed the need to have a security service for the dealerships and had agreed to equally divide the expenses. At the time of the conference it was assumed that a professional security service organization would be hired on a contract basis.
>
> Tim O'Neill was due to leave on vacation and Mark McIntyre volunteered to call the Council Bluffs Police Department to inquire about an individual who might possibly be looking for that type of work. The Police Department suggested John Schweer, recently retired.
>
> The expense of hiring a security guard was to be shared equally by the three dealerships.
>
> Mark McIntyre contacted John Schweer because Tim O'Neill was due to leave on vacation.
>
> John Schweer was to continuously patrol all three facilities.

Jim Duffack's (Bluffs) answer to the same questions is identical.

Robert Mark McIntyre (Mark), son of Robert McIntyre, the sales manager for motor homes and Subaru for McIntyre Oldsmobile-Cadillac, agreed that these steps were followed in hiring claimant's decedent:

> [S]tep one, was the, you arrived at the opinion or decision that a retired police officer was the proper solution; step two: was when you contacted the other three persons, Bob McIntyre, Tim O'Neill and Jim Duffack by phone; step three, was for you to contact the, Sergeant Tempel, and step four was your conference with John Schweer and step five was the meeting at which the four persons were present, yourself, Bob McIntyre; Jim Duffack and Tim O'Neill?

Mark, answering interrogatories for McIntyre, related "that any one of the three dealers had the right of rejection or veto, prior to the time that John Schweer commenced his employment," that "any one or more of the three automobile dealers could have terminated the services of Mr. Schweer at any time by simply notifying the remaining dealer(s) that he no longer wanted the service and would not share the cost thereof," that McIntyre "directed the areas of its property over which Mr. Schweer was to provide security and watchman services; Tim O'Neill Datsun, Inc., directed the areas of its property which required the services of Mr. Schweer for security and watchman purposes, and Bluffs Toyota, Inc., directed the areas of its property, which required the security and watchman services," that McIntyre "had the responsibility and authority over the services being performed by Mr. Schweer only when Mr. Schweer was on the premises owned by McIntyre," and that "Mr. Schweer would patrol the areas of all three dealerships on an 'as needed basis' . . . ."

Tim O'Neill responded to interrogatories for O'Neill Datsun, Inc. He swore that "[a]ll three companies . . . participated in the decision to employ a security guard . . . ," that on the date of claimant's decedent's death he was providing security guard services for all three dealerships, that "[a]ll dealers had the right to reject John Schweer . . . . with [h]is hiring . . . discussed by all parties concerned," that he "controlled the work to be performed . . . by instructing John Schweer to investigate nightly the areas of repeated vandalism and stolen auto parts" with "[a]ll three dealers . . . [retaining] the right to instruct John Schweer about any area of security on each dealership premises," and that "[i]t was mutually agreed between Robert McIntyre, Jim Duffack and Tim O'Neill that the salary of John Schweer would be split three ways, equally."

James Duffack's, general manager and secretary and treasurer of Bluffs Toyota, Inc., sworn answers provide the following: that both Bluffs and O'Neill "participated in the decision [to hire claimant's decedent] and discussed salary and hours and qualifications," that claimant's decedent "was working for all three dealers this evening [of his death] and was rotating his duties between all three business lots"; that Bluffs had the right to reject claimant's decedent as an employee and "if the services had been unsatisfactory that Bluffs Toyota, Inc., in conjunction with the other dealers would have had a right to terminate the services," that claimant's decedent "continuously patrolled the premises of the three dealerships," that "cost of wages were to be shared equally among the three companies."

Claimant's decedent came to McIntyres and was shown the area of the three dealerships where he would work. Working from nine p.m. to five a.m. six days a week, he began work on the day of his first contact with McIntyre. His duties according to Mark were:

> simply to patrol all our three lots on an equal basis; just, which was decided upon by him on what was taking place; with his experience as a police officer and let him make the decision on how often to patrol and exactly where to be; he stationed himself where ever [sic] he wanted to be, which happened to be our lot which -- where he could see stategically [sic] all, both Bluffs Toyota, Tim O'Neill Datsun and out [sic] lot at the same time. And we left it up to his discretion on patrolling. You know, based upon his years of experience as a police officer.

Claimant's decedent had access to used cars on the McIntyre lot for making his rounds and Mark said:

> He [claimant's decedent] did drive and patrol in a car all three, which, since we do have a fairly large area, he would have to drive behind our service department, come back around and drive behind Bluffs Toyota and drive behind Tim O'Neill and make it a various patrol and in his position, from where he sat on our lot, elevated up, he could see traffic coming, either into Tim O'Neill Datsun or Jim Duffack's lot or our lot, from any position, because it is a dead-end road on the other side and he could see anybody that approached from any direction into any one of our facilities.

Claimant's decedent, according to Mark, was given discretion to do his job as he saw fit.

Although it appears the parties to the conference on the afternoon of July 11 agreed to a one-third, one-third, one-third split of claimant's decedent's salary, the exact mechanism for payment was not discussed. Mark McIntyre stated that a W-4 form was filled out at McIntyres and that

> finding out from our office managers that it would cut down the paper work and make it a lot less of a headache to just simply have one company pay him and bill the other two, more-or-less, or however it may be said, I don't know, but just as a matter of cutting some extra paper work, it was decided we would issue the check and in turn Bluffs Toyota and Tim O'Neill would reimburse us a third each.

The factual situation in the case sub judice is very similar to that faced by the supreme court of New York in *Cyrus v. Modart Construction Company,* 283 App. Div. 368, 128 N.Y.S.2d 115 (App. Div. 1954). In *Cyrus* two corporations agreed to hire the same man as a watchman. They also assented to splitting his salary and to his simultaneously watching their adjacent properties. When he was injured on the property of one corporation, the other was found to be equally liable. Another New York case presenting a similitude is *Hunt v. Regent Development Corporation,* 3 N.Y.2d 132, 164 N.Y.S.2d 694 (1957). In *Hunt,* as here, the watchman spent a major portion of his time keeping watch from a shack on one of his employers' properties just as claimant's decedent apparently watched from the McIntyre holding which provided him with a good view of all three dealerships. New York's highest court in deciding *Hunt* warned at 134, 696 that "differentiations over borderline activities are completely out of place and, unless the employer's duties to each are so separate and distinct in time or place that the employment is capable of identification as that of only one employer, both are to be held as liable." The court apportioned liability between the two employers.

Professor Arthur Larson in his treatise *Workmen's Compensation* (Desk Ed. 1976) at §48.40 distinguishes between joint employment and dual employment:

> Joint employment occurs when a single employee, under contract with two employers, and under the simultaneous control of both, simultaneously performs services for both employers, and when the service for each employer is the same as, or is closely related to, that for the other. In such a case, both employers are liable for workmen's compensation.
>
> Dual employment occurs when a single employee, under contract with two employers, and under the separate control of each, performs services for the most part for each employer separately, and when the service for each employer is largely unrelated to that for the other. In such a case, the employers may be liable for workmen's compensation separately or jointly, depending on the severability of the employee's activity at the time of injury.

Applying the analysis used by Larson, *supra,* to the situation of the claimant's decedent, it becomes apparent that he, a single employee, was, according to the answers to interrogatories and testimony of the various witnesses, under the simultaneous control of all the defendant employers while he was performing the same service for each.

Appellants insist that *Muscatine City Water Works v. Duge,* 232 Iowa 1076, 7 N.W.2d 203 (1942) is controlling to indicate that claimant's decedent was the sole employee of McIntyre. No justification is found for such an application. Duge entered into a contract of employment with the water works. At the time Duge was hired by the water works it was not contemplated that he would perform work for the electric company. The work he was performing for the electric company was pursuant to an order of the person by whom he was hired at the water works. In the case sub judice, claimant's decedent was fully aware that he would be working for all three dealerships. McIntyre was not in the business of supplying security services. The course of conduct pursued by the parties to this action indicates a banding together in a joint relationship to secure their business premises. The dealerships all intended to have claimant's decedent perform services for them. The whole course of conduct prior to hiring indicated the defendants intended a joint employment relationship. Unquestionably, had he been patrolling on one's property and become suspicious of criminal activity on another property, he would have gone immediately to that property as he was

given the discretion to divide his time between the dealership as he saw fit. The mode of payment was an afterthought. This in no way, however, altered the employment contract.

As appellant correctly points out, rate determination in this matter should have been made pursuant to Iowa Code §85.36(4). Claimant's decedent was to be paid at a monthly rate of $750. That amount multiplied by twelve and the total divided by fifty-two results in a weekly wage of $173.08, entitling claimant to weekly benefits of $114.79.

WHEREFORE, it is found:

That claimant's decedent was an employee of the three employers named as defendants herein.

* * *

THEREFORE, it is ordered:

* * *

That costs be divided equally among the three defendants.

* * *

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

ROBERT C. LANDESS
Industrial Commissioner

No Appeal.

L. E. SHACKELFORD,

Claimant,

vs.

DAUFELDT TRANSPORT, INC.,

Employer,

and

EMPLOYERS INSURANCE OF WAUSAU,

Insurance Carrier,
Defendants.

Order

BE IT REMEMBERED that on March 23, 1979 claimant herein filed a motion for protective order and advancement of expenses. Said motion alleged that the claimant was now a resident of California and indicated that travelling to the law offices of defendants' counsel, located in Davenport, Iowa solely to be deposed, in addition to travelling to Iowa at another time for a hearing on the matter, constituted a substantial hardship in terms of time and expense. Claimant seeks either an order preventing the defendants from taking his deposition or an order requiring the defendants to advance expenses, accommodations and lost earnings resulting from claimant attending such a deposition.

On March 26, 1979 defendants herein filed a resistance to motion for protective order. Said resistance clarifies that a discovery, not an evidentiary, deposition was sought. (It should also be noted that the date of the deposition -- April 6, 1979 as it appears on the notice of oral deposition -- has been continued until a ruling is made by this office on claimant's present motion.) Said resistance alleges that claimant was a resident of Iowa in May 1977 when he filed his original notice and petition, that in June 1977 claimant's counsel indicated the workers' compensation matter would not be pursued at that time, that in July 1978 claimant's counsel indicated he wished to proceed with the workers' compensation case, and that in the meantime claimant had lost his third-party litigation against the State of Iowa. Defendants contend that they had no control over claimant's decision to move to California, that they were prepared to defend this cause after it was filed in May 1977, that they received no notification of claimant's intention to move out of Iowa so that they could have secured a deposition of the claimant while he was still a resident of this state, and that, accordingly, it should not be deemed unreasonable to require the claimant to be available for a discovery deposition in Iowa and it would be unjust to require defendants to advance the costs requested by the claimant if the deposition is taken.

Review of the Industrial Commissioner's file reveals that on September 20, 1978 defendants filed interrogatories propounded to the claimant. Pursuant to objections made by the claimant with regard to said interrogatories and a subsequent motion to compel discovery by the defendants, another deputy industrial commissioner on October 31, 1978 ordered that certain interrogatories be answered within twenty days of his ruling. According to a letter dated October 20, 1978, addressed to claimant's counsel, signed by defendants' counsel and attached to defendants' resistance to motion for protective order as exhibit "d", defendants indicated that they wanted to obtain a discovery deposition from the claimant after the interrogatories propounded to the claimant had been answered.

The relevant portion of Iowa Rule 121 of Civil Procedure provides that "[p]arties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions, written interrogatories . . . ."

The relevant portion of Iowa Rule 123 of Civil Procedure states that "[u]pon motion by a party or by the person from whom discovery is sought . . . and for good cause shown, the court in which the action is pending . . . may make any order which justice requires to protect a party or person from . . . undue burden or expense, including one or more of the following: . . . (b) That the discovery may be had only on specified terms and conditions, including a designation of the time or place; and (c) That the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; . . . ."

It is hereby found that requiring the claimant to travel from California to Davenport, Iowa, solely for the taking of his deposition by defendants constitutes an undue burden and expense for the claimant.

THEREFORE, IT IS ORDERED pursuant to Iowa Rule 123(b) and (c) of Civil Procedure that defendants attempt to secure the additional information they claim they need

through use of additional written interrogatories or by means of a deposition upon written questions. In the event an oral depositon is still deemed necessary by the defendants, said deposition is to be taken either (1) within two days prior to the date of the hearing of this matter at the same location as that specified for the hearing at an hour convenient to the parties or (2) at the California county seat closest to the residence of the claimant at an hour convenient to the parties and at the defendants' expense.

Signed and filed this 12th day of April, 1979.

LEE M. JACKWIG
Deputy Industrial Commissioner

No Appeal.

L. E. SHACKELFORD,

Claimant,

vs.

DAUFELDT TRANSPORT, INC.,

Employer,

and

EMPLOYERS INSURANCE OF WAUSAU,

Insurance Carrier,
Defendants,

Ruling

BE IT REMEMBERED that on July 2, 1979 claimant herein filed an application for protective order. Said application alleges that claimant does not have the necessary funds to pay his attorney's expenses in attending a deposition of the claimant to be held in Beverly Hills, California, on July 20, 1979 at 9:30 a.m. Claimant requests an order requiring the defendants to reimburse his attorney's travel and lodging expenses that will be incurred in connection with attending said deposition. On July 5, 1979 defendants herein filed a resistance to application for protective order. On July 9, 1979 claimant filed a response to employer and insurance carrier's resistance to application for protective order.

Pursuant to a prior motion for protective order and advancement of expenses with regard to this same deposition, which was filed by claimant on March 23, 1979 and which was resisted by defendants on March 26, 1979, the undersigned filed an order on April 12, 1979 that stated in part:

> The relevant portion of Iowa Rule 121 of Civil Procedure provides that "[p]arties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions, written interrogatories, ..."
>
> The relevant portion of Iowa Rule 123 of Civil Procedure states that "[u]pon motion by a party or by the person from whom discovery is sought . . . and for good cause shown, the court in which the action is pending . . . may make any order which justice requires to protect a party or person from . . . undue burden or expense, including one or more of the following: . . . (b) That the discovery may be had only on specified terms and conditions, including a designation of the time or place; and (c) That the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; . . . ."
>
> It is hereby found that requiring the claimant to travel from California to Davenport, Iowa, solely for the taking of his deposition by defendants constitutes an undue burden and expense for the claimant.
>
> THEREFORE, IT IS ORDERED pursuant to Iowa Rule 123(b) and (c) of Civil Procedure that defendants attempt to secure the additional information they claim they need through use of additional written interrogatories or by means of a deposition upon written questions. In the event an oral deposition is still deemed necessary by the defendants, said deposition is to be taken either (1) within two days prior to the date of the hearing of this matter at the same location as that specified for the hearing at an hour convenient to the parties or (2) at the California county seat closest to the residence of the claimant at an hour convenient to the parties and at the defendants' expense.

It is noted that the file contents do not contain evidence that defendants have attempted to secure additional information through use of additional written interrogatories or of a deposition upon written questions. Although this does not appear to be a point of contention between the parties -- the present controversy revolves around what "defendants' expense" includes, nevertheless, the attempt to secure additional information in the manner specified was a prerequisite set by the prior order and controls whether or not the deposition scheduled for this Friday should proceed as scheduled.

With regard to the matter of what "defendants' expense" does not include, general review of the Iowa Rules of Civil Procedure relating to depositions reveals no provision for requiring the party taking a deposition to pay transportation costs and fees of opposing counsel attending the deposition except when the party taking the deposition fails to attend or the deposition witness fails to appear due to the party's failure to subpoena him or her. Iowa Rules 140(c) and 157(b) of Civil Procedure. See and compare Code section 86.40 and Iowa Industrial Commissioner Rule 500-4.33.

The Supreme Court of Iowa in *Grapes v. Grapes,* 106 Iowa 316, 320, 76 N.W.796 (1898), briefly discussed this matter:

> Appellants ask us to sustain a motion to tax as costs certain expenses of counsel incurred in taking depositions. It is claimed that defendants gave notice of taking the deposition of a witness at three different

places in the state before it was finally secured by them, and that plaintiff and his attorney were compelled to attend and unnecessarily expend a large amount of money. We know of no authority for taxing such expenses as costs. If recoverable at all, it must be in an independent suit.

WHEREFORE, IT IS FOUND that there is not evidence of compliance with the prerequisite set forth in the prior order filed on April 12, 1979.

As further clarification of that order it is found that claimant will not incur undue expense if claimant's counsel decides to be present at the taking of claimant's deposition unless defendants' counsel does not attend or claimant does not appear at the scheduled time and place for such deposition due to a failure on the part of the defendants to supoena him.

Signed and filed this 17th day of July, 1979.

LEE M. JACKWIG
Deputy Industrial Commissioner

No Appeal.

JEAN K. SHANNON,

Claimant,

vs.

DEPARTMENT OF JOB SERVICES,

Employer,

and

THE STATE OF IOWA,

Insurance Carrier,
Defendants.

Appeal Decision

This is a proceeding brought by defendants, Department of Job Services, employer, and the State of Iowa, insurance carrier, appealing a proposed review-reopening decision wherein claimant was awarded a running award of temporary total disability benefits.

Claimant has a history of a number of medical problems. Prior to the injuries which are the subject of this proceeding, claimant had the veins in her legs stripped at two different times and had undergone two ear surgeries. Ronald K. Woods, D.O., testified in his deposition that he first saw claimant in 1973 for problems related to the veins in her legs. He next treated her in January of 1975 for a sore throat and again in April and May for vein problems. In June of 1975 Dr. Woods testified that he saw claimant for a complaint about her neck. On a visit in July, claimant expressed concern over her umbilical hernia which had been noted at this point and also stated she was experiencing a low backache.

Dr. Woods next saw claimant on February 4, 1976 following the injury incurred at work while lifting file boxes. Her complaints related to her back and her hernia. Dr. Woods concluded that claimant had a sprain of the lumbar area and an umbilical hernia. X-rays of the lumbar area of the back revealed "osteoarthritis, L-5, S-1, with narrowing of disc joint space, mild spondylosis within the verebral bodies." Claimant also underwent a dilation and curetment in February of 1976.

Dr. Woods continued to see claimant throughout the following months. He noted that upon her May 5, 1976 visit, claimant was complaining of upper back pain as well. Claimant went to Iowa City to be examined in June. Following her return, Dr. Woods testified that claimant continued to complain of both upper and lower back pain and was advised to avoid heavy lifting, bending, and reaching. It was recommended to claimant that she be hospitalized for evaluation. She was admitted on July 23, 1976 with a diagnosis of lumbar strain. During this hospitalization, claimant underwent a hysterectomy, an appendectomy, and a repair of her umbilical hernia. She was discharged on August 10, 1976. Claimant had left her employment prior to this hospitalization on July 9, 1976 and was on sick leave at this point.

Dr. Woods testified that he has seen claimant intermittently since that time for postoperative treatment and upper and lower back complaints. In a report dated October 13, 1976, Dr. Woods noted a diagnosis of "lumbar and cervical strain; umbilical hernia; disk degeneration C3-C7 with spondylosis between C6 and 7; disk degeneration L3-S1 with spondylosis; osteoarthritis, L3-S1." He further stated:

> The lifting itself could have caused symptoms in a normal individual; but in this case the preexisting conditions made the symptoms much worse, with longer duration, aggravating the preexisting state to more serious consequences; and probably a degree of permanent disability.

Claimant was evaluated in January of 1977 by Donald W. Blair, M.D. His report dated February 14, 1977 notes that claimant has mild degenerative arthritis, cervical and lumbo-sacral spine. However, he felt that the lifting incident at work was not sufficient to produce claimant's longstanding subjective complaints and concluded her work as a clerk-typist should not present any problem. Claimant was evaluated for social security purposes on February 22, 1977 by Glenn E. Bigsby, III, D.O. He noted that claimant had slight degenerative arthritic changes of the cervical spine, short cervical ribs, and minimal degenerative disc changes of the lumbosacral spine. Claimant was further evaluated by T. Park, M.D., Immanuel Medical Center, Omaha, Nebraska, from April 23, 1977 - May 7, 1977. He concluded that claimant had degenerative joint disease of the cervical, thoracic, and lumbar spine and anxiety and depression secondary to chronic pain. Dr. Park noted that claimant expressed an interest in returning to work and suggested vocational rehabilitation.

Dr. Woods testified that when he last saw claimant on August 8, 1977, she expressed the "same complaints." He indicated that the incident at work was a contributing

factor superimposed on a preexisting condition and her likely impairment was 10-15%. Claimant was to avoid heavy lifting and long periods of time spent in one position.

The deputy industrial commissioner found that the claimant was entitled to temporary total disability benefits beginning February 13, 1977. A review of the record indicates that such finding was proper.

The deputy commissioner further found that claimant's benefits were to continue until the recommendations of Dr. T. Park have been complied with. The deputy pointed out the importance of physical rehabilitation to this claimant.

Dr. Park's report of April 25, 1977 states:

> HOSPITAL COURSE: The patient was placed on bedrest with Equanil 200 mgs. q.i.d., Singequan 100 mgs. h.s., Motrin 400 mgs. q.i.d. The patient was [sic] also received intensive physical therapy program including heat, massage, progressive mobilization of the spine as well as reconditioning of the extremities. The patient was evaluated by psychological and social services for evaluation and counselling. * * * The patient showed progressive improvement in her physical condition and pain tolerance, tolerating progressive exercise program fairly well. The patient started to show less depression and pain symptoms gradually subsided. The patient required clavicle strap to maintain long posture which contributed to relieve the pain in the upper back area. Most of the arthritic symptoms were subsided. The patient became more realistic in her life planning and showed great interest in returning to job which is to be adjusted to her physical condition. Patient agreed to have DVR evaluation for job placement.
>
> * * *
>
> DISPOSITION AND FOLLOW-UP: The patient was dismissed to her own home and will not be seen by us unless requested. Patient was recommended to have DVR work evaluation at Des Moines, Iowa.

Dr. Blair, in a report dated February 14, 1977, further noted:

> I would feel that this woman very definitely needs to increase her physical activities and that these complaints do not represent an industrial injury. She may need some reinforcement to convince her that she can again be gainfully employed. Her previous work as clerk typist should present no problem as far as her present findings are concerned.

The evidence indicates that implementation of a rehabilitation program would improve claimant's condition and facilitate her return to employment. The evidence supports a finding that claimant's lot was improved and in all likelihood could be bettered by rehabilitation. There is no indication in the record that the claimant has complied with this recommendation.

During recent years the restoration of employability objective of workers' compensation has placed greater emphasis on physical rehabilitation. It is axiomatic in workers' compensation that the restoration objective, returning the injured employee to work as soon as possible consistent with good medical judgment, is inherent in quality medical care and rehabilitation. It is unfortunate that a relatively minor incident is perceived to be cause to permanently abandon the labor market.

Because of the evidence indicating a need for and apparent betterment indicated by physical rehabilitation in this case and in light of the objectives of workers' compensation law, it is ordered that the defendants offer a program of rehabilitation along the lines recommended by Dr. T. Park. Any such plan must be first approved by this office. Upon an appropriate showing that claimant refuses or rejects a reasonable plan for rehabilitation, consideration will be given to the suspension of benefits previously ordered.

* * *

Signed and filed this 17th day of November, 1978.

ROBERT C. LANDESS
Industrial Commissioner

No Appeal.

RONALD E. SHERIFF,

Claimant,

vs.

INTERCITY EXPRESS,

Employer,

and

FARMERS INSURANCE GROUP,

Insurance Carrier,
Defendants.

Appeal Decision

Defendants have appealed from a proposed review-reopening decision wherein claimant's industrial disability was increased by 25% over a previous finding.

* * *

The first issue to be determined is whether the defendants are liable for medical expenses from St. Luke's Methodist Hospital. The second issue presented is whether there has been a change in claimant's condition since the first review-reopening decision.

On April 21, 1970 claimant was involved in a fiery truck accident in which he received severe third degree burns to more than one-half of his body. A memorandum of agreement was approved on November 3, 1970 calling for a temporary disability rate of $48 and a permanent partial disability rate of $47.50.

The first review-reopening decision was filed on December 5, 1973 wherein a deputy industrial commissioner awarded claimant 150 weeks of healing period and found

claimant to be 50% industrially disabled, resulting in 250 weeks of permanent partial disability. This finding was based on claimant's lack of education, relative inability to retrain for another occupation and general condition at that time.

Sidney E. Ziffren, M.D., who was the treating physician, testified as to claimant's condition but made no disability rating. The deputy in his decision described claimant's condition as follows:

> Claimant is currently suffering from contractures of the neck with limitation of extension. He has substantial deformities of both ears and the scars that have formed as a result of the healing process are keloid. The claimant further has limitation of motion by reason of the keloid scar condition in both arms. The scar tissue present on his face is causing a deformity of the lower lip. The claimant has difficulty in raising his arms because of the contracture caused by the keloid scar tissue.

The deputy further noted Dr. Ziffren's opinion that the scar tissue on claimant's body had limited claimant's ability to perspire through the groin and armpit areas and that claimant was unusually sensitive to heat and dust.

A portion of the award from the first review-reopening was subject to subsequent commutations. There were four separate partial commutations ranging from 70 weeks on February 1, 1974 to 10 weeks on May 23, 1975. In total, 111 weeks were subject to commutations. Without the commutations benefits would have been payable through July 4, 1978.

On January 26, 1976, claimant filed a petition for a second review-reopening proceeding. On February 18, 1976 claimant filed an application for an employee's examination under Iowa Code §85.39. The application noted that claimant was an inpatient at St. Luke's Methodist Hospital for the purpose of receiving a physical examination and disability evaluation. On February 26, 1976, claimant filed a bill from St. Luke's Methodist Hospital for $950.97. Defendant filed a resistance to claimant's application on March 1, 1976. On October 27, 1976, claimant filed a motion for an order that the St. Luke's bill be paid by defendant. Defendant filed a resistance to this motion on October 28, 1976. Further pleadings on this motion were received from both parties. On January 20, 1977 the deputy filed an order in which defendants were ordered to pay both medical and hospital expenses from St. Luke's Methodist Hospital. This order was vacated on appeal on April 4, 1977. It was found on appeal that claimant, in his petition, waived hearing on the request for disability evaluation; but defendants by their timely denial did not. The order on appeal noted that if at the hearing of the main action the facts indicated the application for disability evaluation had merit, then the order might be reinstated. In the second review-reopening, the deputy ordered defendants to pay the St. Luke's Methodist Hospital changes of $950.97.

Iowa Code §85.39 states in part:

> 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.

Although defendants contend that Dr. Ziffren was not an employer-retained physician, he was the treating physician. Defendant employer acquiesced in the care he tendered and readily paid for the services he provided. Dr. Ziffren did not make an actual percentage evaluation of permanent disability. Had the claimant prior to the first review-reopening proceeding sought an examination pursuant to §85.39, it might well have been proper. Instead, claimant chose to proceed to hearing. Upon the evidence in the record of the first review-reopening proceeding, the deputy then made a determination of industrial disability. Claimant's subsequent attempt to obtain an examination pursuant to §85.39 is either an attempt to get evidence of an evaluation of disability greater than that awarded by the deputy in the first review-reopening proceeding or an attempt to get evidence of a change of condition at the employer's expense. It is neither contemplated nor proper that §85.39 be used for these purposes. Claimant's application for defendants to pay the expenses from St. Luke's Methodist Hospital must be denied.

The second review-reopening decision was filed on May 17, 1978. The deputy found there was a change in claimant's condition since the first review-reopening decision and held that claimant had industrial disability of 75%. The deputy considered medical reports from Donald Weir, M.D., and Dr. Ziffren and decided to give greater weight to Dr. Weir's April 23, 1976 report.

The deputy, in his decision, set forth the contents of a report from Dr. Ziffren. Dr. Ziffren operated on claimant on September 9, 1976 "for release of contractures of the left elbow and left axilla, excision of ulcers in these areas and application of split thickness skin removed from the left thigh." On March 15, 1977 Dr. Ziffren noted that claimant had reached a satisfactory point of recovery and additional surgery would be merely for cosmetic purposes.

Dr. Weir gave claimant a thorough examination and decided that claimant was 100% disabled. (50% - skin problems, 25% - personality disorder, 25% - shoulder impairment) The deputy found a change of condition because of factors in Dr. Weir's report which the deputy stated were not in existence at the time of the first hearing. These factors are a personality disorder, hearing loss, shoulder joint impairment and lack of physical conditioning.

A review of the record reveals the factors relied on by the deputy for a finding of change of condition were either in existence at the time of the first review-reopening proceeding or there was not sufficient evidence for the

factors to constitute a change of condition.

First, it is apparent that claimant had a personality disorder at the time of the first review-reopening based on the testimony of claimant, claimant's wife, and Dr. Ziffren. Claimant testified in the first proceeding that he was seen by psychologists and spent some time in the mental health ward at Bethesda General. Claimant's wife testified that after the accident claimant was difficult to get along with and had a short temper with his children. Dr. Ziffren testified that claimant's physical appearance was "psychologically . . . a bad thing for him." Furthermore, Dr. Weir's report seems to relate claimant's emotional problems to the time of the injury. Although Dr. Weir's report was not available for the first proceeding, it does provide evidence against a finding of change of condition. Finally, it is apparent from the medical reports in claimant's exhibit 6 that claimant was having some psychological problems.

Second, there is evidence in the record from the first proceeding that claimant was suffering some hearing loss. Both claimant and claimant's wife testified in the original proceeding that claimant had hearing problems. Thus, claimant's hearing problem was definitely part of the record in the first hearing. There is evidence in the present proceeding that claimant's hearing problem is not that significant. Dr. Weir's report noted that claimant had "no significant hearing impairment."

Third, there was evidence from the record of the first review-reopening that claimant had limited shoulder movement. Dr. Ziffren testified that there was definitely a limitation because the armpits had been welded with the arms to the body. Claimant testified that he had problems moving his arms. Also claimant's exhibit 6 noted such limitation. Reports from Dr. Ziffren and Dr. Weir seem to indicate that claimant's shoulder motion has improved since the first proceeding. Thus a limitation in claimant's shoulder motion was a part of the first review-reopening record.

Fourth, there is no evidence in the present record that claimant's lack of physical conditioning came about or has worsened since the first review-reopening decision. In the first proceeding there is no specific mention of deconditioning, but claimant has failed to establish that this problem has come into existence or has worsened since the first review-reopening decision to constitute a change in condition.

In a review-reopening proceeding in which the claimant is seeking additional compensation after a previous award of disability, he must show a change of condition since the previous award which would entitle him to an additional award. *Stice v. Consolidated Coal Co.*, 228 Iowa 1031, 291 N.W. 452 (1940). Claimant has the burden of showing by a preponderance of the evidence his right to compensation in addition to that awarded by a prior adjudication. *Deaver v. Armstrong Rubber Co.*, 170 N.W.2d 455 (Iowa 1969). Unless there is more than a mere scintilla of evidence of increased incapacity of the employee, a mere difference of opinion of experts as to the percentage of disability arising from the original injury would not justify a finding of change of condition. *Bousfield v. Sisters of Mercy*, 249 Iowa 64, 86 N.W.2d 109 (1957).

Claimant has failed to sustain his burden of proof that he has suffered a change of condition since the first review-reopening decision. Dr. Weir's report does provide a detailed analysis of claimant's present condition. However, there is no indication from this report as to whether claimant's problems arose before or after this first review-reopening decision. If the problems did arise before the first proceeding, Weir's report gives no indication as to whether there has been a worsening of claimant's condition since the review-reopening. Furthermore, Dr. Weir did not examine claimant until after the first decision so that his knowledge of claimant's condition at the time of the first review-reopening would be limited to a medical history.

On the other hand, Dr. Ziffren treated claimant for the periods before and after the first review-reopening. Dr. Ziffren seems to indicate in his reports in the present proceeding that claimant's condition has improved since the first review-reopening. This evidence weighs heavily against a finding of change in condition.

There is no doubt that claimant still suffers many serious problems as a result of the April 21, 1970 injury. However, there is nothing in the present record to indicate that these problems are any different or worse than they were during the first review-reopening proceeding. The mere difference in opinion that may exist between Dr. Weir and Dr. Ziffren as to claimant's present disability does not justify a finding of change of condition.

WHEREFORE, it is found:

That claimant's application for medical expenses from St. Luke's Methodist Hospital is not in compliance with Iowa Code §85.39.

That claimant has failed to establish that he is entitled to an increase in benefits.

THEREFORE, it is ordered:

That claimant's petition for additional compensation is hereby denied.

That defendant is not liable for any expenses from St. Luke's Methodist Hospital for any disability evaluation of claimant.

Signed and filed this 18th day of October, 1978.

ROBERT C. LANDESS
Industrial Commissioner

Appealed to District Court: Affirmed.

LELAND DALE SHOOK,

Claimant,

vs.

CATERPILLAR TRACTOR CO.,

Employer,
Self-Insured,
Defendant.

Appeal Decision

This is a proceeding brought by defendant appealing a proposed arbitration decision in which it was directed to handle claimant's claim as a compensable injury under the Iowa Workers' Compensation Act.

* * *

On August 20, 1976 claimant, whose titles include chairman of the grievance committee, chairman and president of the union, and chairman of the bargaining union, was injured when his motorcycle left the road as he traveled from the union hall to a negotiating session at defendant employer's plant. Claimant suffered several fractured ribs, cuts and abrasions. Although he spent about an hour at the hospital, he was able to go to the session later in the day. Claimant contended at the time of hearing that his ribs had not healed and that he had lost six hours of time because of an infection which developed after the accident.

Defendant alleges that the issues on appeal are whether or not claimant was an employee of defendant and whether or not he was in the course of his employment at the time of his accident.

Iowa Code section 85.61(2) defines the term "worker" or "employee" as "a person who has entered into the employment of or works under contract of service, express or implied, or apprenticeship, for an employer . . . ." Claimant has the burden of showing an employer-employee relationship. The Iowa Supreme Court has recognized five factors in determining whether or not an employer-employee relationship exists: (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. (5) Is the party sought to be held as the employer the responsible authority in charge of the work or for whose benefit the work is performed. *Nelson v. Cities Service Oil Co.,* 259 Iowa 1209, 146 N.W.2d 261 (1967).

Although defendant argues that it had no control over the selection of claimant as a union officer, it may be presumed that defendant initially selected claimant as an employee and that the union membership elected someone familiar with the plant to represent them.

As chairman of the grievance committee, claimant was paid by the employer at the hourly rate required by his classification at the time he became chairman. The company, under the agreement negotiated with the union, did not pay claimant for time spent in negotiations, on vacations, while attending meetings or conventions not held in the local union office or in participating in activities not directly related to the function of his office. It appears that practice between the parties was for claimant to be paid by defendant up until the time claimant actually engaged in an excepted activity.

Gary Brummerstedt, labor relations manager at Mount Joy, indicated claimant would be paid for travel time. He testified, "If Dale had turned in an exception slip for that day indicating he was going to be in a Cat Council meeting beginning at two o'clock, I would pay him from eight a.m. until two p.m." Exhibit 1 submitted with defendant's stipulation of facts shows claimant was paid by the union for one hour of local negotiations following his accident on August 20.

Regarding the right to discharge, Brummerstedt, saying "[i]f you haven't been separated from the company while on leave of absence, you still have employee status," further stated that he believed he could terminate claimant's leave of absence and thereby terminate claimant's employment.

Brummerstedt apparently thought he could not request claimant to come in and work his shift, but it is unclear from the record whether or not that belief arose from Brummerstedt's own personal policy or from company policy. Although his suggestions were not always accepted, Brummerstedt did make suggestions to claimant. Claimant asserted, "I am always under Mr. Brummerstedt's supervision. He is my boss." Claimant reported being told:

> . . . anything I done -- if I was absent, I would report to him, or whatever I did, I answered to him. Went into the plant and -- anything that don't suit him, I answer to him. Anything that I want done, I have to have his permission, and all circumstances I answer to him as to what I do.

Claimant answered affirmatively when he was asked if there had been situations in which he had been called to the plant to be told of a downgrade or to talk to an employee.

In Brummerstedt's opinion the "function that [claimant] . . . performs while acting as Chairman of the Grievance Committee does not directly benefit Caterpillar Tractor Company as an employer . . . and instead directly benefits Local 215."

A number of courts and this agency are taking a different view. Larson in 1A *Workmen's Compensation Law,* section 27.33 (1978 ed.), discusses the benefit of union activity.

> It is being increasingly held . . . that an activity undertaken by an employee in the capacity of union office may simultaneously serve the interests of the employer . . . .[A] . . . union steward was awarded compensation when he was assaulted by an employee whom he sought out in another section of the plant to talk to about a work complaint the employee had made. *[Herndon v. UAW Local No. 3,* 56 Mich. App. 435, 224 N.W.2d 334 (1974)] It was the steward's job to process such complaints, and his contract provided for free time with pay to carry on such activities. A . . . union steward, although engaged in checking carpenters for the union at the time he sustained the injuries from which he died, was held to have been performing a job incidental to his employment. *[Fidelity & Casualty Co. v. Landers,* 89 Ga. App. 100, 78 S.E.2d 878 (1953)] The court relied on the fact that an agreement between the employer and the union permitted the steward to check carpenters while on the job for membership and dues payment without a reduction in salary for the time so consumed.

A Minnesota case was the harbinger of the developing area of law. *Kennedy v. Thompson Lumber Co.,* 26 N.W.2d

459 (Minn. 1947). In *Kennedy,* claimant, a shop steward, was responsible for negotiating grievances and was injured as he crossed a public street to reach a telephone off his employer's premises so that he could call the union business agent. While the supreme court was unable to determine whether or not claimant was entitled to an award and therefore remanded the case to the industrial commissioner, the opinion did hypothesize at 461 that "[i] f at the time of the injury the employer was about to make a telephone call which would have advanced the interests of his employer in its relations with its employees, the case might be covered by the act." The court entered a finding at 463 that claimant "was acting in the interests of the employer as well as the employes and that the injuries he sustained arose out of and in the course of his employment."

The New Jersey Supreme Court has dealt with injuries suffered during union activity in two recent cases. *Salierno v. Micro Stamping Co.,* 72 N.J. 205, 370 A.2d 3 (1977); *Mikkelson v. N. L. Industries,* 72 N.J. 209, 370 A.2d 5 (1977). In *Salierno, supra,* claimant was a union steward who had taken part after working hours in an emotional negotiating session aimed at obtaining a new contract. Subsequent to that session he suffered a myocradial infarction. The opinion of the superior court, which was affirmed on appeal, acknowledged the shop steward's function in maintaining the employer's production flow without disruption from labor strife. *Salierno v. Micro Stamping Co.,* 136 N.J. Supr. 172, 345 Ad. 342 (1975). Bargaining sessions were viewed by the superior court as providing an opportunity which benefited both the employees and the employer and at_____, 345 that "the union representative -- the shop steward -- is as essential a part of conducting a business as the employer's management personnel" with "[w] hat the union representatives do and how they fashion their demands" being seen as "an essential part of every unionized business" and their participation in bargaining accruing to the benefit of the employer. This case was cited with approval by the Pennsylvania Commonwealth Court in *Repco Products Corp. v. Workmen's Compensation Appeal Board,* 379 A.2d 1089 (1977).

Mikkelson, supra, presented to the New Jersey court the case of a claimant who had taken part in a union meeting off the employer's premises. The purpose of the meeting was ratification of a contract. After leaving the meeting, claimant injured his ankle in the parking lot of the meeting place. Again mutual benefit to the employer-employee was emphasized at ___ , 9:

> Where, in fact, the union is a recognized bargaining unit, the collective agreement may be viewed as a necessary element of the employer's business. Further, while the union members' primary concern in a bargaining contract assuredly is the promotion of their own interests, nevertheless such agreements typically involve give and take between employer and employees, with concessions rendered on both sides. On today's industrial scene, the successful consummation of the periodic labor negotiations is accounted a substantial employer benefit.

The Supreme Court affirmed the award of benefits.

Viewed in its totality and particularly in light of the benefit conferred to defendant by claimant's union activities, the relationship between claimant and defendant is an employee-employer relationship.

Defendant's second argument is that claimant's injury did not occur in the course of his employment. The Iowa Supreme Court in *McClure v. Union County,* 188 N.W.2d 283 (Iowa 1971), stated at 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).

Claimant in the matter sub judice was traveling from the union hall to defendant's plant at the time of his injury. His work day had begun at eight a.m. He spent the morning preparing for the afternoon's negotiating session which was to begin at one thirty. He left the union hall at one o'clock. He was to be paid by defendant up until the time the negotiations began. Claimant's travel period certainly falls within the rule provided by *Bushing, supra.*

* * *

THEREFORE, it is ordered.

That defendant handle this matter as a compensable claim under the Iowa Workers' Compensation Law.

* * *

Signed and filed this 28th day of December, 1978.

ROBERT C. LANDESS
Industrial Commissioner

Appealed to District Court: Pending.

ALETTE E. SHULL, Widow of CHARLES F. SHULL,

Claimant,

vs.

L & L INSULATION AND SUPPLY CO., IOWA ASBESTOS COMPANY, and CENTRAL ASBESTOS AND SUPPLY CO.

Employers

and

NORTH RIVER INSURANCE CO., WESTCHESTER FIRE INSURANCE CO. WESTERN CASUALTY AND SURETY COMPANY, and EMPLOYERS MUTUAL CASUALTY COMPANY,

Insurance Carriers,
Defendants.

Ruling

On December 6, 1979, this matter came on for hearing before the undersigned deputy industrial commissioner on the various motions for summary judgment filed by the following defendants; Iowa Asbestos Company and its insurance carrier, Westchester Fire Insurance, (motion for summary judgment filed on October 10, 1979); and Iowa Asbestos Company and its insurance carrier, Western Casualty and Surety (motion for summary judgment filed on October 19, 1979). A previous ruling issued on November 6, 1979, granted the aforementioned motions. Thereafter, an application for rehearing was granted to the claimant on November 13, 1979.

The present hearing is consolidated for rehearing and consideration of the prior ruling on summary judgments with a subsequent motion for summary judgment by Central Asbestos and Supply Company and its insurance carrier, Employers Mutual Casualty Company filed on November 9, 1979.

The claimant, at the time of the hearing requested to file an amended petition in arbitration. Said amendment was filed December 19, 1979. Those parties having so elected have filed their respective briefs and responses on the motions for summary judgments and determination is now made upon the various motions.

* * *

The motions are based upon the undisputed fact that the decedent was employed by his last employer L & L Insulation and Supply Company for a period of six years prior to his death and that the claimant admitted in her response to requests for admission that the decedent was not disabled in the first three years of his employment by this employer. Thus the proponents of the motions (defendants here) are not liable for this claim.

A summary judgment may be rendered on the issue of liability alone where there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. Iowa Rule of Civil Procedure 237(c).

As will be seen later, the statutes of limitations under the Iowa Workers' Compensation Laws are dispositive of the issue herein.

The petition for arbitration was filed on June 28, 1979, alleging, inter alia, at paragraphs numbered 15, 18 and 22 that the decedent died on May 12, 1978, and that death resulted from asbestosis, "[S]ame not being made known to the surviving widow and claimant herein until receipt of physician's letter dated May 23, 1979." Claimant pleads in the alternative that the decedent died from an injury caused by severe coughing, namely cerebral hemorrhage, complicated by the contributing factor of pulmonary asbestosis. Further, at paragraph 9 it is shown that claimant's decedent was employed by L & L Insulation for approximately six years prior to his death.

The 1977 Code of Iowa applies to this claim. Section 85.26, the statute of limitations for an injury in effect at the time of the decedent's death provided:

> Section 85.26-Limitation of Actions. 1. No original proceedings *for benefits* under this chapter, chapter 85A, 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 in section 86.20. (Emphasis added) Cf. 1963 through 1976, Code Section 85.26 which provided for a statute of limitations of two years "from the date of the injury causing such death or disability for which (compensation) benefits are claimed."

The definition of injury is found in Section 85.61(5) which provides:

> The words "injury" or "personal injury" shall be construed as follows: (1) 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. (Emphasis added)

Section 85.61(5)(b) excludes an occupational disease in its definition of injury thereby excluding it from Chapter 85 application, specifically application under Section 85.26. Further, Section 85A.16 states that the provisions of the workers' compensation law, so far as applicable and not inconsistent with the occupational disease law, shall apply to compensable occupational disease cases.

Section 85A.10, (1977) Code of Iowa, provides that only the last employer in whose employment the employee was last (or could have been last by virtue of length of employment) injuriously exposed to the hazards of an occupational disease shall be held liable.

> Section 85A.10-Last exposure-employer liable. Where compensation is payable for an occupational disease, the employer in whose employment the employee was last injuriously exposed to the hazards of such disease, shall be liable therefor. The notice of injury and claim for compensation as hereinafter required shall be given and made to such employer, provided that in case of pneumoconiosis, the only employer liable shall be the last employer in whose employment the employee was last injuriously exposed to the hazards of the disease during a period of not less than sixty days.

Additionally, Section 85A.12 provides a statutory limitation for the time of the institution of this claim.

> Section 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. (Emphasis added)

This statute provides that an employer shall not be liable in the case of pneumoconiosis unless disablement or death results within three years (the longest period) or in the case of any other occupational disease one year (the shortest period) after the last injurious exposure. In the case where compensation has been paid or awarded the statute allows recovery for death benefits within seven years after exposure. In the case sub judice compensation has not been paid or awarded prior to the filing of the petition or institution of this action.

Of greater importance is the three year statute of limitations where the claimant's decedent's death occurred more than three years subsequent to the last possible exposure for the employers, Iowa Asbestos Company and Central Asbestos and Supply Company and their respective insurance carriers, Western Casualty and Surety and Employers Mutual Casualty Company. These defendants cannot now be held liable for this death benefit claim. Tracas v. A.C. & S. Inc., et al, Thirty-Third Biennial Report of the Industrial Commissioner at page 200 (1978). Mousel v. Bituminous Material Supply Company, 169 N.W.2d 763 (1969). See also Jacques v. Farmer's Lumber and Supply Co., 242 Iowa 548, 47 N.W.2d 236 (1951). [Notice provision under Section 85.23.]

The plain intent of the statute is unmistakable. Only L & L Insulation and Supply Company and its insurance carrier, North River Insurance Company, has any exposure for liability on this claim because the decedent was employed by their company for at least six years before his death. Additionally, any exposure to liability is limited to the last three years of the decedent's employment by virtue of the claimant's admission in her response to requests for admission, which limited disability of the decedent to the last three years of his employment.

The legislative intent was to exclude remote employers from workers' compensation liability where the medical causation of a claimed injury was difficult, if not impossible, for the claimant to prove. Further, the apportionment of liability from one prior employer to another would be an impossibility. Therefore, the practical approach taken by the legislature was to affix liability upon the last employer provided in the case of pneumoconiosis that the injured employee was hazardously exposed for a period of not less than sixty (60) days. Section 85A.10., supra.

Furthermore, Section 85.26, as a statute of limitations limits the right to seek *all benefits, which include death benefits,* in an original proceeding, as in this case, to two years from the date of the occurrence of the injury. The prior employers then cannot be held liable for an injury under Chapter 85 of the workers' compensation laws.

In Jacques v. Farmer's Lumber & Supply Company, supra, the court discussed the meaning of "occurrence of the 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 the seriousness or compensability of his claim. In this case, claimant has filed her dependency claim within one month of receipt of the examiner's report asserting pulmonary asbestosis as a contributing factor to the decedent's death. This statute of limitation provision, however, clearly precludes any liability for the prior employers Iowa Asbestos Company and Central Asbestos and Supply Company because of the remoteness in time of employment by the claimant's decedent and his subsequent death, no matter what the cause thereof.

There is no plausable way the prior employers and their insurance carriers could be held liable for this decedent's death where the decedent had been employed by the last employer, L & L Insulation and Supply Company, for at least six years prior to his death. The occurrence of the injury must, of necessity, have occurred within this period by virtue of the limits contained in the statute.

This claim, as amended, is for death benefits resulting from asbestosis. Asbestosis is an occupational disease as defined in chapter 85A, Code of Iowa. Thus the claim made herein is clearly for an occupational disease within chapter 85A and not an injury within chapter 85, Code of Iowa.

WHEREFORE, the prior ruling of November 6, 1979, is adopted and restated as if duly set forth herein. Defendant Iowa Asbestos Company and its insurance carriers, Westchester Fire Insurance Company and Western Casualty and Surety Company, as well as Central Asbestos and Supply Company and its insurance carrier, Employers Mutual Casualty Company, should have their motions for summary judgment sustained.

The uncontroverted evidence as shown by the pleadings and response to request for admissions show that that there is no genuine issue of material fact relating to the defendants Iowa Asbestos Company and Central Asbestos and Supply Company in that the limitations mentioned in Sections 85A.10 and 85A.12 excludes any liability.

THEREFORE, defendants Iowa Asbestos Company's and Central Asbestos and Supply Company's and their insurance carriers' motion for summary judgment, as heretofore filed in this claim, are sustained and the case herein is dismissed as to them.

Accordingly this claim shall be assigned for hearing on the merits of the claim as against the remaining employer, L & L Insulation and Supply Company and its insurance carrier, North River Insurance Company on the regular assignment docket.

THEREFORE, defendants' motions for summary judgment as heretofore filed in this claim are sustained.

Signed and filed this 23rd day of January, 1980.

THOMAS R. MOELLER
Deputy Industrial Commissioner

Appealed to Commissioner: Affirmed
Appealed to District Court: Pending.

CHARLES ROGER SIDDENS,

Claimant,

vs.

MID-IOWA BUILDERS, INC.,

Employer,
Defendant.

Motion to Set Aside Default Judgment

BE IT REMEMBERED that on December 27, 1979 defendant herein filed what was called an "application for rehearing of decision or in the alternative motion to set aside default judgment." On January 16, 1980 claimant herein filed a resistance to defendant's application or motion. The matter came on for hearing before the undersigned at the Iowa Industrial Commissioner's Office in Des Moines, Iowa on February 14, 1980. The record was considered fully submitted on February 21, 1980.

The file reveals that claimant filed an original notice and petition on September 17, 1979 and personally served such document on the defendant on September 28, 1979. No appearance was filed by the defendant. The claimant filed a motion for default judgment pursuant to Industrial Commissioner Rules 500--4.36 and 500--4.9 on November 13, 1979. No resistance was filed by the defendant. On December 7, 1979 a default judgment was entered and the claimant was ordered to appear on January 9, 1980 to prove his right to benefits. On December 27, 1979 defendant filed the present application or motion in addition to a request for oral hearing, an answer and a motion for extension of time as to the hearing scheduled January 9, 1980.

* * *

The issue to be determined is whether the claimant demonstrated "good cause," as interpreted by Iowa Rule 236 of Civil Procedure and relevant case law, why the December 7, 1979 default judgment should be set aside.

Donald D. Rankin, president and 100 percent stockholder of Mid-Iowa Builders, Inc., testified that upon receipt of the original notice and petition, he immediately contacted Galvin Insurance. Rankin said he read the original notice and petition and knew generally with what incident it was concerned. According to Rankin he received a memorandum from R. Pantoga of Galvin Insurance, dated September 20, 1979, which stated: "Your policy is written for clerical and warehouse employees only, under your payroll." (Defendant's exhibit 1.) Rankin stated that he then talked with the claimant about the situation with Galvin Insurance and the claimant indicated he would do nothing to harm Rankin and would advise his own attorney accordingly. Rankin testified that he and the claimant had a number of similar conversations both before and after he received the motion for default judgment. Rankin explained that he did not contact an attorney to handle the matter until he received the default judgment.

On cross-examination Rankin testified that he was aware of the fact that a policy with another company -- not Galvin Insurance -- was in effect on the alleged date of claimant's injury. He stated that he did not contact such company. He admitted he did not try to contact claimant's attorney although he was aware of the attorney's name. Rankin further testified on cross-examination that he had requested the services of attorneys, including his present counsel, on previous occasions but did not contact an attorney regarding the present matter until he received the default judgment.

When recalled as a defense witness, Rankin testified that he generally ignored the matter because he was of the opinion that he did not have coverage for salespersons, and that the claimant fell into such category.

Bobbie S. Davis, business office manager and Rankin's secretary, testified that she typed in the notation on the upper right-hand corner of the memorandum from Galvin Insurance when she learned of the terms of coverage and to explain to this office that claimant was being considered an independent contractor by the defendant. Davis verified Rankin's testimony regarding claimant's repeated assurances that he did not wish to pursue any action against Rankin or the company per se but only that he wished to collect under any available insurance coverage the defendant might carry.

On cross-examination Davis testified that she too was aware that Galvin Insurance did not provide coverage for defendant on the date of injury. Davis stated she did not know what coverage was in effect on the date of injury even though she apparently knew which agency the defendant dealt with in the past. She also indicated that she did not attempt to contact claimant's attorney.

On redirect examination Davis explained that because she reviewed the company's old files and could not locate a record of policy for the date of injury, she did not bother contacting the prior insurance agency.

On cross-examination she conceded making the determination that claimant was an independent contractor without contacting the prior carrier.

Claimant testified that he had many conversations with Rankin before and after contacting an attorney. He insisted he never told Rankin he would not pursue a claim for workers' compensation benefits. Claimant explained that although he might have said he did not wish to hurt Rankin personally, he did not thereby mean he would not proceed with his claim. Claimant noted that he learned of the hearing on the motion from Rankin two days earlier.

On cross-examination claimant testified that Rankin indicated in one of their many meetings that he would fight the claimant "tooth and nail" over the workers' compensation matter.

Iowa Rule 236 of Civil Procedure provides in relevant part as follows:

> On motion and for good cause shown, and upon such terms as the court prescribes, but not ex parte, the court may set aside a default or the judgment thereon, for mistake, inadvertence, surprise, excusable neglect or unavoidable casualty. Such motion must be filed promptly after the discovery of the grounds thereof, but not more than sixty days after entry of the judgment. Its filing shall not affect the finality of the judgment or impair its operation.

In explaining the rationale behind this rule, the Iowa

Supreme Court stated:

> The purpose of this rule is to allow a determination of litigation on the merits, where appropriate, as opposed to an ex parte adjudication when the absence of opposing litigant is due to his nonprejudicial inadvertence or excusable mistake. (citation)
>
> On the other hand, *In re Estate of Staab,* 192 N.W.2d 804 807 (Iowa 1971), holds the burden is upon defendant-movant to plead and prove such good cause as will not only permit but require a finding of mistake, inadvertence, surprise, excusable neglect or unavoidable casualty. * * * * *Hansman v. Gute,* 215 N.W.2d 339, 342 (Iowa 1974).

In examining the reasons for setting aside a default judgment, the Iowa Supreme Court stated:

> What constitutes good cause in relation to grounds of mistake, inadvertence and excusable neglect has been settled in our cases. Good cause is a sound, effective, truthful reason, something more than an excuse, a plea, apology, extenuation, or some justification for the resulting effect. The movant must show his failure to defend was not due to his negligence or want of ordinary care or attention, or to his carelessness or inattention. He must show affirmatively he did intend to defend and took steps to do so, but because of some misunderstanding, accident, mistake or excusable neglect failed to do so. Defaults will not be vacated where the movant has ignored plain mandates in the rules with ample opportunity to abide by them. (citations) *Dealers Warehouse Co. v. Wahl & Associates,* 216 N.W.2d 391, 394-95 (Iowa 1974).

Good cause is established if one of the grounds in rule 236 is proved. Setting aside a default judgment under such rule, without proper basis in the record, amounts to an abuse of discretion. A party's misconstruction of a proper legal notice is not the equivalent of "good cause." *Williamson v. Casey,* 220 N.W.2d 638 639 - 640 (Iowa 1974).

In *Haynes v. Ruhoff,* 261 Iowa 1279, 157 N.W.2d 914, 918 (1968), the Iowa Supreme Court reversed a trial court's setting aside of a default judgment. Where nonresident defendant received notice as to civil action initiated against him but neither consulted an attorney nor requested the insurance carrier to act in the matter because, as alleged in said defendant's motion, he and the insurance agent thought the civil action was part of a pursuit of a criminal action against the plaintiff, the Court reasoned:

> We are satisfied a showing of confusion by the movant, because he and his insurance agent were not acknowledgeable in the ways of litigation and did not understand the consequences of a failure to appear in response to the notice, will not be deemed sufficient to comply with rule 236, R.C.P. If a showing that one is not knowledgeable in the law is sufficient, few applications thereunder could be denied. * * * Confusion, for one reason or another, seems to affect everyone these days, but when confused as to legal notices, reason requires that one seek legal advice in order not to disrupt court procedure and the expeditious adjudication of the parties' rights * * * It may be that defendant did show grounds for confusion, but we cannot hold that a lack of understanding as to the legal effect of a notice in a civil action will excuse one from taking affirmative action to obtain an understanding and an attempt to appear as required. To permit one to set aside a default when he admits he took no reasonable steps to appear and defend would abrogate completely the rules of civil procedure requiring appearances within a specified time and reward one's neglect or inattention to legal notices properly served upon him.
>
> We are satisfied defendant failed to show anything more than an excuse, a plea, apology, extenuation, or an explanation for his failure to appear as required by the statute. He failed to show any effort to resolve his confusion or seek legal advice as he did when he received a subpoena previously. In other words, he chose to ignore this notice and decide for himself its import. This is not excusable neglect * * * *.

Defendant, in support of its application or motion, states:

> 1. Defendant failed to appear and defend because of mistake, inadvertence and surprise in that it was Defendant's understanding that the Claimant would not pursue this matter before the Iowa Industrial Commissioner.
>
> 2. Had the Defendant been knowledgeable of the fact that the Claimant would have intended to proceed with the matter, he would have filed this answer and defended not only as to whether the purported injury had a causal relationship to the purported employment, but also as to whether or not Mr. Siddins [sic] was an independent contractor and was covered by Iowa Workman's [sic] Compensation law.
>
> 3. Attached and incorporated hereto is an Affidavit by Donald E. Rankin, President and 100% stockholder of the Defendant in support of this application.

In said affidavit Donald R. Rankin alleges:

> 1. That I am the President and 100% stockholder of the entity known in file number 603546 as Mid-Iowa Builders, Inc.
>
> 2. Neither I nor the Corporation have previously been involved in any Workman's [sic] Compensation proceedings, and had no knowledge of the proceedings in the same.
>
> 3. That during the pendency of this action, I was repeatedly informed by Charles Roger Siddens, Claimant, individually and in the presence of others, that he would not pursue his claim against the Corporation and he would not seek a judgment which would adversely affect the Corporation.
>
> 4. Had I realized that it was Mr. Siddens [sic] intent to pursue his claim, I would have appeared and defended as alleged in Paragraph 2 of the Motion for Rehearing.

5. That my failure to appear and defend was based on mistake, inadvertence and surprise as outlined above.

In its brief, defendant argues that Rankin thought he was complying with the original notice and petition's directive to appear by contacting his insurance carrier who advised him of the terms of coverage and by sending exhibit 1 to this office. Defendant contends Rankin therefore did not ignore the mandate of the original notice and petition. With respect to the so-called "second notice," the motion for default, Rankin falls back on the theory that he acted reasonably by meeting with claimant and, upon being advised again that claimant would not continue to pursue his claim before this agency, he did not think it necessary to respond to the matter.

Defendant's position in the present matter is without merit. Sending exhibit 1 to this office did not amount to showing an intention to appear and defend but rather a conclusion by a party that it was not liable and did not need to appear. Furthermore, it is noted that both Rankin and Davis testified they did not contact the carrier which provided coverage at the time of the alleged injury. (See *Haynes, supra,* 917.)

Indeed, Rankin's behavior is similar to that of the defendant in the *Haynes* case. Lack of familiarity with the workers' compensation procedure does not constitute good reason to set aside the default. Rankin's reliance upon what he believed claimant was saying in their varied discussions about the status of the claim does not justify setting aside the default. Rankin had employed the services of legal counsel in the past to handle other matters for him. He should have done so in this matter -- at the very least when the motion for default was received. Instead Rankin did nothing to resolve the confusion and decided for himself that the legal pleadings were not of serious import.

Parenthetically, the undersigned points out that even if determination of the present matter turned on the credibility of the witnesses (which it does not), the straightforward calm demeanor of the claimant in being sworn in and in testifying at the hearing would outweight that of defense witness Rankin who appeared belligerent throughout the proceeding.

* * *

Signed and filed this 4th day of March, 1980.

LEE M. JACKWIG
Deputy Industrial Commissioner

Appealed to Commissioner: Affirmed
Appealed to District Court: Pending.

JULIA Y. SIFUENTEZ

Claimant,

vs.

HUTTIG MANUFACTURING

Employer,

and

EMPLOYERS INSURANCE OF WAUSAU

Insurance Carrier,
Defendants.

Review-Reopening Decision

This is a proceeding in Review-Reopening brought by the claimant, Julia Sifuentez, against her employer, Huttig Manufacturing Company and Employers Insurance Company of Wausau, the insurance carrier, to recover additional compensation under the Iowa Workers' Compensation Act by virtue of industrial injury which occurred on September 1, 1976.

* * *

The issue for determination is whether the claimant is entitled to additional compensation in the form of healing period and permanent partial disability.

On September 1, 1976 the claimant was an employee of defendant and while pulling a pallet loaded with wood, stepped in a crack in the floor, twisting her right ankle. She went to see the plant nurse and then was taken to the plant doctor who took x-rays and gave the claimant an elastic bandage to wear. She was told not to work for 14 days but later that day the pain was becoming so severe that she called the nurse. On September 2, 1976 she talked to the plant physician and received a pain pill. About three days later she started noting a pain and fever, and she again called the doctor. Upon the request of her son she removed the elastic bandage and noted that her little toe was black, cracking on the side, and draining a black fluid. She went to the hospital and was treated by V. Warren Swayze, M.D. who referred the claimant to William Catalona, M.D., an orthopedic surgeon.

Eventually Dr. Catalona amputated the metatarsial bones of both the fourth and fifth toes of the right foot. The claimant was diabetic. Gangrene had started to appear. Dr. Catalona stated in his report dated September 13, 1976 that the claimant had an aggravation of her previously existing condition which resulted from her injury at work and which caused a flare-up and infection with gangrene. The claimant has had diabetes for some 30 years and has been taking medicine for that time for her condition. Because of the diabetic condition, Dr. Catalona indicated that it would take considerable time to heal the injury; and on October 14, 1976, Dr. Catalona reported that the claimant had been practically healed, although she was still in the hospital and receiving whirlpool baths and there was only a small line of granulation tissue over the entire length of the surgical incision. Dr. Catalona feared that the claimant would eventually face an amputation of the leg below the knee. Dr. Catalona made the following statement: "In view of this patient not ever being able to return to work, it appears that you consider settling her claim on a time lost basis and whatever permanent she might be entitled to."

On October 28, 1976, Dr. Catalona reported that the claimant had not reached maximum healing of her amputation and estimated that it would take another month for

her to reach that maximum recuperation. At that time Dr. Catalona indicated that the claimant's permanent partial impairment to the foot was 10%. Dr. Catalona referred the claimant to the University of Iowa Hospitals and Clinics Department of Internal Medicine on March 20, 1978. The report of the University of Iowa indicates most of the problems were of a medical nature and did not give any recommendations with regard to the claimant's return to work.

The claimant was seen by Paul From, M.D., an internist from Des Moines, Iowa on April 11, 1978. He later wrote a lengthy report which indicated in essence that he thought the claimant's basic problem could be traced to diabetes which was severe in nature and complicated by chronic overweight, obvious arteriosclerosis obliterans and possible neuropathy as well as some nephropathy and some retinopathy. Dr. From stated that it was difficult for him to see how a sprain in the ankle could lead to the secondary enterobic infection along the lateral aspect of her right foot but concedes that the sprain could have aggravated the underlying circulatory problems. In a later letter dated April 20, 1978 Dr. From reported that he felt that the problem was related to a corn on the fifth toe of the right foot which became infected and became extremely severe in its impact because of the claimant's diabetes and conceded that there was a chronological relationship with the ankle injury.

The claimant has not worked since the date of the injury and is now living in Kearney, Nebraska.

The claimant has the burden of proving preponderance of the evidence that the injury of September 1, 1976 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. *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. Based on the foregoing principles it is found that the claimant has established her claim by the requisite preponderance of the evidence. The reports of the treating physicians indicate that the claimant's condition is directly traceable to the injury of September 1, 1976 under the doctrine *Langford v. Kellar Excavating & Grading Co.,* 191 N.W.2d 667.

The problem for resolution at this time is the nature and extent of the claimant's disability and specifically whether the disability is confined to a scheduled number or not. The evidence taken as a whole indicates that no medical evidence was presented which indicates that the work related incident caused permanent disability other than to the foot and that the claimant's pre-existing condition was aggravated. The conclusion of this deputy industrial commissioner is that the disability now suffered is caused by the claimant's pre-existing diabetic condition rather than any result of the original injury of September 1, 1976. The only medical evidence which indicates the extent of the permanency to the claimant's foot is the report of Dr. Catalona indicating a permanent partial disability to the foot only. The Form Five shows that the claimant has been compensated for her injury. See *Barton v. Nevada Poultry,* 253 Iowa 285, 110 N.W.2d 660.

WHEREFORE, claimant has failed to establish that she is entitled to compensation in addition to that which has been already paid.

* * *

Signed and filed this 10th day of August, 1978.

JOSEPH M. BAUER
Deputy Industrial Commissioner

Appealed to Commissioner: Affirmed
Appealed to District Court: Pending.

JULIA Y. SIFUENTES,

Claimant,

vs.

HUTTIG MANUFACTURING'

Employer,

and

EMPLOYERS INSURANCE OF WAUSAU,

Insurance Carrier,
Defendants.

Appeal Decision

Claimant appeals from a review-reopening decision in which she was denied additional benefits as a result of an injury she received on September 1, 1976.

* * *

Claimant twisted her right ankle in the course of her employment. She received first aid and was sent home for fourteen days. Claimant is diabetic. In a matter of a few days the claimant developed gangrene which resulted in the amputation of the fourth and fifth toes on the right foot. The amputation extended into the metatarsal bones.

Compensation is payable for the disability which results from injury. It is the resultant disability and not the location of the trauma that determines the compensation to be paid. If the disability is limited to a scheduled member, compensation is limited to the schedule. Regardless of the inability to engage in employment because of a scheduled injury, compensation is limited to the schedule. Compensation for a loss less than the total of the scheduled members shall be based upon a percentage proportion of the scheduled maximum. *Barton v. Nevada Poultry Co.,* 253 Iowa 285, 110 N.W.2d 660; *Soukup v. Shores Co.,* 222 Iowa 272, 268 N.W. 598; Section 85.34(2)(u), Code of Iowa.

The only rating of disability is that of Dr. William Catalona at 10% of the right foot. This amounts to 15 weeks of permanent partial disability. Defendants have

compensated the claimant for 30 weeks of permanent partial disability. This amount would represent either the loss of two lesser toes or 20% loss of the right foot. Nothing in the record shows claimant's disability as a result of her injury to be greater than the amount for which she has been compensated. Applicable healing period and medical benefits have been paid.

* * *

Signed and filed this 29th day of September, 1978.

ROBERT C. LANDESS
Industrial Commissioner

No Appeal.

OWEN SIMMONS,

Claimant,

vs.

BLACK CLAWSON HYDROTILE,

Employer,

and

EMPLOYERS INSURANCE OF WAUSAU,

and

SECOND INJURY FUND OF IOWA,

Defendants.

Appeal Decision

All parties have appealed from a proposed review-reopening decision wherein the claimant was awarded healing period and permanent partial disability from the employer and insurance carrier, and permanent partial disability from the Second Injury Fund of Iowa.

* * *

On reviewing the record, it is found that the findings of fact and conclusions of law are proper with the following modifications.

As a result of claimant's most recent injury, it was found that claimant's disability was to his right arm. The reason for this finding was that claimant was unable to satisfactorily perform the dorsiflexion maneuver, and the loss of use of this wrist motion is a loss to the arm. This particular finding is unsupported by the record.

A review of the record shows that there is no medical testimony which would indicate that claimant had any restriction in his wrist motion. Dr. Sprague made no mention of claimant's wrist motion. Dr. Diamond testified that claimant's shoulder, elbow and wrist showed good motion and were normal. Further, careful examination of claimant's exhibit A reveals that claimant has no noticeable difficulty with motion in his right wrist.

It appears from the record that claimant's disability as a result of his most recent injury is to his right hand. While the situs of the injury and the subsequent surgeries was confined to the fingers of claimant's hand, the medical evidence shows that claimant's disability extended into his hand. Dr. Diamond testified that the flexion of the MP joints, or knuckle joints between the base of the fingers and the hand, was only perhaps 75 or 80 degrees. Ninety degrees would be normal, so it appears claimant's motion in his right hand has been impaired as a result of his injury.

The medical testimony differs widely on the nature and extent of the disability to claimant's right hand. Dr. Diamond gave claimant a 60% disability rating based upon anatomical and functional considerations. Dr. Sprague based his disability rating solely upon anatomical considerations and rated claimant's disability at 23% of the right hand.

Claimant is entitled to have his disability determined from a functional standpoint and not solely upon loss of motion or purely anatomical considerations. Since Dr. Sprague declined to consider this aspect of claimant's disability, his rating is not given the weight of Dr. Diamond's rating which did consider the functional aspects of claimant's disability. Thus, claimant is found to have sustained a 60% permanent partial disability to his right hand.

Due to the change in the nature and extent of claimant's disability caused by his most recent injury, and given that this proceeding necessarily involves the Second Injury Fund of Iowa, the final payments by all of the defendants to claimant are respectively modified in accordance with the provisions of the Second Injury Compensation Act.

WHEREFORE, the proposed review-reopening decision is hereby adopted as the final decision of the agency as modified. It is found:

* * *

That claimant on October 6, 1976 sustained a sixty percent (60%) disability to his right hand which entitled him to one hundred fourteen (114) weeks of permanent partial disability compensation at the rate of one hundred fifty-five and 81/100 dollars ($155.81) per week.

That prior to the instant injury claimant had sustained a fifty percent (50%) disability to his left upper extremity which has a value of one hundred twenty-five (125) weeks.

That claimant as a result of his combined injuries is disabled to the extent of ninety-five percent (95%) of the body as a whole which has a value of four hundred seventy-five (475) weeks.

That claimant's injury on October 6, 1976 entitles him to benefits from the Second Injury Fund. After first deducting claimant's entitlement due to his previous injury, claimant is entitled to two hundred thirty-six (236) weeks of compensation from the Second Injury Fund at the rate of one hundred fifty-five and 81/100 dollars ($155.81) per week.

* * *

Signed and filed this 21st day of September, 1979.

ROBERT C. LANDESS
Industrial Commissioner

Appealed to District Court: Settled.

LENORE SMITH,

Claimant,

vs.

CARNATION COMPANY,

Employer,

and

THE TRAVELERS INSURANCE CO.

Insurance Carrier,
Defendants.

Arbitration Decision

This is a proceeding in arbitration brought by the claimant, Lenore Smith, against her employer, Carnation Company, and The Travelers Insurance Company, the insurance carrier, to recover benefits under the Iowa Workers' Compensation Act by reason of an alleged industrial injury that occurred on June 22, 1977.

* * *

The issue requiring resolution in this matter is whether or not the alleged incident of June 22, 1977 arose out of and in the course of the claimant's employment activities on behalf of the defendants.

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

Claimant, age 37, divorced with two dependent minor children, began her duties as a display worker for the defendant employer in January 1975. Her duties required extensive auto travel encompassing a territory from Des Moines north to the Minnesota state border containing some 120 supermarkets and requiring her to be away from her residence overnight on a regular basis. On June 22, 1977, while in the Dahl's supermarket in West Des Moines, and being in a squatting position, the claimant was pulling on a 20 pount bag of pet food arranging shelf space in accordance with her duties. While so doing, she felt "something" pull in her lower lumbar area. Claimant has not been gainfully employed since that date.

The claimant has the burden of proving by a preponderance of the evidence that the injury of June 22, 1977 is the cause of the disability on which she now bases her 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.

Claimant was injured in a motor vehicle accident April 13, 1971 which resulted in immediate pain in her lumbosacral area. On August 3, 1971 she was examined by F. Eberle Thornton, M.D., who in defendants' exhibit 1, reported as follows:

> I feel that at the time of this patient's accident, on 4-13-71, she sustained a strain of her lower back. I can find no evidence on x-ray of any bony injury. She does have some asymmetry of the articular facets and she does have a spina bifida, minor in degree, of the first sacral segment, which could possibly be interpreted as a fracture, but is not.
>
> The patient, objectively, has less findings than she has subjectively . . . . I feel that the patient probably needs further physical therapy, reassurance, muscle relaxants and I feel that she should be able to start getting away from her support fairly soon.
>
> I feel that the overal [sic] picture in the future is quite good and I feel that the patient will end up with little, if any, permanent disability.

At the request of Dr. Thornton, claimant was seen by Dr. Afredo D. Sacarras, M.D., a neurologist on June 30, 1972 and his report as contained in defendants' exhibit B reports as follows:

> At the time of examination she complained of a dull ache across the lower spine with intermittent shooting pains and numbness in the back of the thighs lasting for a few seconds. She stated this pain was aggravated by sitting, walking and standing and she had been awakened by the pain. She denied any serious illness.
>
> On examination the patient was alert. Cranial nerves were intact. Fundi were negative. There was no nystagmus. Gait and coordination were normal. Deep tendon reflexes were active and equal. She resisted all motions of the back. Straight leg raising test was negative while in a sitting position. Sensation was intact. In summary the examination failed to reveal any objective neurological deficit.
>
> It was my impression that Mrs. Smith's symptoms were probably on a psychophysiological basis. I advised an electromyogram of the lower extremities and paraspinalis muscles as a screening test, however this test was not carried out.

Claimant was complaining of back pain to Robert Knox, M.D., her family physician, until February 26, 1973 which then appears to be the last reference as to lumbosacral discomfort contained in Dr. Knox's clinical notes which are in defendants' exhibit C.

Claimant's testimony together with the lack of contradictory evidence concerning the claimant's medical condition as of the date of her commencement of employment with the defendant employer creates the basis for a conclusion that the claimant appeared to have made a full recovery from the injuries that she received as a result of the 1971 automobile accident. The claimant's work record since the 1971 occurrence, as contained in her answer to defendants' interrogatory 5, discloses an uninterrupted period of employment. The defendants' attempt to pinpoint this automobile accident as the source of the claimant's current disability is not well taken.

The claimant reported this work incident to her employer by long distance telephone the following day, on June 23, after failing in an attempt to return to duty. The fact that the claimant did not advise her manager at the Dahl's store, Edward A. Beitman, of the occurrence, is of little significance.

Within a very short period of time the claimant came under the care of Jim Blessman, M.D. and Donna Drees Kern, M.D., both general practitioners. Dr. Blessman had arranged for claimant's hospitalization in June 1977 after which the claimant became a patient of Dr. Kern and has remained so until the date of hearing. Dr. Kern testified live at the hearing that she had arranged for the examination of claimant by Dr. Marvin Dubansky and Dr. Marshall Flapan. Her testimony as it relates their examinations, is as follows: (transcript page 6, line 22 - page 7, line 23).

> We had Orthopedic Associates examine her and they initially felt that it was a lumbosacral strain. too, and modified the physical therapy routine and Doctor Dubansky, in a personal converation, said,"You know, I just believe this girl has to have something and I think that, despite the fact that her reflexes are still intact, that we should go ahead with the myelogram." Doctor Dubansky is extremely conservative, as are all orthopedic surgeons, considering their malpractice insurance, and she did have the myelogram, which was not diagnostic of a ruptured disc, and she was very hesitant to undergo this because of some problems with her previous spinal headache with a delivery and she, unfortunately, did develop some bad side effects in the form of a severe headache from the myelogram. The therapy had to be intermittently discontinued because of the headache associated, which was believed to be attributed to the myelogram. She was discharged and she was re-admitted on the 29th of August because of the severity of headaches and vomiting because of the headaches and just inability to stay in an upright position without demanding narcotics to control the pain and the narcotics made her sick and so we were at an impasse.

Neither of the two orthopedic surgeons who have examined the claimant have been able to demonstrate any abnormality by x-ray or myelogram and further found that the claimant did not appear to have any neurological deficit at the time of their examinations.

In October 1977 the claimant was referred to Jerome Bashara, M.D., an orthopedic surgeon, who reported his findings in part on October 7, 1977 as follows (Defendants' exhibit J):

> She has some difficulty standing and walking. There is a mild, left lumbar list, moderate lumbar paraspineous spasm with a marked amount of tenderness over the L-4, 5 and L-5 S 1 interspace posteriorly.
>
> Straight leg raising test is positive on the left at 20° and on the right at 50°. The left ankle jerk is somewhat more sluggish than the right. Knee jerks are 2+ bilaterally. There is no significant motor or sensory deficit.
>
> Recommendations:
> That patient continue with her present symptomatic treatment for her back difficulties to include the lumbo-sacral corset whenever she is up and out of bed. She is to limit her activity with lifting of no more than 5 lbs. at any time. To return in approx. 3 wks. for follow-up visit.

Dr. Bashara further reported on November 2, 1977 as follows:

> She is still having a lot of difficulty with pain in her back and down her rt. lower extremity. The symptoms are intermittent & they usually resolve within a fairly short period of time. She is having a difficult time accepting her limitations. I have tried to encourage her today that the conservative approach to her problem should lead to eventual healing. She is to return in 6-8 weeks.

On June 16, 1978 Dr. Bashara reported (claimant's exhibit 1) that on his opinion that claimant was suffering from myofascial lumbosacral strain at the time of his last examination which took place May 5, 1978.

* * *

Dr. Donna Drees Kern causally connects the injury found to claimant's employment incident.

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

1. The claimant sustained an industrial injury on June 22, 1977 which injury arose out of and in the course of the claimant's employment activities for employer.

2. That by reason thereof the claimant has been unable to perform acts of gainful employment and remains so.

3. That the claimant's rate of weekly benefits is found to be one-hundred forty-seven and 20/100 dollars ($147.20).

WHEREFORE, it is ordered that the defendants herein pay the claimant a running award at a weekly rate of one-hundred forty seven and 20/100 dollars ($147.20) beginning on June 22, 1977 and continuing until the terms of §85.34(1), Code of Iowa, have been met.

* * *

Signed and filed this 31st day of October, 1978.

HELMUT MUELLER
Deputy Industrial Commissioner

No Appeal.

DIANE SPRINGFIELD, formerly McNAUGHTON, as surviving spouse of RUSSELL E. McNAUGHTON, Deceased.

Claimant,

vs.

VERNON L. HESSE,

Employer,

and

ZURICH-AMERICAN INSURANCE COMPANIES,

Insurance Carrier,
Defendants.

Supplemental Decision

The undersigned filed a Declaratory Ruling in the above-captioned matter on April 26, 1979. The surviving spouse's share of $58.00 was mistakenly apportioned in accordance with the prior deputy industrial commissioner's rationale for apportionment presented in the second paragraph preceeding the numbered paragraphs in the order of apportionment filed December 23, 1976, rather than in accordance with the third numbered paragraph of said order.

THEREFORE, the last three paragraphs of the Declaratory Ruling filed April 26, 1979 are hereby amended to read:

The surviving spouse's share of $58.00 death benefits shall be paid in equal shares to the Clerk of the District Court for Woodbury County, State of Iowa, for Machel Marie McNaughton, Lisa Renee McNaughton and Terri Lynn McNaughton, if eligible under said section.

Signed and filed this 11th day of May, 1979.

LEE M. JACKWIG
Deputy Industrial Commissioner

DIANE SPRINGFIELD, formerly McNAUGHTON, as surviving spouse of RUSSELL E. McNAUGHTON, Deceased,

Claimant,

vs.

VERNON L. HESSE,

Employer,

and

ZURICH-AMERICAN INSURANCE COMPANIES,

Insurance Carrier,
Defendants.

Declaratory Ruling

BE IT REMEMBERED that on March 28, 1979 the defendants herein filed a petition for declaratory ruling. On March 27, 1979 the claimant herein signed an endorsed stipulation regarding the facts set forth in said petition. On April 16, 1979 a copy of claimant's letter, which had been referred to in the petition as attached thereto and made a part thereof, was filed with the undersigned.

Review of the industrial commissioner's file reveals that on June 6, 1976 a deputy industrial commissioner entered an order of apportionment finding that at the time of Russell McNaughton's fatal injury on February 2, 1975, which arose out of and in the course of his employment, he left surviving him a spouse, Diane Lynn McNaughton, and three children from his previous marriages: Machel Marie McNaughton, born October 19, 1966; Lisa Renee McNaughton, born September 1, 1965; and Terri Lynn McNaughton, born January 1, 1963. An order filed by the industrial commissioner on December 23, 1976 and entered pursuant to a petition for review of the order of apportionment affirmed the actual apportionment analysis by the deputy industrial commissioner with the exception of a reduction in the amount payable to the surviving spouse from $72 per week to $58 per week as a result of a modification of the rate earlier awarded from $97 per week to $83 per week. The relevant portion of the order for apportionment reads:

> The testimony of Diane Lynn McNaughton and of Carolyn J. Brown, the conservator of Machel Marie McNaughton and Lisa Renee McNaughton, and the affidavit of Judith Ann Carda, the mother of Terri Lynn McNaughton demonstrated a need for the benefit by the surviving spouse and the three children. Since Machel Marie McNaughton and Lisa Renee McNaughton are receiving a monthly social security benefit of four-hundred and fifty dollars per month, it is determined that Diane Lynn McNaughton and Terry Lynn McNaughton are entitled to a larger share of the workmen's compensation benefit.
>
> It is therefore ordered and adjudged that the weekly compensation benefit payable by reason of the death of Decedent shall be apportioned among the surviving spouse and the three children as follows:
>
> 1. The sum of ten (10) dollars per week for the duration of the appropriate time as provided in §85.31(1), Code of Iowa, shall be paid to the Clerk of the District Court for Woodbury County, State of Iowa, as trustee for Terri Lynn McNaughton. In the event Terri Lynn McNaughton shall no longer be entitled to benefits by operation of §85.31(1), Code of Iowa, or as a result of death, her share shall go to Diane Lynn McNaughton. In the event Diane Lynn McNaughton is not entitled to the share of Terri Lynn McNaughton by reason of §85.31(1), Code of Iowa, the share shall be paid to Clerk of the District Court for Woodbury County, State of Iowa, for Machel Marie McNaughton and/or Lisa Renee McNaughton if eligible under said section.
>
> 2. The sum of fifteen (15) dollars per week for the duration of the appropriate time as provided in §85.31(1), Code of Iowa, shall be paid to the Clerk of the District Court for Woodbury County, State of Iowa, as trustee for Machel Marie McNaughton and Lisa Renee McNaughton. Each child shall have the right to an equal share of the sum. In the event either Machel Marie McNaughton or Lisa Renee McNaughton

shall no longer be entitled to benefits by operation of §85.31(1), Code of Iowa, the share shall go to the remaining child eligible under said section. In the event neither Machel Marie McNaughton nor Lisa Renee McNaughton shall be entitled to benefits by operation of §85.31(1), Code of Iowa or as a result of death, the share shall be paid to Diane Lynn McNaughton if eligible under said section. In the event Diane Lynn McNaughton is not entitled to the share of Machel Marie McNaughton and Lisa Renee McNaughton by reason of §85.31(1), Code of Iowa, the share shall be paid to the Clerk of the District Court for Woodbury County, State of Iowa, for Terri Lynn McNaughton if eligible under said section.

3. The sum of seventy-two (72) dollars per week for the duration of the appropriate time as provided in §85.31(1), Code of Iowa, shall be paid to Diane Lynn McNaughton. In the event, Diane Lynn McNaughton shall no longer be entitled to benefits by operation of §85.31(1), Code of Iowa, her share shall be paid in equal shares to the Clerk of the District Court for Woodbury County, State of Iowa, for Machel Marie McNaughton, Lisa Renee McNaughton, and Terri Lynn McNaughton, if eligible under said section.

On September 12, 1978 the surviving spouse filed an original notice and petition seeking two years' benefits upon remarriage pursuant to Code section 85.31(1). The petition indicates that the surviving spouse remarried on May 21, 1978, that the defendants denied the surviving spouse further benefits upon remarriage and that the children are receiving benefits. (It is unclear from the pleadings whether the amounts the children are receiving have been proportionately increased since the surviving spouse remarried and her benefits were curtailed.)

The application of Code section 85.31(1)(a) to the facts of this case being in dispute, the parties herein ask the industrial commissioner to enter a declaratory ruling.

The relevant portion of Code section 85.31 reads:

> 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.

Pursuant to Code section 85.42(2), children under eighteen years of age are conclusively presumed to be wholly dependent upon the deceased employee. As evidenced from the file contents and as stated in the petition, all three children are under eighteen years of age. Accordingly, they are entitled to benefits under Code section 85.31(b) and the widow is not entitled to two years' benefits in a lump sum pursuant to the language of Code section 85.31(a).

Prior to the 1973 amendments to the workers' compensation act, Code section 85.31 did not contain the specific paragraphs set forth above (see ch. 144 §6, 65th G.A., 1973 session); however, Code section 85.43 (which has remained essentially unchanged for purposes of this issue) indicated then and indicates now that:

> 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.

In *Davey v. Norwood-White Coal Co.,* 195 Iowa 459, 192 N.W.304 (1923) the Iowa Supreme Court found that death benefits awarded under the workmen's compensation act were not forfeited by the remarriage of the surviving spouse where there were dependent minor children. The court was construing Section 2477-m16(c)(1), Code Supplement, 1913, as amended by Section 11, Chapter 270, Acts of the Thirty-seventh General Assembly which reads: "And should the deceased employee leave no dependent children, and should the surviving spouse remarry, then all compensation payable to her shall terminate on the date of such remarriage." (Said section later became Code subsection 85.42(1)(c) which was worded essentially the same with the exception that " . . . all compensation payable to her shall terminate . . . " read " . . . compensation shall cease . . . "; said section was striken by Ch. 144 §14, 65th G.A., 1973 session.) The *Davey* decision was based on the fact that the statutory condition was not met--that dependent children did exist. In dicta, the court noted

> It will be observed that it will avail defendant nothing to defeat the widow alone in her right to claim compensation. If she alone, because of her marriage, were excluded from the benefits of the compensation awarded, it would not reduce the defendants' burden of liability. The full amount would still be due to the dependent children.

Parenthetically, it is noted that unlike the *Davey* surviving spouse who continued to receive the death benefits and apparently had custody of the dependent children, the dependent children in the present case appear from the file contents to be under the care of decedent's prior two spouses.

Citing *Davey,* the Iowa Supreme Court stated without elaboration in *Walker v. Speeder Machinery Corp.,* 213 Ia. 1134, 1141, 240 N.W.725 (1932) that "[c]ompensation awarded under the workmen's compensation act to a wife

with dependent minor, because of the death of the husband and father, is not forfeited by the remarriage of the wife." See also *Reeves v. Northwestern Mfg. Co.,* 202 Iowa 136, 138, 209 N.W.289 (1926).

In *Kramer v. Tone Brothers,* 198 Ia. 1140, 1145-46, 199 N.W.985 (1924), the Iowa Supreme Court stated:

> In the instant case, the deceased did leave dependent children and a widow. The statute does not read that compensation to her shall cease on her remarriage if there are dependent children; and the question is whether her remarriage, under the circumstances in this case, terminates her right to compensation. This proposition has given us some trouble. We are not prepared to say -- neither is it necessary to determine in this case -- that the marriage of the widow alone terminated her compensation, because there is more in the case than her remarriage. We think the trial court properly held that her conduct in releasing the company from further payment of compensation to her, as shown, terminated the right to compensation, so far as she is concerned. This being so, the balance of the $4,500 fixed by the statute and the agreement of settlement, due from the employer, would necessarily go to the dependent children. The amount of $4,500 was due from the defendants unless and until discharged by some statutory exception. We said in the *Davey* case that necessarily the statutory liability continues until discharged by statutory exceptions. Although the widow has waived or forfeited further compensation to her, there has been no discharge by any statutory exception, and the liability continues as to the other dependents, the children. The trial court so held, and we think correctly."

The undersigned was unable to find any Iowa Supreme Court decision regarding the present issue as controlled by the statutory provisions in effect since the 1973 amendments. However, in light of the Iowa Supreme Court comments with regard to the former statutory provisions, the undersigned finds the legislative action in 1973 striking Code subsection 85.42(1)(c) and enacting Code subsections 85.31(1)(a) and (b), which reinforces the language of Code section 85.43 quoted above, to be indicative of legislative intent that the surviving spouse receive no further benefits upon remarriage if the deceased was also survived by dependent children at the time of the injury. Such an interpretation is important under the facts of the present case and in light of the realities of our modern-day culture wherein a decedent may be survived by children from previous marriages in the care and custody of the respective previous spouses.

WHEREFORE, IT IS FOUND that the surviving spouse herein is not entitled to two years' benefits in a lump sum.

THEREFORE, IT IS ORDERED that Diane Lynn McNaughton (Springfield), the surviving spouse, take nothing upon remarriage.

In the event there is no dispute regarding the earlier analysis of apportionment among the surviving children being appropriate, the proper apportionment among the three children would be as follows:

1. The sum of thirty-three and 20/100 dollars ($33.20) per week for the duration of the appropriate time as provided in Code section 85.31(1) shall be paid to the Clerk of the District Court for Woodbury County, State of Iowa, as trustee for Terri Lynn McNaughton. In the event Terri Lynn McNaughton shall no longer be entitled to benefits by operation of Code section 85.31(1) or as a result of death, her share shall be paid to the Clerk of the District Court for Woodbury County, State of Iowa, for Machel Marie McNaughton and/or Lisa Renee McNaughton if eligible under said section.

2. The sum of forty-nine and 80/100 dollars ($49.80) per week for the duration of the appropriate time as provided in Code section 85.31(1) shall be paid to the Clerk of the District Court for Woodbury County, State of Iowa, as trustee for Machel Marie McNaughton and Lisa Renee McNaughton. Each child shall have the right to an equal share of the sum. In the event either Machel Marie McNaughton or Lisa Renee McNaughton shall no longer be entitled to benefits by operation of Code section 85.31, or as a result of death, the share shall go to the remaining child eligible under said section. In the event neither Machel Marie McNaughton nor Lisa Renee McNaughton shall be entitled to benefits by operation of Code section 85.31(1), or as a result of death, the share shall be paid to the Clerk of the District Court for Woodbury County, Stage of Iowa, for Terri Lynn McNaughton if eligible under said section.

Signed and filed this 26th day of April, 1979.

LEE M. JACKWIG
Deputy Industrial Commissioner

Appealed to Commissioner: Affirmed.

BRADFORD LEE SQUIRE,

Claimant,

vs.

IOWA ELECTRIC LIGHT & POWER COMPANY,

Employer,

Self-Insured,
Defendant.

Decision on Application to Set Aside an Approved Form 12

This is a proceeding filed by Bradford Lee Squire, the claimant, against Iowa Electric Light & Power Company, his employer, wherein he requests that a Form 12, approved by the Iowa Industrial Commissioner on August 17, 1976 now be revoked.

* * *

Section 85.55 Code of Iowa, states in part:

However, any person who has some physical defect which increases the risk of injury, may subject to the approval of the industrial commissioner, enter into a written agreement with his employer waiving compensation for injuries which may occur directly or indirectly because of such physical defect, provided, however, that such waiver shall not affect the employee's benefits to be paid from the second injury fund under the provisions of section 85.64.

The Form 12 (Waiver) reads in part as follows:

> This is to certify that the undersigned, a practicing physician for years, having an office in Cedar Rapids, Iowa has examined Bradford Lee Squire on July 21, 1976, and finds that he has the following physical defect: Small spina bifida at the first lateral segment, space on the regular lateral is not well opened up and presence of schmorl's noddes.
>
> and is able to perform such work as:
>
> Normal activity, but not excessive back demands as in pole climbing activity.
>
> without undue hazard to his health or life.
>
> (John R. Huey) M.D.
> (Signature)
>
> I, Bradford Squire, of Marshalltown, Iowa, aged 23 years, in accordance with the terms of the aforesaid section, hereby waive compensation on behalf of myself, and in case of death resulting thereform, for my dependents, for any injury sustained by me while in the employ of Iowa Electric Lt. & Pw. Co. of Cedar Rapids, Iowa which may occur directly or indirectly because of such aforesaid physical defect.
>
> Dated at Marshalltown, Iowa (August 5, 1976)
>
> Witnesses to Employee's Signature:
> (Frances E. Porter)
> Robert Peterson
>
> (Signature) Bradford Lee Squire
> Employee's Signature
> 403 South 5th Street
>
> Concurring parent or guardian if employee be a minor:
>
> Parent Guardian
>
> The undersigned employer agrees to this waiver and that the above employee will not be requested or required to do work of a more strenuous or hazardous nature than that suggested or recommended by the above named doctor.
>
> Dated this 8th day of August, 1976.
>
> (Signed) David J. Hingtgen, Safety Director
> Employer

The claimant's application requesting revocation raises an issue of first impression in this state, and in that connection in mind, the purpose of the waiver should be discussed. The General Assembly's intent seems clear in that it desired to provide a climate wherein an employee with a physical defect would be able to obtain employment from an employer who would otherwise refuse to hire such an employee.

Thè law is well settled that an employer takes an employee's physical condition as he finds such condition as of the date of employment. The mere existence of a preexisting condition is not a defense available to an employer when a subsequent industrial injury occurs. An injured claimant is not entitled to compensation for the results of a preexisting injury or disease, but if the injury aggravated, accelerated, worsened or "lighted up" the preexisting condition, the claimant may maintain an action before the Iowa Industrial Commissioner requesting benefits to the extent that the injury aggravated the preexisting condition. Facing such a burden employers are reluctant to hire disabled workers unless the protection of Section 85.55 is available to them.

Based upon the approval by the commissioner of the Form 12, the claimant accepted the offered employment. The claimant may terminate the effectiveness of the Form 12 by resigning his position, however claimant wishes to remain a member of the bargaining unit recognized by the defendant-employer and be allowed by the terms of that labor agreement to bid for a job opening offered by the defendant-employer. The defendant-employer refuses to accept such a request saying that the duties of the proposed new position increases the claimant's "risk of injury" as evidenced by the restriction contained in the approved Form 12.

It is apparent that this tribunal finds itself called upon to resolve what appears to be a labor-management dispute, and would in that regard call the parties attention to the provisions of Chapter 601A.6(1) (a), Code of Iowa.

The medical evidence introduced by Drs. Hey and Wirtz confirms that the claimant's "physical defect" consists of a spinal bifida at S-1 level. Both these physicians are orthopedic surgeons and are well qualified to express medical opinions.

Dr. Wirtz did not find the spinal bifida during his first physical examination and reading of the x-rays taken in Ames, but later agreed that the abnormality exists and considers the defect to be of a non-risk nature.

Dr. Huey did not personally examine the claimant, but did interpret the same x-rays, finding the spinal bifida. Dr. Huey finds this boney abnoramlity as being risk-producing.

Based upon his many years of medical experience and due to his unique position as the medical examiner for the defendant-employer and to his being, therefore, in a better position to understand the physical requirements of a lineman apprentice, the testimony of Dr. Huey is given the greater weight.

WHEREFORE, it is ordered that the claimant's petition to set aside the approved Form 12 from the Commissioner's record is denied.

* * *

Signed and filed this 2nd day of May, 1979.

HELMUT MUELLER
Deputy Industrial Commissioner

No Appeal.

BLANE STEFFES,

Claimant,

vs.

IOWA BEEF PROCESSORS, INC.

Employer,
Self-Insured,
Defendant.

Appeal Decision

This is a proceeding brought by defendants appealing a proposed decision in review-reopening wherein claimant was awarded running healing period benefits and mileage expenses under the Iowa Workmen's Compensation Act for an injury arising out of and in the course of his employment on February 14, 1976.

* * *

On Saturday, February 14, 1976 claimant climbed to the top of a ladder attached to the outside of a boiler to close a valve and open the steam line. As he was on his way down to shut off two skimmer valves, he crossed to a vertical ladder which had been removed for a retinning process and then set back but not pinned. Claimant fell and was hit by the ladder and his helmet as he fell. He reported the accident, but he did not seek medical care until Monday. Claimant continued working until March 2, 1976. He attempted a return to work on July 27, 1976. He continued to work until August 3, 1976, when after working the full day, the claimant went to Dr. Meyer. He has not gone back to his job since that date. His employment was terminated on August 13, 1976 because of his alleged falsification of medical bills.

In December of 1977 at the request of defendant, claimant began going to the Hagen Chiropractic Clinic.

The issue here presented is whether or not claimant is entitled to additional compensation resulting from the injury of February 14, 1976.

Claimant currently complains of trouble sleeping, an inability to engage in hobbies he had enjoyed, and a weight restriction of twenty-three pounds. Claimant depended on a back brace, which he said had been prescribed by Dr. Nichols to be worn until his muscle spasms stopped; a cane at home; and an electric stimulator. Although claimant had been able to quit medication at one time, he had found it necessary to begin taking it again.

Other witnesses verified the changes in claimant following his injury.

Medical evidence was provided through depositions by Dr. Meyer and Dr. Skultety.

Dr. Meyer first saw claimant, who continued in his care at the time of hearing, on February 16, 1976. Feeling that claimant had a probable low back sprain, he gave claimant treatment and muscle relaxants. X-rays on December 8, 1976 showed "findings consistent with degenerative disk disease at L-4, L-5, evidence of muscle spasm of a moderate degree, mild degenerative osteoarthritic changes . . . ." When counsel inquired whether or not claimant's present complaints related to his injury or to degenerative disk disease, the doctor answered, "it could both be related. Sometimes you get an injury that can cause degenerative disk disease to be more acute than it was before." In describing his examination of claimant on September 12, 1977, Dr. Meyer said:

> It [claimant's condition] seemed to have deteriorated and gotten worse up there. His shoulders were shrugged; his face was in kind of a frowned, painful expression, holding his right hip up in kind of painful sort of manner. When I would lay him down on the table, there seemed as though there was a muscle jerking in that area. When he tried to relax, it would keep jerking even automatically.

The doctor noted that claimant's complaints were consistent in that

> [t] there was always a tenderness over the side of his posterior-superior iliac spine which is a muscle attachment into the back of the right hip or pelvis. There was always muscle spasm in that area, and on lifting the leg on the right side -- a straight leg raising test -- there was always pain at a certain level which indicates that there is some type of nerve root irritation which causes some limitations.

Asked to estimate the length of time claimant would require treatment, the doctor responded that claimant's injury would present "an indefinite problem." Regarding claimant's returning to work, Dr. Meyer stated, "If he is like he is now, I don't know if he ever will . . . ." While the doctor believed claimant had pain, he though claimant's personality compounded claimant's problems.

In June 1976 Dr. Meyer sent claimant to Jeffrey Kudsk, a physical therapist, who gave claimant treatments and instructed him in a home exercise program. Dr. Meyer read the following discharge summary which was prepared by Kudsk into the record:

> "The patient has had moderate, albeit temporary reduction of pain, through the use of TNS weekly or bi-weekly treatments with heat and electrical stimulation, followed by stretching exercise. Prolonged relief of pain has been attainable through this program, and the patient is discharged to attend the University of Nebraska Pain Clinic for further consultation. Symptoms remain confined to the right side at the level of L-5, S-1 joints with some gluteal" -- he's got irradiation, it should be radiation. "he has an antalgic gait, and is using a cane for gait at his decision."

Dr. F. Miles Skultety, neurosurgeon, first saw claimant in consultation for a possible facet syndrome in August of

1976. Facet syndrome was defined by the doctor as

> an individual [sic] who has back pain, pain extending into the leg, usually just into the thigh, more or less constant. They do not have any neurological findings. They have changes in the facet joint in the back, usually enlargement and they are usually quite tender to pressure over the area of the joint.

Dr. Skultety saw claimant again on March 7, 1977 and made a diagnosis of chronic intractable back pain and headaches. The doctor found marked spasm of the paraspinous muscles on the right, tenderness in the right paravertebral region, limited motion "in all directions," and "no demonstrable sensory deficit." Pain, which Dr. Skultety described as a psychophysiologic experience, was viewed by the doctor as real to claimant. Claimant's muscle spasm was palpable and he had an appropriate scoliosis accompanying his limitation of motion. Dr. Skultety recounted claimant's treatment at the Nebraska Pain Rehabilitation Unit as being a gradual weaning from medication, a program of physical activity and a plan for behavior modification. While Dr. Skultety believed claimant made some progress, his treatment was not considered successful. With respect to future disability, the doctor testified, "If the pain is still there, it is going to be disabling." He continued, "[O]n the basis of a four-week observation of Mr. Steffes, I would expect that he will continue to have disability with his pain."Dr. Skultety guessed that the pain would cause claimant to be unable to work.

A report from Robert M. Cochran, M.D., of the Department of Orthopedic Surgery and Rehabilitation of The University of Nebraska Medical Center, dated September 13, 1976, reported "X-rays of the lumbosacral spine which showed some mild degenerative changes of the facet joints of L-4, L-5, and S-1" with "no definate [sic] pathology" revealed in a neurosurgery exam. It appears that it was the neurosurgeon's opinion that claimant, with the psychiatrist's permission, could return to work in a week.

Claimant did not return to work and had not at the date of the hearing returned to work. It seems that objective findings relating to claimant's back are scanty with Dr. Meyer's testimony suggesting any aggravation of disk disease was acute rather than chronic. The record does not contain evidence of permanent disability to the body as a whole. On the other hand, the psychophysiologic experience which claimant has, continues to bar his reentry into the job market. The record here presented supports a finding that claimant remains temporarily totally disabled. *Auxier v. Woodward State Hospital School,* 266 N.W.2d 139 (1978).

* * *

Signed and filed this 27th day of October, 1978.

ROBERT C. LANDESS
Industrial Commissioner

Appealed to District Court: Pending.

LETTIE STEPHENS; RUTH STEPHENS, Mother and Next Friend of Stephanie Stephens, a Minor; RUTH STEPHENS, Mother and Next Friend of Bryan Stephens, a Minor; and KAREN LEDFORD, as Mother and Next Friend of Genevieve Kathryn Coty, a Minor,

Claimants,

vs.

KROBLIN REFRIGERATED XPRESS, INC., STEEL DIVISION, INC., TAKIN BROTHERS FREIGHT LINES, INC., and REX BARKER AUTO SALES AND SERVICE,

Employers,

and

TRANSPORT INDEMNITY COMPANY,

Insurance Carrier,
Defendants.

KROBLIN REFRIGERATED XPRESS, INC., TAKIN BROTHERS FREIGHT LINES, INC., REX BARKER AUTO SALES AND SERVICE and TRANSPORT INDEMNITY COMPANY,

Cross Petitioners,

vs.

THERMON STEPHENS, III, MARIA A. STEPHENS, KEVIN P. STEPHENS and KELLY C. STEPHENS,

Defendants to Cross Petition.

Order on Appeal

NOW on this 26th day of Jenuary, 1979 the matter of the appeal from the order entered January 4, 1979 denying the motion to appoint guardian ad litem comes on for determination. All parties to the proceeding have waived notice of hearing and requested an immediate determination of this appeal.

Having reviewed the matters concerning the motion for appointment of a guardian ad litem, it is concluded that this agency does not have the power to appoint a guardian ad litem although it would be expedient to have such power. This agency has adopted the rules of civil procedure where not in conflict with the workers' compensation law or obviously inapplicable to the industrial commissioner (IAC 500-4.35). However, lacking requisite power to enter an enforceable judgment (Section 86.42, Code 1977), it is determined that the appointment of a guardian ad litem would be acting in excess of the authority vested with this

agency and therefore R.C.P. 13 and 14 are obviously inapplicable to the industrial commissioner insofar as allowing this tribunal the authority of appointment of such a guardian.

Signed and filed this 26th day of January, 1979.

ROBERT C. LANDESS
Industrial Commissioner

No Appeal.

FREDRICK HENRY STOOKESBERRY,

Claimant,

vs.

DOUDS STONE, INCORPORATED,

Employer,

and

AID INSURANCE COMPANY,

Insurance Carrier,
Defendants.

Ruling and Order

BE IT REMEMBERED that on February 15, 1979 defendants herein filed a motion for ruling on discovery. Said motion requested the Iowa Industrial Commissioner to rule on certain prior motions and resistances which can be analyzed in two parts as follows:

I

Review of the file reveals that on December 27, 1978 defendants filed a motion to compel answers to interrogatories they had submitted to the claimant. On January 11, 1979 a deputy industrial commisssioner entered a ruling ordering the claimant to answer said interrogatories on or before January 25, 1979. The claimant filed answers to interrogatories on January 12, 1979.

On January 24, 1979 defendants filed a motion for sanctions pursuant to Iowa Rule 134(b)(2)(A) and (C) of Civil Procedure alleging that claimant failed to provide answers to interrogatories 14 and 15. Said motion prayed that the Iowa Industrial Commissioner enter an order "that it is an established fact the claimant is receiving substantial income from other sources which results in the claimant having no interest or intent to return to gainful employment of any type this time or in the future. In addition, claimant's substantial income from other sources has resulted in claimant having no interest nor having made any attempt to seek gainful employment nor obtain any training or education which would allow claimant to engage in gainful employment." Said motion also prayed that the subject action against the defendants be dismissed on account of what defendants considered to be claimant's failure to comply with the order of the industrial commissioner.

On January 26, 1979 the claimant filed a resistance to defendants' motion for sanctions stating that interrogatories 14 and 15 had been fully answered.

The interrogatories and answers in issue read:

> 14. Subsequent to the date of the incident alleged in the Review-Reopening Petition, state all sources of income, state each source from which you or any member of your family has received a financial assistance, income or benefits and in regard to each, state:
>
> (1)The name and address of each source;
>
> (b)The time period during which you or a member of your family has received such benefits, income or resources;
>
> (c) The nature and amount received;
>
> (d)The basis on which received (e.g. $50.00 per month);
>
> (e) The reason for receipt of said income or benefit.

ANSWER: I have not received any income since the date of the incident alleged in the Petition for Review-Reopening. I refuse to state whether or not any member of my family has received any financial assistance, income or benefits as the same is irrelevant.

> 15. List the name, address and telephone number of each employer for whom your wife has worked during the past fifteen years from the date you answer this interrogatory, and state:
>
> (a) Describe your wife's job or work duties with each such employer;
>
> (b)State the dates which your wife was so employed at each place;
>
> (c)State the amount of wages (salary, commission, etc.) received at each place of employment.

ANSWER: I refuse to answer question 15 as the same is irrelevant.

Insofar as Iowa Rule 122(a) of Civil Procedure states "[i]t is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence," and insofar as it appears that the interrogatories may be calculated to lead to information bearing on matters such as motivation which may be relevant to the present case--the Original Notice and Petition indicates that industrial disability for an alleged injury to the body as a whole is being sought, the undersigned hereby determines that the information requested in interrogatories 14 and 15 is necessary to the defendants' preparation of their case and that the claimant shall answer said interrogatories with sufficient specificity.

However, sanctions are not appropriate at this juncture of the discovery process. Iowa Rule 126(a) of Civil Procedure specifies that "[e]ach interrogatory shall be answered separately and fully in writing under oath, unless it is objected to, in which event the reasons for objection

shall be stated in lieu of an answer . . . a failure to comply with this rule shall be deemed a failure to answer and shall be subject to sanctions as provided in Rule 134 . . . The party submitting the interrogatories may move for an order under Rule 134 'a' with respect to any objection to or other failure to answer an interrogatory . . . . "

The claimant complied with Rule 126(a) by stating his objection in lieu of an answer to both interrogatory 14 and 15 and is not, at this point, subject to sanctions provided for in Iowa Rule 134(b). As indicated in the above-quoted language, the appropriate procedure for the defendants would have been to move for an order compelling discovery pursuant to Iowa Rule 134(a) with respect to the objections made by the claimant to the interrogatories in issue.

THEREFORE, defendants' motion for sanctions is construed as a motion to compel answers to interrogatories 14 and 15 and as such is hereby sustained.

IT IS ORDERED that claimant answer interrogatories 14 and 15 with sufficient specificity by April 19, 1979.

II

On January 22, 1979 defendants filed notice of taking of deposition of the claimant at the Poweshiek County Courthouse in Grinnell, Iowa on January 26, 1979 at 1:00 p.m. and from day to day thereafter until said deposition would be completed. On January 23, 1979 claimant filed a motion for protective order pursuant to Iowa Rule 123 of Civil Procedure alleging that claimant would suffer undue burden and expense in travelling to Grinnell, Iowa to be present at said deposition because claimant now resides in Colorado and is presently enrolled in and attending classes at the Colorado School at Trades. The motion further suggests that any additional discovery be secured through additional written interrogatories submitted to the claimant or by taking the claimant's deposition immediately prior to the hearing on this matter. On January 25, 1979 defendants filed a response and resistance to claimant's request for protective order contending that they have the right pursuant to Iowa Rule 121 of Civil Procedure to depose the claimant by oral deposition and that written interrogatories are inadequate at this stage of the discovery process.

The relevant portion of Iowa Rule 121 of Civil Procedure, upon which the defendants rely, provides that "[p]arties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions, written interrogatories, ..."

The relevant portion of Iowa Rule 123 of Civil Procedure, upon which claimant relies, states that "[u]pon motion by a party or by the person from whom discovery is sought . . . and for good cause shown, the court in which the action is pending . . . may make any order which justice requires to protect a party or person from . . . undue burden or expense, including one or more of the following: . . . (b) That the discovery may be had only on specified terms and conditions, including a designation of the time or place; and (c) That the discovery may be had only by a method of ordinary other than that selected by the party seeking discovery; . . . ."

It is hereby found that requiring the claimant to travel from Colorado to Grinnell, Iowa, solely for the taking of his deposition by defendants constitutes an undue burden and expense for the claimant.

THEREFORE, IT IS ORDERED pursuant to Iowa Rule 123(b) and (c) of Civil Procedure that defendants attempt to secure the additional information they claim they need through use of additional written interrogatories or by means of a deposition upon written questions. In the event an oral deposition is still deemed necessary by the defendants said deposition is to be taken either (1) within two days prior to the date of the hearing of this matter at the same location as that specified for the hearing at an hour convenient to the parties or (2) at the Colorado county seat closest to the residence of the claimant at an hour convenient to the parties and at the defendants' expense.

Signed and filed this 9th day of April, 1979.

LEE M. JACKWIG
Deputy Industrial Commissioner

No Appeal.

LYDIA A. STREET,

Claimant,

vs.

UNITED PARCEL SERVICE,

Employer,

and

LIBERTY MUTUAL INSURANCE COMPANY,

Defendants,
Insurance Carrier.

Appeal Decision

The defendants have appealed from a proposed review-reopening decision wherein it was found that claimant had established her claim to permanent partial disability compensation, but had failed to establish her claim for further healing period benefits.

On reviewing the record, it is found that the deputy's findings of fact and conclusions of law are proper.

The claimant need not prove that an employment injury be the sole proximate cause of the 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 Company,* 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 Co.,* 253 Iowa 369, 112 N.W.2d 299 (1961).

It is clear from the medical evidence that claimant has had a preexisting disease in her hip since childhood. The disease is of the type where claimant's hip will steadily deteriorate over time such that surgical intervention eventually will be necessary. Prior to her fall on March 23, 1977, claimant had only had some hip discomfort associated with excessive activity on her feet. However, during the course of her employment claimant never had her present discomfort in her hip prior to her fall. It appears that claimant had a particular physical condition, which had been nearly asymptomatic, forced to the surface upon her fall of March 23, 1977.

It also appears that current recommendations regarding restricting claimant's employment activities with regard to standing and walking prolonged distances are based in large part on claimant's preexisting hip disease. Although the symptoms had not previously been manifested as a result of claimant's disease, it is evident that the recommendations are a warning that her condition will worsen if she returns to her former duties. While the recommendations will not stop the degeneration of claimant's hip, they will prolong the life of its use. It is evident that not all of claimant's inability to perform her previous duties is as a result of her injury she received from her fall. However, it can be said that the fall is a proximate cause of her disease being "aggravated, accelerated, worsened or 'light up'."

Dr. Flapan estimated claimant's permanent impairment rating to be 10% of the body as a whole, but declined to estimate how much of the impairment was due to her fall as he knew only of her present state. 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 also 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 (1963). It is the reduction of earning capacity, not merely functional disability, which must be determined. *Barton v. Nevada Poultry Company,* 253 Iowa 285, 110 N.W.2d 660 (1961).

WHEREFORE, the proposed arbitration decision is hereby adopted as the final decision of the agency. It is found:

* * *

That claimant has sustained an industrial injury to the extent of fifteen percent (15%) of the body as a whole . . . .

* * *

Signed and filed this 24th day of December, 1979.

ROBERT C. LANDESS
Industrial Commissioner

No Appeal.

GARY A. STRODE,

Claimant,

vs.

METRO ATHLETIC ASSOCIATION,

Employer,

and

HOME INDEMNITY COMPANY,

Insurance Carrier,
Defendants.

Appeal Decision

Defendants have appealed from a proposed arbitration decision wherein claimant was awarded healing period, permanent partial disability and medical expenses.

Claimant, who is 25 and married with one dependent child, was a player and team member of the Cedar Rapids Falcons. The Falcons are a part of the defendant employer, Metro Athletic Association, and are a semi-pro football team of the Northern States Football League. On October 2, 1976, claimant sustained a severe injury to his left knee, while playing defensive end for the Falcons, when an opponent clipped him. Claimant was taken immediately to Mercy Hospital where his knee was operated on by John S. Koch, M.D., the next morning, October 3, 1976. The central issue for determination is whether or not an employer-employee relationship existed between claimant and the defendant employer.

It was found that a workers' compensation policy held by the defendant employer (claimant's exhibit 2) covered the operation of the Falcons and was in effect at the time of claimant's injury. The existence of a workers' compensation policy does not make a person an employee of the holder of the policy if he is not otherwise an employee. The existence of the workers' compensation policy does not operate to bring the employer within the scope of the Workers' Compensation Act. *Stiles v. Des Moines Council Boy Scouts of America,* 209 Iowa 1235 (1930). There must be an employer-employee relationshipi in order to bring the employer within the scope of the Workers' Compensation Act.

The Iowa Supreme Court in *McClure v. Union,* 188 N.W.2d 283 (Iowa 1971), outlined the criteria to be used in determining the existence of an employer-employee relationship.

> The factors by which to determine whether an employer-employee relationship exists 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 the employer the responsible authority in charge of the work or for whose benefit the work is performed. In addition thereto we recognize the overriding element of the intention of the parties as to

the relationship they are creating may also be considered.

A careful review of the record in light of the criteria set out in *McClure, supra,* shows that an employer-employee relationship in fact existed between claimant and the defendant employer.

Claimant received a two hundred dollar certificate of membership in the team without cost, and was to receive a share of any net proceeds realized by the team from any play-off games that they would play in. The defendant employer supplied claimant with all the necessary equipment needed for his work, and gave expenses for meals and mileage. The coaching staff of the defendant employer directed claimant in his work. Claimant did not have the right to employ assistants and had no right to control the progress of his work. The coaching staff of the defendant employer had the right to determine how and when claimant would get playing time, and could terminate claimant's work and exclude him from the team were he to miss a couple of practices or a game. Based upon the conduct of the defendant employer and claimant, it is clear that they intended claimant to be a member of the team. Claimant viewed his relationship with the team as one of being a team member and an employee of the team. In fact, claimant is an employee of the defendant employer.

It is clear from the medical evidence in the record that claimant has sustained a permanent functional impairment to his left lower extremity. The attending physician and the orthopedic surgeon who operated on claimant's knee, John S. Koch, M.D., found claimant to have sustained a 30% impairment of the left leg. W. J. Roble, M.D., an examining orthopedic surgeon, found the claimant's impairment to be 25% of the left leg. In view of Dr. Koch's status as the treating physician, his opinion is given the greater weight in this decision.

By applying section 85.36(10), Code of Iowa (1976), to the record in this matter, it is clear that claimant's weekly wage entitlement is 35% of the state average weekly wage, or $61. Since claimant is married and has three deductions, he is entitled to a weekly compensation rating of $45.94.

* * *

Signed and filed this 9th day of October, 1979.

ROBERT C. LANDESS
Industrial Commissioner

No Appeal.

DONALD H. STRUBLE,

Claimant,

vs.

PAMIDA DISTRIBUTORS, INC.,

Employer,

and

GREAT AMERICAN INSURANCE CO.,

Insurance Carrier,
Defendants.

Arbitration Decision

This matter came on for hearing at the Woodbury County Courthouse in Sioux City, Iowa, on February 29, 1980 and the record was closed April 11, 1980.

* * *

The issues for determination are:

1. Whether claimant is entitled to compensation.
2. Whether claimant's treatment by Dr. Van Patten was authorized.
3. The extent of defendants' credit for a third party action.

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

Claimant was employed by defendant-employer on January 20, 1977 when he was involved in a collision when he was driving a truck for defendant near Elkader, Iowa. He was treated at the local hospital. Claimant was complaining of pain in the left knee and the cervical and lumbar spine. Claimant was discharged from the hospital on January 22, 1977 with a final diagnosis of a fracture of the transverse process of L-2. He returned to Sioux City and was treated by his family physician, Merril D. Van Patten, D.O., who was apparently authorized to treat claimant. He saw claimant on January 24, 1977 and commenced treatment of the claimant, consisting primarily of osteopathic manipulation, ultrasound and steroid injections. Claimant was complaining of pain over the lumbar region with muscle spasm. Claimant had numbness of the left buttocks and left leg pain. Claimant had a positive Lasegue's sign and pain upon lifting the left leg. X-rays revealed narrowing at the L4-L5 level and a probable fracture of the transverse process of L-2. Dr. Van Patten felt that claimant had a "disc syndrome" of L4 and L5. He treated claimant extensively as heretofore described, and was told by the insurer to see John J. Dougherty, M.D., a Sioux City orthopedist. Examination was conducted on April 7, 1977. Examination showed that claimant could walk on his toes and heels. He could go to about 70 degrees upon forward bending. There was left leg numbness and tenderness in the left buttocks. X-rays were taken. Dr. Dougherty diagnosed a dorsal lumbar sprain, superimposed upon an old "S" shaped scoliosis in the dorsal spine with wedging of several dorsal vertebrae. He also diagnosed some degenerative arthritis and degenerated discs in the upper dorsal spine. Claimant also had degenerative arthritis with degenerated disc in D-11-12 and a degenerated disc at L4-5. Claimant continued to see both Dr. Van Patten and Dr. Dougherty.

Claimant returned to work on May 23, 1977 and saw Dr. Dougherty on August 22, 1977 complaining of back pain radiating down his left leg. Dr. Dougherty admitted claimant to Marian Health Center in Sioux City on August 31, 1977. Claimant was treated conservatively and seemed to improve. He was dismissed from the hospital on September 10, 1977. Claimant continued to see Dr.

Dougherty. He also saw Dr. Van Patten at the same time. In a report dated January 17, 1978, Dr. Dougherty made the statement that claimant was "not having that much difficulty" and that claimant had a five percent permanent partial disability to the body as a whole. Dr. Van Patten released claimant on March 15, 1978 with "a total disability for the rest of his life." Dr. Dougherty again examined claimant on November 29, 1979. There was some decreased flexion of the back. He noted that claimant had refused a myelogram earlier. This refusal was generated by claimant's insistence that Dr. Dougherty guarantee that claimant be restored to his former condition, based upon claimant's overreaction to Dr. Van Patten's general bias against surgical intervention. Dr. Dougherty changed his permanent partial disability rating to 10 percent of the body as a whole. Claimant has not been employed since August 1977 and has moved to California. He is receiving a disability pension which provides for his knees.

The record fairly indicates that claimant saw Dr. Van Patten initially with the implied assent of defendants. By referral by Dr. Van Patten, claimant's treatment by Dr. Dougherty became authorized. The continued treatment by Dr. Van Patten was not discouraged by defendants. Claimant was being treated under a provision of the Nebraska Workmen's Compensation Law which allows for employee choice of medical benefits.

The parties are also in dispute as to the credit allowed them pursuant to a third party settlement by the claimant as against a third party tortfeasor. The record fairly indicates that the lawsuit which was filed against the third party tort-feasor was filed by claimant's attorney shortly before the expiration of the statutory period of limitation. The testimony of Robert Wetzel indicates he contacted representatives for the third party's insurance carrier, but no suit had been filed. The case was settled for $25,000.00, the apparent policy limits. Mr. Wetzel testified that he ordinarily compensated attorneys 33 1/3 percent of the recovery in a subrogation case where suit was filed.

To be compensable, the statute requires payment of compensation "for any and all personal injuries sustained by an employee arising out of and in the course of the employment." Section 85.3(1), Code of Iowa 1979. *Cedar Rapids Community Schools v. Cady,* 278 N.W.2d 298 (Iowa 1979). It is clear that claimant's injury did arise out of and in the course of his employment because claimant's injury occurred at the time and place where he was intended to be by his employer. The injury was also a natural incident of the work. Therefore, it is found that the injury arose out of and in the course of claimant's employment with defendant-employer.

By way of additional defense defendants allege that the Iowa Workers' Compensation Law is inapplicable since claimant had previously submitted himself to the jurisdiction of the Nebraska Act. A provision of Nebraska Law provides that if a claimant elects to take Nebraska compensation he is bound by said election. However, Section 85.3(2), Code of Iowa, provides, in pertinent part:

> Any employer who is a nonresident of the state, for whom services are performed within the state by employees entitled to rights under this or chapter 85A by virtue of having such services performed shall be subject to the jurisdiction of the industrial commissioner and to all of the provisions of this chapter, chapters 85A, 86, and 87, as to any and all personal injuries sustained by an employee arising out of and in the course of such employment within this state.

It is clear then that the injury occurred within Iowa, therefore granting jurisdiction to this agency. The acceptance of compensation in Nebraska appears, in the case *sub judice,*, to be unilateral election on the employer's part. This grants concurrent jurisdiction in Iowa and Nebraska. Therefore, this agency has jurisdiction. Defendants, however, will receive credit for payments made pursuant to the law of Nebraska.

The claimant has the burden of proving by a preponderance of the evidence that the injury of January 20, 1977 is the cause of his disability on which he now bases his claim. *Bodish v. Fischer, Inc.,* 257 Iowa 516, 133 N.W.2d 867 (1965). *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 testimony. *Bradshaw v. Iowa Methodist Hospital,* 251 Iowa 375, 101 N.W.2d 167 (1960).

Based upon the foregoing principles, it is found that claimant has sustained his burden of proof that the injury of January 20, 1977 entitled him to healing period and permanent partial disability compensation.

Section 85.34(1), Code of Iowa, provides for healing period compensation from the date of injury until such time as claimant has returned to work or competent medical evidence indicates that recuperation has been accomplished, whichever comes first. The record indicates that claimant is clearly entitled to healing period compensation from January 21, 1977 until May 24, 1977 when he returned to work. This is a period of 17 4/7 weeks. The record also indicates that claimant missed work from August 21, 1977 to the present. Since claimant has not returned to work, the test for the cessation of healing period must be that time when claimant recuperated. Recuperation occurs when it is medically indicated that either no further improvement is anticipated or that claimant is capable of returning to employment which is substantially similar to that in which claimant was engaged at the time of the injury. Industrial Commissioner's Rule 500-8.3. There is a dispute since Dr. Dougherty released claimant on December 22, 1977 and Dr. Van Patten released claimant on March 15, 1978. The record clearly preponderates in favor of Dr. Dougherty's evaluation of the case. Dr. Van Patten, in a letter dated January 11, 1978, indicates that claimant is "totally disabled and unable to work again." Dr. Dougherty's last report indicates that claimant's condition is essentially unchanged from December 22, 1977, although some change of a minor nature did occur. Therefore, it is found that claimant is entitled to healing period compensation from August 21, 1977 through December 22, 1977, a period of 17 5/7 weeks.

Claimant's total healing period entitlement is 35 2/7 weeks.

Functional disability is an element to be considered in determining industrial disability which is the reduction of earning capacity, but consideration must also be given to the injured employee's age, education, qualifications, experience and inability to engage in employment for which he is fitted. *Olson v. Goodyear Service Stores,* 255 Iowa 1112, 125 N.W.2d 251 (1963). *Barton v. Nevada Poultry,* 253 Iowa 285, 110 N.W.2d 660 (1961).

Claimant, age 53, has been a truck driver since 1946. He has not been employed since August 1977. He receives a disability pension, which in itself provides him with no incentive to work. In order to outweigh the benefits which he receives from the pension, claimant would have to be employed in a job which paid $17,000.00 a year. Claimant has moved to California mainly because his children live in the area. The testimony of Anita Howell shows that some work is available in the Sioux City area. Considering the facts of industrial disability, it is found that claimant is disabled, for industrial purposes, to the extent of 20 percent of the body as a whole.

The next issue to be resolved is whether claimant is entitled to be reimbursed for the treatment given by Dr. Van Patten. The record indicates that when Dr. Van Patten commenced his treatment that it was authorized. At no time was claimant not told to go to Dr. Van Patten. Therefore, the treatments given by Dr. Van Patten will be held as authorized and payment for his services in the amount of $1655.00 will be authorized. See Section 85.27, Code of Iowa.

The last issue to be addressed is the amount of credit to be given defendants for the settlement made with the third party tortfeasor. Section 85.22, Code of Iowa, provides for subrogation interest in favor of the employer for the amount of compensation actually paid. The payment need not be made pursuant to judgment, but rather could be made by any settlement device. If defendants brought this action themselves they presumably would have to pay an attorney's fee for the action. Testimony at the hearing indicates that defendants ordinarily paid a 33 1/3 percent fee for the services of an attorney in the action. However, the credit for a third party award should be reduced by a fee set by the district court. In the instant case, employer's liability for compensation is $22,139.76 (100 weeks at $160.00 plus 35 2/7 weeks at $174.00), and the credit to be given employer is to be reduced by the fee set by the United States District Court for the Northern District of Iowa. Nothing in the Act provides for a subrogation interest for 85.27 benefits, so no credit therefore will be given.

The parties stipulated that the rate of compensation herein was the statutory maximum i.e. $174.00 for healing period and $160.00 for permanent partial compensation.

* * *

JOSEPH M. BAUER Deputy Industrial Commissioner

No Appeal.

JAMES W. STURM,

Claimant,

vs.

KENNETH HENKE, d/b/a K & T OK HARDWARE,

Employer,

and

THE ST. PAUL COMPANIES,

Insurance Carrier,
Defendants.

Appeal Decision

Claimant appeals a proposed decision in arbitration denying claimant's petition for workers' compensation benefits.

* * *

The ultimate issue to be determined is whether claimant sustained an injury arising out of and in the course of his employment on April 22, 1978.

During the week of April 22, 1978, claimant was hired by defendant-employer to pick up a load of the inventory from a closed hardware store in Fort Madison and deliver it to Des Moines. Defendant-employer rented a truck which claimant drove from Des Moines to Fort Madison. When claimant arrived in Fort Madison, two employees of defendant-employer, Bruce Erickson and Terry Henke, were there to help claimant load the truck. Claimant drove the truck back to Des Moines with an overnight stopover at his home in Lytton. After unloading the truck in West Des Moines, claimant returned to Fort Madison to pick up more of the inventory. Claimant arrived in Fort Madison late in the afternoon. After partially loading the truck, claimant and his co-workers received instructions from defendant-employer to remain overnight and finish up in the morning. Claimant, Erickson and Henke went to the Holiday Inn in Keokuk where Erickson and Henke were staying at Defendant-employer's expense. After cleaning up they went out to eat at about 10:00 p.m. and "hit a few spots" before returning to the motel room around 1:00 a.m. At this time claimant and his co-workers engaged in conversation with some girls through the motel room window. During this discourse two unknown men appeared and started hassling claimant and his co-workers. Claimant and Erickson left the room to go into the parking lot. As they were rounding the corner of the motel a car, apparently containing the other parties to the conversation, approached them. Claimant was hit in his left eye with an unidentified object. He was knocked to the ground and bled profusely. The police were summoned and they took claimant to the hospital.

After the injury claimant had a lens laceration with a rapidly forming cataract and resorbing hyphema of the left eye for which surgery was performed in Iowa City. On May 28, 1978 claimant's visual acuity was 20/20 in the right eye

and 20/500 pinholding to 20/70-1 in the left eye. Claimant's vision had been normal prior to the injury. Several soft contact lenses were prescribed, improving the vision to 20/30-2 O.S.

In order to receive compensation for an injury an employee must establish that the injury arose out of and in the course of employment. *Crowe v. DeSoto Consolidated School District,* 246 Iowa 402, 68 N.W.2d 63 (1955). Both conditions must exist. *Id.* at 405 The words "arising out of" suggest a causal relationship between the employment and the injury. *Id.* at 406.

An injury "arises out of" the employment when a causal connection between the conditions under which the work was performed and the resulting injury is established, i.e., it must be determined whether the injury followed as a natural incident of the work. *Musselman v. Central Telephone Co.,* 154 N.W.2d 128, 130 (Iowa 1967).

The words "in the course of" relate to time, place and circumstances of the injury. *McClure v. Union, et al., Counties,* 188 N.W.2d 183, 287 (Iowa 1971). An injury occurs "in the course of" employment when it is within the period of employment at a place where the employee may be performing his duties and while he is fulfilling those duties or engaged in doing something incidental thereto. *Id.* at 287.

In addition, an injury caused by the willful act of a third party directed against the employee for reasons personal to the employee precludes recovery pursuant to Iowa Code §85.16(3).

Although claimant was at the motel for business reasons, at the time of his injury in the parking lot he apparently was neither fulfilling his duties nor engaged in something incidental to his employment. Claimant's personal, nonbusiness-related actions in the parking lot arguably were a deviation from his employment.

However, even assuming claimant's injury occurred "in the course of" his employment, the second requirement that an injury "arise out of" the employment is absent. There was no causal connection between claimant's employment and his injury. Claimant left the motel on his own initiative to pursue the conversation, which had nothing to do with his employment, in the parking lot. No causal connection existed between the attack which was precipitated by the heated conversation between the claimant and the unknown men and the fact that claimant was required to spend the night in the motel. Claimant's involvement in a personal matter totally unrelated to his employment incited the attack. The attack bore no relationship to claimant's job. The requisite causal connection between claimant's employment and the injury was absent; therefore the injury to claimant's eye did not "arise out of" his employment.

* * *

Signed and filed this 30th day of May, 1980.

ROBERT C. LANDESS
Industrial Commissioner

Appeal to District Court: Pending.

DEAN TAYLOR,

Claimant,

vs.

OSCAR MAYER & COMPANY,

Employer,
Self-Insured,
Defendant.

Ruling

BE IT REMEMBERED that on March 17, 1980 claimant herein filed motions for consolidation of claims. Said motions alleged that two arbitration proceedings commenced by the claimant should be consolidated because the respective "injuries combine to affect the claimant's overall disability." On March 24, 1980 defendant herein filed resistances to claimant's motions. Said resistances emphasized that claimant's "two claims involve separate injury dates, alleged injuries to completely separate parts of the body and with completely separate factual and medical backgrounds."

Review of the two files indicates that the original notice and petition filed November 28, 1979 concerns an alleged January 1979 knee injury and the original notice and petition filed January 24, 1980 concerns an alleged January 8, 1980 "injury" to the pulmonary system. The answer to claimant's January 8, 1980 arbitration claim raises a statute of limitation defense and a notice defense.

Industrial Commissioner Rule 500--4.2 governs the consolidation of proceedings:

> When any contested case proceeding shall be filed prior to or subsequent to the filing of an arbitration or review-reopening proceeding and of such a nature that is an integral part of the arbitration or review-reopening proceeding, it shall be deemed merged with the arbitration or review-reopening proceeding. No appeal to the commissioner of a deputy commissioner's order in such a merged proceeding shall be had separately from the decision in arbitration or review-reopening unless appeal to the commissioner from the arbitration or review-reopening decision would not provide an adequate remedy.

Neither proceeding is of such a nature that it is an integral part of the other. Accordingly, the consolidation of the two arbitrations herein is discretionary. The defendant's resistance suggests that it would be inconvenient to join the actions. The undersigned agrees. The specific nature of each cause of action entails different issues and will likely require distinct and separate medical and lay testimony or evidence. It is feasible that either party might wish to appeal only one of the proceedings. If consolidation were granted, the intermingling of the testimony and the exhibits would cloud the issues on appeal.

* * *

Signed and filed this 2nd day of April, 1980

LEE M. JACKWIG
Deputy Industrial Commissioner

No Appeal.

JILL M. THOMPSON,

Claimant,

vs.

THOMPSON PIPELINE & UTILITIES CONSTRUCTION CO., INC.,

Employer,

and

AETNA LIFE AND CASUALTY,

Insurance Carrier,
Defendants.

Appeal Order

Claimant has appealed from a proposed order of commutation wherein five years of benefits were commuted in favor of a trust which will distribute the compensation in favor of claimant. The record on appeal consists of a transcript of the proceeding along with claimant's exhibit one and the deposition of claimant.

The issues presented are: (1) whether the commutation would be in the best interest of claimant and her two sons or that periodical payments as compared with a lump sum payment would entail undue expense, hardship, or inconvenience on the employer, and (2) whether the period during which compensation is payable can be definitely determined.

Claimant has been receiving $247 per week in workers' compensation death benefits since her husband's work-related death. At the time of the hearing claimant's assets amounted to $788,694.80 and her liabilities amounted to $27,000. She also received $190.96 per month from social security. Claimant had taxable income in the amount of $70,959.51 for 1978. Claimant's older son, Edward, who was born on March 15, 1964, had assets of $6,651.08. The younger son, Robert, who was born on July 12, 1966, had assets of $6,402.94. Each son received $337.90 per month from social security.

Claimant testified that she does not need the weekly payments of workers' compensation to support her family. She is seeking the commutation for the sole purpose of investing the lump sum for a greater return on the money. She expressed interest in investing the money in certificates of deposit or some other form of conservative bank investment, depending on the interest rate. Claimant's accountant figured that over a ten-year period claimant and her two sons would receive an additional $153,615 through interest if they received a lump sum payment.

The deputy found that the best interest of claimant would be met if a commutation was granted. The deputy relied on *Diamond v. The Parsons Co.,* 256 Iowa 915, 129 N.W.2d 608 (1964), in which the Iowa Supreme Court allowed a commutation where paying bills and buying equity in an apartment house were presented as the reasons for seeking a lump sum. The Supreme Court looked to the circumstances of the case, claimant's financial plans, and claimant's condition and life expectancy in awarding the commutation. The court stated that it "should not act as an unyielding conservator of claimant's property and disregard his desires and reasonable plans just because success in the future is not assured." *Diamond, supra,* 256 Iowa at 929, 129 N.W.2d at _____. The court in *Diamond* applied a reasonableness test in determining whether a commutation would be in the best interest of the person or persons entitled to the compensation.

The deputy duly noted the difference between the Iowa Supreme Court's philosophy on commutations in 1964 and the philosophy of Professor Larson. Professor Larson takes a much more restrictive view on granting commutations. He warns that lum-summing should "be restricted to those exceptional cases in which it can be demonstrated that the purposes of the act will best be served by a lump sum award." Larson, *Treatise on The Law of Workmen's Compensation,* §82.70. The purpose of the Iowa Workers' Compensation Act is to supply the worker or dependent periodic income benefits for the duration of the work-related disability or dependency. As Professor Larson indicates, experience has shown that a claimant is often under pressure to seek a lump sum payment, and once the payment is received it is soon dissipated. Despite what experience has shown and a change in the procedure for obtaining a commutation, the *Diamond* reasonableness standard still prevails in Iowa. Relying on *Diamond* and the unusually large assets owned by claimant in this case, it cannot be said that a lump sum payment would not be in the best interest of claimant. Therefore, it is found that the "best interest" requirement of Iowa Code §85.45 has been satisfied.

The next question the deputy considered was whether the period during which compensation is payable is definitely determinable. The deputy went through the various possibilities that could occur: (1) If claimant does not remarry, then she would be entitled to payments for life; (2) If claimant remarries, but the children are still eligible for benefits, then payments would be made to the children until they are no longer entitled; and (3) If claimant remarried after the children's period of entitlement had expired, then she would receive a two-year lump sum payment. Based on these alternatives, the deputy decided that the only period of reasonable certainty was from the date of the decision until the younger child, Robert, reaches the age of eighteen. This period was found by the deputy to be 261 weeks in length and the benefits for the period were commuted.

Claimant contends that the entire period for which benefits would be paid is definitely determinable from the

life expectancy and remarriage probability table found in Industrial Commissioner Rule 500-6.3(3). Claimant relies on *Diamond, supra,* for support of this contention. In *Diamond* the claimant was permanently and totally disabled and was entitled to benefits for 500 weeks or until his death, whichever occurred first. The 500-week limit was set by statute. The court held that the claimant was entitled to a 500-week commutation even though there was a possibility that claimant might not live for the full 500-week period. The court reasoned that the court or commission should not speculate on a claimant's life expectancy and that once the extent of disability is determined the question of probable life expectancy is not relevant.

However, the facts in this case are quite different from those in *Diamond.* In *Diamond* the benefits were for a permanent total disability, and under the statute at that time such benefits were limited to 500 weeks. In the present case, claimant is seeking a commutation of death benefits. Claimant is entitled to receive such benefits for the remainder of her life or until she remarries. In the event claimant remarries and there are children entitled to the benefits, her entitlement ceases. In such event, her two dependent children are entitled to benefits only until the age of eighteen or the age of twenty-five if they are full-time students. The deputy inferred the fact that the period of entitlement for a full commutation would be too speculative because there were dependent children involved and that the period of entitlement might vary. Both the supreme court in *Diamond* and the life expectancy and remarriage probability table did not and do not contemplate the problems raised by the contingent entitlement of claimant's children in this case. The entitlement of claimant's children raises too many alternatives and possibilities to make the period for a complete commutation sufficiently definite to satisfy Iowa Code §85.45(1).

The deputy found that with a relative certainty benefits would be payable until the younger child, Robert, reaches the age of eighteen on July 12, 1984. This finding is supported by the facts of this case and the law as stated in *Diamond.* Therefore, claimant is entitled to 261 weeks of benefits to be commuted in favor of a trust which will distribute the compensation in favor of claimant. In the event of claimant's remarriage, the proceeds of the trust will revert to the then eligible child(ren). When both children are no longer eligible for benefits claimant may again apply for commutation if her condition at that time so indicates.

* * *

Signed and filed this 29th day of February, 1980.

ROBERT C. LANDESS
Industrial Commissioner

Appealed to District Court: Pending.

DENNIS L. TOLZMAN,

Claimant,

vs.

WILLIAMS WILBERT VAULT WORKS,

Employer,

and

UNITED STATES FIDELITY AND GUARANTY COMPANY,

Insurance Carrier,

WILLIAMS WILBERT VAULT WORKS,

Employer,

and

UNITED STATES FIDELITY AND GUARANTY,

Insurance Carrier,
CROSS-PETITIONERS,

vs.

ANDREWS CONCRETE, INC., Employer, and MARYLAND CASUALTY COMPANY,

Insurance Carrier,
DEFENDANTS TO
CROSS-PETITION.

Ruling on Motion for Summary Judgment

BE IT REMEMBERED that on February 23, 1979 William Wilbert Vault Company and United States Fidelity and Guaranty Company, defendants herein, filed a motion for summary judgment upon the petition of Dennis L. Tolzman, the claimant herein. Said motion alleged that claimant's action was barred by Iowa Code section 85.26, the statute of limitations, that no material question of fact governed the applicability of that section, and that defendants were entitled to the judgment as a matter of law.

On March 12, 1979 claimant filed a resistance to summary judgment admitting that the documents attached to the motion were true and correct copies of all original records on file in the office of the Iowa Industrial Commissioner with respect to the injury in issue and that the Form 5 reveals that September 13, 1973 was the last date of compensation paid for the May 8, 1973 injury, yet denied that the matter had been finally settled or a final report filed.

This matter came on for hearing before the undersigned at the Iowa Industrial Commissioner's Office in Des Moines, Iowa, on April 6, 1979. The record was left open until April 13, 1979 for the submission of memoranda of authorities by the parties. No memoranda were filed. This matter was heard in conjunction with the motion for summary judgment brought by Williams Wilbert Vault Works and United States Fidelity and Guaranty Company, as defendants to cross-petition, against Andrews Concrete,

Inc., and Maryland Casualty Company, cross-petitioners in claimant's action against said cross-petitioners. A separate decision on that matter will be filed with the decision on the present motion. Claimant was not represented at the hearing; David E. Funkhouser represented Williams Wilbert Vault Works and United States Fidelity and Guaranty; and Dorothy L. Kelley represented Andrews Concrete, Inc. and Maryland Casualty Company for James C. Huber.

Review of the industrial commissioner's file indicates that the Form 5 referred to in defendants' motion is the final report of benefits paid. The claimant has not given any reason nor statement of facts (with or without supporting affidavit) why they contend a final report has not been filed as required by law. No question of fact regarding the last date of payment is evident.

The file also reveals that the original notice and petition, incorrectly designated as an arbitration rather than review-reopening proceeding, was filed December 18, 1978.

WHEREFORE, it is found that claimant's action for additional benefits for an injury occurring on May 8, 1973 was brought more than three years after the last date of payment of compensation for such injury. Section 86.34, Code of Iowa 1973 (rather than Section 85.26 cited by defendants) bars claimant's action for additional weekly compensation benefits. Claimant's potential claim for additional medical benefits is not barred by the statute of limitations. Section 85.27, Code of Iowa 1973; See and compare Section 85.26, Code of Iowa, 1977.

* * *

Signed and filed this 1st day of June, 1979.

LEE M. JACKWIG
Deputy Industrial Commissioner

No Appeal.

DENNIS L. TOLZMAN,

Claimant,

vs.

ANDREWS CONCRETE, INC.,

Employer,

and

MARYLAND CASUALTY COMPANY,

Insurance Carrier,
Defendants.

ANDREWS CONCRETE, INC., Employer, and MARYLAND CASUALTY COMPANY, Insurance Carrier,

Cross-Petitioners,

vs.

WILLIAMS WILBERT VAULT WORKS, Employer, and UNITED STATES FIDELITY and GUARANTY COMPANY, Insurance Carrier,

Defendants to
Cross-Petition.

Ruling on Motion for Summary Judgment

BE IT REMEMBERED that on February 26, 1979, Williams Wilbert Vault Works and United States Fidelity and Guaranty Company filed a motion for summary judgment upon the cross-petition filed by Andrews Concrete, Inc, and Maryland Casualty Company. Said motion alleged that defendants to cross-petition had paid Dennis L. Tolzman, claimant in action against cross-petitioners, compensation for a May 8, 1973 injury, that the last date of payment of compensation was on September 13, 1973, that claimant was barred by the statute of limitations from bringing further claims against cross-petitioner arising out of the May 8, 1973 injury; that cross-petitioners and cross-defendants were not common employers of the claimant on the 1973 date of injury and therefore had no common liability that would support a contribution theory under Iowa law; that recovery of benefits by the claimant against Andrews Concrete, Inc., employer, and Maryland Casualty Company depended upon establishing disability as a result of a separate injury in the course of and arising out of employment with the cross-petitioners or as a result of an aggravation in the course of and arising out of employment with cross-petitioners of a preexisting condition that resulted in additional disability; that this agency could not award benefits to claimant and cross-petitioners for any disability pre-existing claimant's employment with cross-petitioners -- again, no common liability existed between the cross-petitioners and defendants to cross-petition; and that there is no genuine issue as to any material fact and therefore defendants to cross-petition are entitled to requested summary judgment as matter of law.

On March 9, 1979 cross-petitioners herein filed a resistance to motion for summary judgment of cross-petition alleging that their claim for contribution had not been barred by any statute of limitations; that common liability exists because the functional disability to the claimant's back was in issue and both employees allegedly caused injury to the same area; and that the motion could not be sustained until a determination is made regarding the causal connection between the disability and the alleged injuries and regarding the extent of the disability. Cross-petitioners acknowledged that the legal propositions and authorities set forth in cross-defendants' motion may be accurate but are not exhaustive theories regarding indemnity and contribution.

* * *

Review of the industrial commissioner's file reveals that on December 18, 1978 claimant filed an original notice and petition against cross-petitioners seeking benefits for an injury occurring on August 1, 1977. Claimant alleges "[p]rolonged work as truck driver and doing various other

heavy duty tasks related to employment" has affected his back and has resulted in disability to the body as a whole. According to the claimant, the dispute in the case is that "[e]mployer states the accident is non-job related." On December 20, 1978 defendants/cross-petitioners filed their cross petition denying any injury or disabling condition resulted from claimant's employment with them and alleging that since claimant had sustained an injury May 8, 1973 while employed with cross-defendants and had surgery and continuing problems subsequent thereto, the cross-petitioners would be entitled to indemnity for any disability rating from claimant's employment with cross-petitioners in the event the industrial commissioner finds claimant entitled to permanent partial disability, and, in the alternative, the cross-petitioners would be entitled to equitable contribution in the event the industrial commissioner finds claimant has a disabling condition as a result of employment with both cross-petitioners and cross-defendants.

With respect to the May 8, 1973 injury claimant sustained while in the employ of cross-defendant, it should be noted that claimant filed an application for additional benefits (twelve weeks of temporary total benefits had been paid according to the Form 5 on file) for said injury which is described as having occurred when "[c]laimant was holding on to a tent flap and a heavy wind blew the same causing injury to him." A separate ruling has been filed this day sustaining the summary judgment of Williams Wilbert Vault Works and United States Fidelity and Guaranty with respect to the request for additional weekly compensation benefits but not with respect to the request for additional medical expenses.

At the hearing, cross-petitioners contended that the possibility of hospital expenses being the responsibility of cross-defendants suggested a factual issue defeating the summary judgment motion; that there had been some discussion at the pre-hearing about fraudulent action on the part of cross-defendants; that there was no specific second injury on August 1, 1977 and therefore the present case should be distinguished from *Lois A. McCoy v. Stewart Memorial Hospital and Argonaut Insurance Companies and United States Fire Insurance Company,* 33rd Biennial Report of the Iowa Industrial Commissioner, p. 64; that the statute of limitations does not apply to indemnity situations, *Vermeer v. Sneller,* 190 N.W.2d 389 (Iowa 1971); and that Dr. McClain's medical reports would support an indemnity or an equitable apportionment argument.

The undersigned notes that cross-defendants acknowledged both parties might be responsible for medical expenses, and that the original notice and petition filed by the claimant in both proceedings alleges identical medical expenses. Of course, determination of that issue depends on whether claimant sustains his burden of proof in the actions he has filed separately against both parties.

The factual issue regarding medical expenses does not obviate a ruling sustaining the motion with respect to the weekly compensation benefits. It may be that the medical evidence will show claimant's present disability or a portion thereof is related to the 1973 injury and not the 1977 injury/aggravation. However, Iowa is not an apportionment jurisdiction and clearly the cross-petitioners will be responsible only for whatever disability, if any, was sustained as a result of the injury/aggravation which arose out of and in the course of employment with cross-petitioners. *Olson v. Goodyear Service Stores,* 255 Iowa 1112, 125 N.W.2d 251 (1963). Cross-petitioners have not cited any authority in support of their proposition that a prior employer, who has paid a claimant compensation for an injury to a portion of the body which is later the subject of a claim against another employer for compensation benefits for another injury, should be held accountable to that second employer under indemnity or equitable apportionment theories. The undersigned did not locate any Iowa law supporting cross-petitioner's argument. See and compare §§59.20, 95.30 Larson's Workmen's Compensation Desk Edition.

Additionally, it is noted that the statute of limitations issue does bar claimant from seeking additional benefits against cross-defendants as discussed in the other decision filed today, and referred to above. The statute of limitations in a workers' compensation matter is special not general; that is, the limitation is an inherent part of the statute or agreement out of which the right in queston arises so that there is no right of action independent of the limitation. *Secrest v. Galloway,* 239 Iowa 168, 30 N.W.2d 793 (1948); *Otis v. Parrott,* 233 Iowa 1039 8 N.W.2d 708 (1943). See and compare *Sprung v. Rasmussen,* 180 N.W.2d 430 (Iowa 1970), cited in *Vermeer.*

WHEREFORE, IT IS FOUND that no genuine issue exists with respect to additional weekly compensation benefits -- the statute of limitations bars claimant from pursuing additional benefits against cross-defendants. Whereas any recovery claimant may have against cross-petitioners for the alleged 1977 incident depends upon a showing of a separate industrial injury, or an aggravation amounting to a separate injury, which results in disability in addition to what claimant may have sustained in 1973, no theory of contribution or equitable apportionment is appropriate in this case.

It is further found that the matter of additional medical expenses may entail liability for either or both cross-petitioners and cross-defendants. Determination of said matter depends on the presentation of the evidence.

THEREFORE, cross-defendants' motion for summary judgment is sustained with regard to the matter of indemnity or equitable apportionment for weekly compensation benefits that may be awarded to the claimant against the cross-petitioner. The matter of which party is responsible for alleged medical expenses will have to be determined upon a full hearing.

Signed and filed this 1st day of June, 1979.

LEE M. JACKWIG
Deputy Industrial Commissioner

No Appeal.

TIMOTHY TOMLINSON

Claimant,

vs.

KEN LANGILLE d/b/a C.K. WELDING,

Employer,

and

GRINNELL MUTUAL INSURANCE COMPANY,

Insurance Carrier,
Defendants.

Arbitration Decision

This is a proceeding in arbitration brought by the claimant, Timothy Tomlinson, against Ken Langille d/b/a C. K. Welding, his employer, and Grinnell Mutual Insurance Company, to recover benefits under the Iowa Workers' Compensation Act by virtue of an industrial injury that occurred on November 16, 1977.

* * *

There are three issues: (1) whether or not the claimant's employment relationship with defendant-employer brings him within the provision of §85.36(1) Code of Iowa or §85.36(10) Code of Iowa; (2) whether or not the injury caused the disability; and (3) the nature and extent of such disability.

Claimant, age 17, testified that he quit school on October 17, 1977 after having been employed part-time prior to that time by the defendant-employer. The claimant testified further that he left for work on a daily basis working from 8 to 5 with four hours on Saturday. Defendants deny the relationship, stating that the claimant was employed on a day-by-day basis. Defendants produced a list (claimant's exhibit B) which reports to be an itemization of the total and irregular earnings of the claimant beginning with August 17, 1977 and ending with November 16, 1977 which indicates the claimant was not a full-time employee. On balance the claimant has not established that he was a full-time employee as of the date of this industrial injury and in accordance with provisions of §85.36(10) the claimant's weekly entitlement is found to be forty-five dollars and fifteen cents ($45.15) per week based upon the following computation, §85.36(10) Code of Iowa which 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 department of job service under the provisions of Section 96.3 and in effect at the time of the injury.

The state average weekly wage as provided for in §96.3 Code of Iowa is found to be $185.61. The weekly benefit as contemplated in §85.36(10) supra rounded to the nearest dollar is found to be $65.00 and an examination of the Workers' Compensation Benefit Schedule beginning July 1, 1977 shows the weekly benefit for a single person to be $45.15.

The claimant has the burden of proving by a preponderance of the evidence that the injury of November 16, 1977 is the cause of the 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 medical evidence in this matter consists of a single report on the date of April 20, 1978 written by John J. Dougherty, M.D. Dr. Dougherty, in describing the injury, said as follows: "The patient sustained a severe crushing injury to the left lower extremity with a fracture of the proximal tibia and fibula." Dr. Dougherty saw the claimant for the last time prior to the hearing on April 6, 1978 at which time the doctor indicated that the claimant's period of temporary total disability ended with his examination. Along with claimant's testimony about the injury, the medical evidence clearly shows a causal relation between the injury and the disability.

The doctor further reported with regard to permanent partial impairment that it will be some time before the claimant has reached his maximum improvement and did not render an opinion as to whether or not the claimant had sustained a permanent impairment of the left lower extremity. Thus, at this time, the record supports only a claim for temporary disability.

* * *

Signed and filed this 9th day of October, 1978 in the office of the Iowa Industrial Commissioner in Des Moines.

HELMUT MUELLER
Deputy Industrial Commissioner

No Appeal.

WILLIAM TRACHTA,

Claimant

vs.

UNIVERSAL ENGINEERING,

Employer,

and

SENTRY INSURANCE,

Insurance Carrier
Defendants.

Appeal Decision

This is a proceeding brought by defendants appealing a proposed decision denying defendants' petition for declaratory ruling and motion to expunge certain material from the claimant's file. Defendants challenge two commissioner procedures: (1) opinion letters sent by nonadjudicatory personnel to claimants upon their request for advice before the initiation of a contested case proceeding, and (2) inclusion of such letters in a claimant's file, which subsequently may be examined by a hearing officer when the matter becomes a contested case.

The claimant alleges that he suffered an injury arising out of and in the course of employment by the defendant employer on May 9, 1978. He sent an employee's report to the defendant insurance carrier, which rejected his claim on June 19, 1978. On July 27, 1978 that insurer received the following letter from the claims analyst, an official of the industrial commissioner:

> Gentlemen:
>
> Our office has been advised that the above captioned employee sustained a back injury while working for Universal Engineering the latter part of May or the Early [sic] part of June.
>
> The doctor has apparently stated this employee could not work for at least a week due to this injury. Would you please forward the first report of injury and form 4 at this time in connection with this matter. [sic]

After defendants continued to deny any obligation under the workers' compensation law, claimant filed a petition for arbitration. The letter from the claims analyst, along with all other documents in the claim file of this claimant, have been placed in the contested case file in this agency. This is the same procedure that has been followed in this agency for longer than the present incumbency.

On December 22, 1978, defendants filed a petition for a declaratory ruling that an order of the commissioner or an employee of the commissioner to file a form 4 is prejudicial, unauthorized, by the workers' compensation law and violative of due process when the claimant has not previously filed a petition with the commissioner, has not made lawful service on the employer and insurance carrier and when there has been no hearing or due process. Defendants also filed a motion to expunge the claims analyst's letter from claimant's file, alleging that the letter was in actuality a declaratory ruling which failed to comport with provisions of chapters 4 and 5 and that its effect as a ruling was highly prejudicial to defendants' case. Both the petition and the motion were denied by the deputy commissioner in his proposed declaratory ruling.

Subsequently, claimant informed the commissioner and opposing counsel that he did not object to removal of the letter from his file. Because this case involves important considerations regarding common agency procedures, the merits of defendants' claims will nonetheless be considered herein.

As to the petition for a declaratory ruling, initially, the discretionary nature of such rulings should be emphasized. Chapter 5 of the Industrial Commissioner's Rules incorporates applicable rules of civil procedure. One such rule is Iowa Rule of Civil Procedure 265, which provides: "The court may refuse to render a declaratory judgment or decree where it would not, if rendered, terminate the uncertainty or controversy giving rise to the proceeding." Since a declaratory ruling as to the effect of the claims analyst's letter would not terminate the claimant's cause of action, it is within the discretion of this agency to deny the petition for a declaratory ruling.

The reason for the fact that defendants' requested declaratory ruling would not affect the outcome of this case is that the letter from the claims analyst has no legal effect. Thus, granting defendants' request to void the letter would constitute the futile exercise of voiding a nullity. The letter was not a declaratory ruling. The reason the letter was not a declaratory ruling is that there is no indication that the notification of the claimant's problem to the claims analyst was stated in the form of a request for a declaratory ruling. The only decisions having legal, binding effect are those brought in the form and manner of a contested case proceeding or rulemaking, as set out in the applicable statutes and rules adopted pursuant thereto.

Although the letter has no binding legal effect as to the establishment of an employer-employee relationship nor as to the establishment of a compensable injury which arose out of and in the course of employment, by their allegation of prejudice, defendants may also be contending that its mere presence in the claimant's file may have some *sub silentio* evidentiary effect upon the hearing officer's decision. Thus, defendants claim that the letter must be removed to eliminate its potential prejudicial effect.

Defendants' claim of prejudice is without merit. The Administrative Procedure Act implicitly recognizes the nonprejudicial nature of general intra-agency communication. Although section 17A.17 prohibits the decision-maker of a contested case from communicating with anyone regarding any issue of fact or law in the case "except upon notice and opportunity for all parties to participate," it also obviates the notice and participation requirements for intra-agency communication. Specifically, it states:

> However, without such notice and opportunity for all parties to participate, individuals assigned to render a proposed or final decision or to make findings of fact and conclusions of law in a contested case *may communicate* with members of the agency, and may have the aid and advice of persons other than those with a personal interest in, or those engaged in prosecuting or advocating in, either the case under consideration or a pending factually related case involving the same parties.

Iowa Code §17A.17(1) (1977) (emphasis added). Thus, communication with personnel who serve a prosecutorial or

advocate function is presumed prejudicial. However, communication with other, non-interested agency personnel, such as the claims analyst, is not presumed prejudicial. Rather, it is implicitly recognized as helpful to personnel responsible for rendering the decision in a contested case. *See also* Iowa Code §17A.14(5) and §86.17(1) (1977).

Moreover, even if the letter were considered potentially prejudicial, defendants have not given the hearing officer the opportunity to provide the requisite statutory safeguards to prevent any prejudice. Section 17A.14 of the Iowa Administrative Procedure Act provides that

> [p]arties shall be notified at the earliest practicable time, either before or during the hearing, or by reference in preliminary reports, preliminary decisions or otherwise, of the facts proposed to be noticed and their source, including any staff memoranda or data, and the parties shall be afforded an opportunity to contest such facts before the decision is announced unless the agency determines as part of the record or decision that fairness to the parties does not require an opportunity to contest such facts.

If fairness does require prior notice and an opportunity to be heard regarding any official notice to be taken of facts in the letter, ample time remains for such safeguards to be provided. On the other hand, if the deputy commissioner who will render the proposed decision does not intend to accord any evidentiary weight to the contents of the letter or for other reasons finds no unfairness inherent in taking official notice of the letter, he may so determine as part of the record and dispense with the requirement of providing an opportunity to contest the letter's contents. In neither case would the defendants be denied a fair hearing. *See Western Union Division, Commercial Telegraphers' Union, A.F. of L. v. United States,* 87 F. Supp. 324, 333 (D.D.C. 1949), in which the court rejected the plaintiff's argument that the FCC denied him a fair hearing by its cognizance of correspondence from the Justice Department bearing upon an issue of the case because the commission stated that it had given no consideration to the correspondence in arriving at its final decision.)

WHEREFORE, it is found:

That defendants have as yet suffered no prejudice by the presence of the letter in claimant's file.

THEREFORE, it is ordered:

That defendants' petition for a declaratory ruling that the letter be declared void and motion that it be expunged from claimant's file are denied.

Signed and filed this 13th day of March, 1979.

ROBERT C. LANDESS
Industrial Commissioner

No Appeal.

WILLIAM TRACHTA,

Claimant,

vs.

UNIVERSAL ENGINEERING,

Employer,

and

SENTRY INSURANCE,

Insurance Carrier,
Defendants.

Order

Claimant has appealed from a proposed arbitration decision. Claimant alleges several erroneous evidentiary rulings, erroneous assumptions of fact and misunderstood and misinterpreted medical testimony. Claimant and defendant have requested oral argument.

Before determining the necessity of oral presentation, claimant is directed to state with specificity what errors are alleged along with what evidence in the record is relied upon to support the errors.

Signed and filed this 29th day of May, 1980.

ROBERT C. LANDESS
Industrial Commissioner

VIRGINIA URMIE,

Claimant,

vs.

FRENCH & HEICHT,

Employer,
Self-Insured,
Defendant.

Order

BE IT REMEMBERED that on February 29, 1980 defendant herein filed a motion for default. Said motion alleged that the claimant and her attorney of record received a copy of defendant's petition on February 6, 1980 and failed to appear or to answer within twenty days of service of said petition.

On March 14, 1980 claimant, through her attorneys (different from the attorney of record previously before this agency in this matter), filed a resistance to the motion for default. Said resistance argued in part that the defendant should be required to elect a remedy in that the defendant has both appealed from a December 31, 1979 review-reopening decision and has commenced a review-reopening proceeding.

Review of the file indicates that Deputy Industrial Commissioner David E. Linquist filed a review-reopening decision in this matter on December 31, 1979 whereby he in effect ordered th defendant to pay the claimant a temporary total running award. On January 7, 1980 defendant appealed such decision. On February 6, 1980

defendant filed a review-reopening decision. Proof of service of such original notice and petition was attached to defendant's motion for default.

Industrial Commissioner Rule 500-4.9 states that "[a] respondent shall appear within twenty days after the service of the original notice and petition upon such respondent." Industiral Commissioner Rule 500--4.36 permits the industrial commissioner to close the record to further activity or evidence by a party failing to comply with the rules of the agency. Default judgments have been entered for failure to timely respond to an original notice and petition. See *Frances Sherwood vs. Collins Radio Company,* 33rd Biennial Report of the Industrial Commissioner, page 66.

No reason for the thirty-seven day delay in answering the petition (or the fourteen day delay in answering the motion for default) was given by the claimant in resistance to the motion for default. The claimant's position that the defendant should be required to elect a remedy is without merit. It is not unusual for defendants to file both an appeal from the decision awarding running temporary total disability benefits and in the alternative, to commence a review-reopening proceeding when there is evidence that the period of disability, as found in the decision, has ended. The latter action in effect concedes some period of benefits may be due and owing in the event the appeal fails, while preserving a cut-off date argument that would not otherwise be before the industrial commissioner on appeal. Although the February 6, 1980 petition could have presented its position more clearly, the claimant is not justified in ignoring the procedural rules of this agency. It may be that some excusable neglect existed for the failure to answer the defendant's original notice and petition. In examining the reasons for setting aside a default judgment, the Iowa Supreme Court stated:

> What constitutes good cause in relation to grounds of mistake, inadvertence and excusable neglect has been settled in our cases. Good cause is a sound, effective truthful reason, something more than an excuse, a plea, apology extenuation, or some justification for the resulting effect. The movant must show his failure to defend was not due to his negligence or want of ordinary care or attention, or to his carelessness or inattention. He must show affirmatively he did intend to defend and took steps to do so, but because of some misunderstanding, accident, mistake or excusable neglect failed to do so. Defaults will not be vacated where the movant has ignored plain mandates in the rules with ample opportunity to abide by them. (Citations.) *Dealers Warehouse Co. vs. Wahl & Associates,* 216 N.W.2d 391, 394-95 (Iowa 1974).

WHEREFORE, it is found that review of the file does not indicate wherein a ruling of excusable neglect would be justified, and therefore, a default judgment will be entered at this time. In the event the claimant determines she has evidence of excusable neglect, she may timely move to set aside the default judgment.

* * *

Signed and filed this 4th day of April, 1980.

LEE M. JACKWIG
Deputy Industrial Commissioner

No Appeal.

VIRGINIA VAN GORP,

Claimant,

vs.

WINPOWER CORPORATION,

Employer,

and

TRAVELERS INSURANCE COMPANY and ROYAL GLOBE INSURANCE COMPANY,

Insurance Carriers,
Defendants.

Order

NOW on this day the claimant's Application For An Order filed December 14, 1979 and defendant-employer and Royal Globe Insurance Company's Resistance thereto come on for determination. After due consideration it is found that claimant's Application For An Order should be granted.

THEREFORE, IT IS ORDERED:

That defendant-employer and Royal Globe Insurance Company pay the claimant healing period compensation from January 24, 1978 until the test of section 85.34(1), Code of Iowa, is met at the rate of one hundred fifty-four and 30/100 dollars ($154.30).

That defendant-employer and Royal Globe Insurance Company may receive credit for any overpayment of healing period benefits in the event of an award for permanent partial disability.

That defendant-employer and Royal Globe Insurance Company pay claimant for all submitted medical expenses incurred on or subsequent to January 23, 1978.

That in the event that any of said benefits required to be paid by this Order are eventually found to be the liability of Travelers Insurance Company, an Order will be issued requiring Travelers Insurance Company to reimburse Royal Globe Insurance Company to the full extent thereof.

Signed and filed this 9th day of January, 1980.

ROBERT C. LANDESS
Industrial Commissioner

No Appeal.

THOMAS M. VANGI,

Claimant,

vs.

TREND/ROXBURY INDUSTRIES, INC.,

Employer,

and

MISSION INSURANCE COMPANY,

Insurance Carrier,
Defendants.

Appeal Decision

Defendants have appealed from a proposed arbitration decision wherein it was found that claimant had met his burden in proving that he had received an injury arising out of and in the course of his employment resulting in a ten percent permanent partial disability to his right leg.

* * *

The issues presented at the arbitration hearing were whether or not the Iowa Industrial Commissioner has jurisdiction; whether claimant is an independent contractor or employee; whether the injury arose out of and in the course of claimant's employment; and the extent and cause of claimant's disability. Upon careful review of the record, it is clear that the Iowa Industrial Commissioner lacks jurisdiction over claimant's claim. The scope of this decision is limited solely to the issue of jurisdiction.

In 1969 claimant was contacted by a district manager for the defendant employer, who was seeking to fill a traveling carpet salesman position. After discussing the merits of the job with the district manager in Omaha, Nebraska, claimant was told that the position was his if he wanted it. Claimant wished to confer with his wife before making a decision on accepting or rejecting the job and returned to his home in Council Bluffs, Iowa to discuss the offer with his wife. Subsequently, claimant telephoned the district manager from his home in Council Bluffs to accept the offer of employment. Claimant's new job territory consisted of most of Nebraska and the western edge of Iowa. His employment was principally localized in Nebraska, and claimant later moved to Omaha, Nebraska. On April 6, 1978 claimant sustained the injury upon which his claim is based when he slipped on the sidewalk leading away from his apartment in Omaha.

The supreme court of the state of Iowa has stated that a contract of employment is made at the time and place where the last act necessary to a complete meeting of the minds of the parties is performed. *Chicago, R.I. & P.R. Co. v. Lundquist,* 206 Iowa 499, 221 N.W. 228 (1928). The court has also stated that it is true that the general rule is that the place of completion of a contract determines the place of the contact. *Haverly v. Union Construction Co.,* 236 Iowa 278, 18 N.W.2d 629 (1945).

Where the offeror and acceptor of a contract speak by telephone from different states and do consummate a contract of employment, the question becomes: in which state, or both, will the contract be recognized under the workers' compensation law?

Although the Iowa state courts have not dealt directly with the question of acceptance by telephone, there is ample authority to find that a contract is made at the place from which the accepting party speaks. (See 17A C.J.S., Contracts, §356; 17 Am. Jur.2d, Contracts, §53.) This position is analogous to the position the Iowa courts have taken in regards to acceptance of an offer by mail.

> It is elementary that an offer communicated through the mail cannot constitute a contract until it is accepted. But, when such offer is accepted and the acceptance thereof, or a letter containing the acceptance, is placed in the mail, properly stamped and directed to the one making the offer at his address, the contract as specified in the offer is then complete. In that event, the contract is made where the offer is accepted.
>
> International Transportation Ass'n. v. Des Moines Morris Plan Co., 245 N.W. 244, 246 (Iowa 1932).

The federal courts have also taken the position that when a contract is accepted on the telephone, the contract is made at the place from which the accepting party speaks. In *Standard Oil Co. v. Lyons,* 130 F.2d 965 (8th Cir. 1942), the court of appeals found that recovery may be had under the Workmen's Compensation Act of Iowa even though the injury occurred outside of Iowa. There, an Illinois employer called an Iowa resident over the telephone to offer him employment. The court stated that:

> If by this conversation Bergsted simply made an offer to give decedent employment upon his reporting for work in Illinois, the offer would be accepted by the act of reporting for work and the contract would be an Illinois contract because that would be the place where the final act necessary to consummate the contract was performed. . . . If, however, there was a promise for a promise, an acceptance by the offeree of the offer of employment, the contract was entered into at once. . . . In such circumstances, the place of making the contract would be the place where the offeree used the telephone. *Lyons, supra,* at 968.

Since the claimant in this case accepted an offer of employment by telephoning his acceptance from Iowa, it is clear that the contract is an Iowa contract since Iowa was the place where the last act necessary to complete the contract was performed.

The Iowa Supreme Court has long held that the Iowa Workers' Compensation Act applies to injuries suffered outside of Iowa when the contract of employment is made in Iowa. The court had said that the Iowa Workmen's Compensation Act was elective, so that the act was to be read into an employment contract made in this state. Thus, absent an election to reject the act, acceptance of the act was presumed, making the act a part of the employment contract even though no part of the labor was to be performed in Iowa. *Pierce v. Bekins Van & Storage Co.,* 185

Iowa 1346, 172 N.W. 191 (1919); *Haverly v. Union Construction Co., supra.* When in 1970 the Iowa Workers' Compensation Act became compulsory for both employers and employees (see Iowa Code §85.3(1) and §85.20 and Acts 63 GA, Ch. 1051 §3), the act still applied to injuries suffered outside of Iowa when the contract of employment was made in Iowa. This was the case until 1973, when the 65th General Assembly of Iowa chose to codify the common law, with some exceptions, by adding Iowa Code §85.71 to the Iowa Workers' Compensation Act.

Iowa Code §85.71 states:

> 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 workers' 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.

Under the record of this case, it is clear that Iowa Code §85.71(3) is applicable. Claimant was working under a contract of hire made in Iowa in employment principally localized in Nebraska. Due to the record revealing that claimant was domiciled in Nebraska, that his work was principally localized in Nebraska, and that he was injured in Nebraska, official notice is taken pursuant to Administrative Procedure Act chapter 17A.14(4) of the fact that the Nebraska workers' compensation law is applicable to the defendant employer in this case. It thus appears that claimant is not entitled to any benefits, in light of Iowa Code §85.71(3), under the Iowa Workers' Compensation Act.

While it appears that under Iowa's common law claimant would have been entitled to his claim of jurisdiction, Iowa Code §85.71(3) defeats that claim. Where the common law and the Iowa Code conflict, this agency must strictly apply the statute.

WHEREFORE, it is found:

That claimant is not entitled to any benefits under the Iowa Workers' Compensation Act pursuant to Iowa Code §85.71(3).

* * *

Signed and filed this 31st day of October, 1979.

ROBERT C. LANDESS
Industrial Commissioner

No Appeal.

JEFF VOSS,

Claimant,

vs.

GLEN HOUGHTON,

Employer,
Defendant.

Appeal Decision

Uninsured defendant, Glen Houghton, has appealed from a proposed arbitration decision wherein claimant was awarded healing period, permanent partial disability and medical expenses.

The defendant has two contentions on appeal. The second contention will be dealt with first, wherein the defendant contends that the deputy commissioner failed to consider evidence supporting the conclusion that the intoxication of the claimant was a proximate cause of the injury.

Intoxication is an affirmative defense which must be pleaded and proved. The defendant failed to answer claimant's petition with the intoxication defense and therefore did not plead it, and defendant failed to argue the defense before the deputy industrial commissioner. Defendant cannot now raise such a defense on appeal. Furthermore, there is no evidence in the record to support an intoxication defense.

Defendant's other contention on appeal is that the decision by the deputy commissioner is contrary to the weight of the evidence. On review of the record, the deputy's proposed findings of fact and conclusions of law are proper . . . .

* * *

Signed and filed this 29th day of May, 1979.

ROBERT C. LANDESS
Industrial Commissioner

Appealed to District Court: Pending 6/22/79.

GENE L. WARD,

Claimant,

vs.

NORTH IOWA EXPRESS, INC.

Employer,

and

GREAT WEST CASUALTY COMPANY,

Insurer
Defendants.

Ruling

BE IT REMEMBERED that on June 8, 1979 the claimant herein filed an application for employer paid physician examination. A resistance to the application was checked on the bottom of the form 100A.

Review of the file reveals that no proceeding seeking compensation benefits has been filed. On September 8, 1978, the employer (and insurance carrier) filed a First Report of Injury regarding an injury date of July 24, 1978. On September 18, 1978, a Notice of Voluntary Payments was filed. On November 6, 1978, notice of intent to terminate voluntary benefits and to deny liability was filed.

It is hereby found that the employer in this action has admitted no injury arising out of and in the course of claimant's employment with employer. The request for an examination pursuant to Code section 85.39 is premature insofar as the employer cannot be ordered to pay for an employee requested examination until liability is established either by the filing of a memorandum of agreement or by an adjudication of the essential elements admitted by the filing of such a memorandum of agreement. *See Michael R. Bjorklund v. Pittsburgh-Des Moines Steel Company and Employers Insurance of Wausau,* 33rd Biennial Report of the Industrial Commissioner, page 101.

THEREFORE, claimant's application for employer paid physician examination is denied.

Signed and filed this 6th day of July, 1979.

LEE M. JACKWIG
Deputy Industrial Commissioner

No Appeal.

GLENN WARDEN,

Claimant,

vs.

DUBINSKY BROTHERS THEATRES,

Employer,

and

HOME INDEMNITY COMPANY,

Insurance Carrier,
Defendants.

Appeal Decision

BE IT REMEMBERED that on April 27, 1979 the defendants herein filed a special appearance challenging the jurisdiction of the Iowa Industrial Commissioner, and also filed a notice of appeal from a proposed ruling by the deputy commissioner denying defendants' motion to dismiss the review-reopening petition.

The special appearance alleges that the original notice is fatally defective in form because it does not conform to Industrial Commissioner Rules 500-4.8 and 500-4.9(1), (3), and (6). Review of the record reveals that the defendants were not prejudiced by the original notice as it allows thirty days instead of twenty days to answer or otherwise plead. A defect in the original notice that allows the defendants more time to answer the petition than the Rules require is not fatal to the original notice.

The notice of appeal alleges that the defendants are placed in the untenable position where they must defend against both the petition for review-reopening and the petition for arbitration. Review of the record reveals that claimant's filing of the arbitration petition on March 30, 1979 supercedes and replaces the petition for review-reopening filed on February 7, 1979. Both petitions are identical in allegations and sufficiently apprise the defendants of the cause of action to be defended.

THEREFORE, it is ordered:

That the special appearance filed herein by the defendants on April 27, 1979 be overruled.

* * *

Signed and filed this 15th day of May, 1979.

ROBERT C. LANDESS
Industrial Commissioner

No Appeal.

Claimant,

KAREN WARDENBERG,

Claimant,

vs.

AMANA REFRIGERATION,

Employer,

and

LIBERTY MUTUAL INSURANCE COMPANY,

Insurance Carrier,
Defendants.

Appeal Decision

Defendants appeal a proposed decision in arbitration wherein claimant was awarded healing period benefits.

* * *

The only issue to be determined on appeal is the extent of claimant's healing period.

Claimant received an injury to her back on March 1, 1976 while moving a radar range off the line. Claimant reported the injury to the company doctor and returned to work the following day on light duty status. Claimant testified that she had continuing pain and was unable to work. Her last day of employment was April 29, 1976.

Claimant was referred to Leland G. Hawkins, M.D., a board certified surgeon, who examined her on May 20, 1976. Dr. Hawkins' diagnosis was lumbar sprain with degenerative disc disease. Dr. Hawkins saw her again on June 10, July 9 and August 20, 1976. In a September 21,

1976 report the doctor stated that this has been a difficult case because "this lady is so resistent [sic] and hostile toward returning to work that I have been trying to gently move her along in her thinking."

Dr. Hawkins saw claimant again on October 21, 1976. His office notes reveal that he recommended that claimant return to work, and that if she had some other concerns he would like her to be examined at the University of Iowa Hospitals and Clinics. In his report of November 10, 1976 Dr. Hawkins made the following statement:

> This lady was having extreme difficulty with muscle spasm in the low back area and had a markedly positive instability sign when I initially saw her although her neurologic exam remained quite well. She was very frightened about the possibility of having to return to work in that early interview, and therefore, I felt it best she be taken off work. She was given Williams exercises which were started in August and then on October 21, 1976, she had no positive physical findings, and I felt that she should return to work at that time.
>
> I also recommended that she should see another orthopedist for another evaluation if she preferred as I was having a hard time convincing [her] that she should be returning to work.

On November 24, 1976 defendant-employer discharged claimant effective October 26, 1976 for failing to return to work when able to do so. Claimant filed a grievance under the employment contract and was given until December 17, 1976 to show cause why she should not be released. Claimant then obtained a written release from Dr. Hawkins that she could return to work with a corset on December 16, 1976. Claimant's grievance was denied. Larry Gerst, labor relations manager for defendant-employer, testified that although the company allowed employees to work while wearing corsets, claimant's termination still stood because Dr. Hawkins' note only stated that claimant could return to work and offered no explanation as to whether or not she was released to return to work on October 21, 1976. Claimant was given thirty days to appeal and carry the matter to arbitration. An appeal was not filed.

Pursuant to Dr. Hawkins' earlier recommendation that claimant should see another orthopedist for evaluation, she was examined by Carroll B. Larson, M.D., at the University of Iowa Hospitals and Clinics on May 12, 1977. Dr. Larson indicated the diagnosis was suspect only of an unstable disc at L-4 and considered claimant totally disabled on a temporary basis. She was next seen by a Dr. Bassett at the University Hospitals on November 17, 1977 with bilateral paraspinal muscle spasm of a mild degree noted. The impression was one of continuing back pain.

Claimant was again examined by Dr. Hawkins on January 26, 1978. At that time, he gave the claimant a five percent permanent partial disability rating because of degenerative disc disease in the lumbar spine and stated that further hospitalization was not indicated. The doctor explained in his deposition that claimant initially made some improvement so he didn't feel a disability was indicated. However, because of her persistent complaints in the ensuing months, he decided to give her a rating because her symptoms had been consistent.

Claimant returned to the University Hospitals on April 24, 1978 when she was seen by Richard A. Brand, Jr., M.D., an associate professor in the Department of Orthopedic Surgery. In a May 1, 1978 letter to claimant's attorney, Dr. Brand writes:

> It was my feeling at the time of the interview that the patient was depressed and anxious on the basis of her affect and exaggerated descriptions of pain. She has a long history of emotional problems, having been seen by the Department of Psychiatry here in 1966 and 1972. A diagnosis of hysterical personality with neurotic depression has been made on those visits.
>
> It is my feeling that the patient could have sustained a back strain from the alleged injury with resulting low back pain. In view of subsequent essentially normal examination and x-rays, I think it is unlikely that her back pain is due to any other problem. However, the patient's course from a pain point of view is not what we would expect for a low back strain in that she has not improved over time. It is my feeling that the persistence of symptoms and the discrepancy between disability and objective findings leads me to believe that there are significant other factors in this case besides the back strain.

Dr. Brand gave claimant a ten percent permanent partial disability rating.

The requirements for healing period benefits are set forth in Iowa Code §85.34(1), which states in part:

> If an employee has suffered a personal injury causing permanent partial disability for which compensation is payable . . . the employer shall pay to the employee compensation for a healing period . . . beginning on the date of the injury, and until he has returned to work or competent medical evidence indicates that recuperation from said injury has been accomplished, whichever comes first.

The word "recuperation" has been interpreted in Industrial Commissioner Rule 500-8.3(85), which states: "Recuperation occurs when it is medically indicated that either no further improvement is anticipated from the injury or that the employee is capable of returning to employment substantially similar to that in which the employee was engaged at the time of the injury, whichever occurs first."

Claimant contends that her healing period should extend to April 25, 1978, the date Dr. Brand initially examined her and concluded she had a ten percent permanent partial disability. However, Dr. Brand stated in his deposition that he could not give an exact date as to when claimant's condition actually stabilized. He could only say that she had reached that plateau by the time he saw her in April. On the other hand, Dr. Hawkins indicated claimant's condition had stabilized and no further recuperation was expected on January 26, 1978 when he reexamined her and gave her a five percent disability rating. As the testimony of

the two doctors is not in conflict, the date set by Dr. Hawkins will be taken as the date for termination of healing period.

WHEREFORE, it is found:

That claimant reached her maximum point of recovery on January 26, 1978, and her healing period benefits should end as of that date.

* * *

Signed and filed this 21st day of May, 1980.

ROBERT C. LANDESS
Industrial Commissioner

No Appeal.

GARY L. WALLIN

Claimant,

vs.

CITY OF CEDAR RAPIDS,

Employer,

and

BITUMINOUS CASUALTY COMPANY,

Insurance Carrier,
Defendants.

Arbitration Decision

This is a proceeding in the Arbitration brought by Gary L. Wallin the claimant against the City of Cedar Rapids his employer and Bituminous Casualty Company the insurance carrier to recover benefits under the Iowa Workers' Compensation Act, by virtue of an alleged aggravation of a preexisting mental condition which became disabling on March 1, 1977.

Claimant is seeking temporary total compensation for psychological injury which was allegedly incurred during a confrontation between claimant and one of his supervisors on January 26, 1977.

Claimant, age 30, single, was employed as a laboratory technician for the Water Pollution Control Department of the city of Cedar Rapids for eight years. In the spring of 1976 the workers in the Water Pollution Control Department were unionized and claimant was elected shop steward. Claimant was quite concerned about the safety of the laboratory where he worked and filed approximately twelve such grievances with his employer. Claimant also helped to publish a union newsletter (defendant's exhibit A) which in January 1977, reported that a city council member told an employee that "[i]f it's so unsafe where you work why don't you find a job somewhere else." The city council member referred to in the article was in fact Richard Phillips, who is commissioner of streets and public improvements for the city of Cedar Rapids.

In the afternoon of January 26, 1977, Commissioner Phillips visited the laboratory where claimant worked and confronted claimant about the statement in the letter which claimant had written. According to the claimant the confrontation went as follows:

> He [Commissioner Phillips] said he was going to sue me and told me he wanted me to try to sue him on that and then, you know, he left the room after that. I went and complained to my supervisor, Dr. Kamhawy, saying he was in here harassing me, you know, and he didn't have much to say.
>
> I went back to work, tried to do my work and the Commissioner came back again, and the same thing, he told me that I smoked too much marijuana and told me he was going to sue my ass off, try to sleep on that, and I was really shook up so I went to Dr. Kamhawy and left without completely finishing my overtime assignment that day.

Commissioner Phillips related his version of the confrontation as follows:

> I made a periodic visit to the water pollution control plant and, prior to that time, I received a copy of the union newspaper there that I knew that Gary (claimant) had edited and there was a quote in there from a council man which was from me, but the quote was untrue. It was taken out of context and I questioned Gary about this and that's when the confrontation was held . . . I mentioned to Gary that, if I recall correctly, that I said, "Gary, do you know that you can be sued for libel, and I referred to the statement that he had put in the newspaper, in the union paper. He took it out of context. He put the words "unsafe conditions" which was not said by me. The statement that I said to Gary was "Gary, if you are so unhappy with your employment here, why don't you seek employment elsewhere?" It was in that fashion, but at that time he was having these grievances on safety and he used my statement out of context and to make the whole department look bad, I thought.

Commissioner Phillips then went on to describe claimant's reaction to the incident.

> Gary got excited and I did say something about, you know, there is a liability here, you know, when you start taking words and putting them in print and not the truth, it becomes a serious factor and I cannot recall how he snapped back, but he said something out of context that shouldn't have been said to a superior and I said "Well now, you are just going to have to smoke that in your marijuana pipe," and I was referring to the fact that he had written an editorial about smoking marijuana to the editor of the paper about it's all right to smoke marijuana.

Claimant testified that before the incident he felt fine, but after he had problems breathing and felt nervous and dizzy. At home that night claimant stated he cried and worried about being sued. The next day claimant felt so uncomfortable at work because of the fear of being

harassed, sued or fired, that he had to leave early. Claimant did not go to work the next day, which was Friday, but did return on the following Monday. Claimant asked his supervisor, Dr. Kumhawy, about the threat of lawsuit by Commissioner Phillips and Dr. Kamhawy said he thought the threat was serious. Claimant testified that this made him "super tense" about his job and he continued to feel that way at work for the next month. Claimant complained of feeling dazed and having problems breathing. Claimant also stated that he was having fantasies of being killed by Commissioner Phillips.

After a month of feeling very tense and uncomfortable about his employment situation, claimant went to see Dr. Shultice, a psychiatrist. Claimant then entered St. Luke's Hospital on March 1, 1977 for treatment of anxiety problems. Dr. Shultice diagnosed claimant's condition as schizoid personality with considerable resolution with high level anxiety. After several weeks claimant was discharged from St. Luke's Hospital with some improvement in his symptomology. Rehabilitation through education along with outpatient group therapy was recommended by Dr. Shultice.

As part of his rehabilitation program claimant attended Coe College. Claimant testified that he had no problem completing his first semester, but in the second semester he became depressed and returned to the hospital. Claimant was hospitalized January through February 1978. Dr. Shultice testified that the need for these hospitalizations was primarily caused by stress of attending Coe College. Claimant's condition was again diagnosed as schizophrenia. Claimant's condition did not improve significantly over the month-long period of hospitalization and claimant was discharged with a guarded prognosis. Dr. Shultice recommended outpatient treatment and group therapy for claimant. At the time of hearing claimant had not yet returned to work.

Claimant has had a relatively long history of psychiatric problems which first manifested themselves in the 1960's. After graduating from high school claimant attended Cornell College for one semester. Claimant found it difficult to deal with other students because of what claimant perceived as his relatively low socio-economic background. Claimant dropped out after the first semester at Cornell and then moved to Cedar Rapids in January 1967. Claimant went to work for Quaker Oaks for several months, and claimant stated that he felt "depressed" during this period. Claimant was then admitted to the Mental Health Institute in Independence, Iowa for six months of treatment and therapy. Claimant was given medications, but became convinced that they were doing him no good. After his discharge from the Mental Health Institute, claimant went to work for defendant-employer.

Claimant was hospitalized in the psychiatric facility of St. Luke's Hospital for two short periods of time in 1969 and 1970 or 1971. Claimant saw Charles Wellso, M.D. for several months in 1971. Dr. Wellso found claimant to be intensely paranoid, depressed and unwilling to take conventional medications. At one point claimant threatened to kill Dr. Wellso, so the doctor had claimant transferred to the Linn County Psychiatric Clinic.

Claimant saw Dr. Shultice for the first time on August 27, 1971. Dr. Shultice stated that claimant described feelings of depression and inadequacy. Claimant continued to see Dr. Shultice but with less frequency as time went on. Claimant became more involved in group therapy under the direction of Melissa Farley, a psychologist at the Mental Health Center in Cedar Rapids. Claimant appeared more satisfied with group therapy and appeared to be making real progress in controlling his problems. Claimant stated, "I was feeling much more confident, more serious. I was doing the right things, not only the right way but I was very pleased with the progress I was making." Claimant testified that these feelings continued until the confrontation with Commissioner Phillips in January 1977.

Dr. Shultice testified that up until the fall of 1976, claimant's job situation was not the major focus of treatment. However, the focus did shift in the fall of 1976 when claimant started expressing to Dr. Shultice his feelings of frustration concerning the response he was receiving from management and fellow employees about his efforts to improve safety in the laboratory.

Several doctors have either examined or treated claimant for his psychiatric problems and have rendered diagnoses. The first doctor of record to see claimant was Dr. Wellso, who saw claimant from December 1970 through July 1971 and in June 1977 for a social security disability evaluation. Dr. Wellso, in a June 14, 1977 report, noted that claimant still has much trouble in dealing with other people on a personal basis. Dr. Wellso diagnosed claimant's condition as schizophrenic reaction, paranoid type, with depressive features. Dr. Wellso thought claimnant was limited in the type of work environment which would be suitable, such as an isolated semi-technical job.

Dr. Shultice has been treating claimant since August 1971. Dr. Shultice testified that claimant's feelings of depression and inadequacy have been chronic since childhood. Dr. Shultice stated that claimant has features of both schizoid and paranoid personality. Dr. Shultice thought that a whole series of possible problems and interpersonal relationships were involved in claimant's condition and environmental factors were less important than conflicts within claimant's own mind. According to Dr. Shultice, threats and rejections have a greater psychological impact on claimant because of his history. Dr. Shultice stated in his deposition, at page 29, as follows:

Q. Could Gary have decompensated as he did out of any type of rejection in his personal life at that time, given these other factors that were present, these other stresses?

A. The general symptoms that Gary Wallin had then, with the exception of being very fearful of going around his place of employment, could have occurred under other circumstances. That is, the symptoms are the same. There didn't seem to be very much doubt, though, that this confrontation with the commissioner at that particular time did give rise to this, although it could have been something else that did. That is to say, the

symptoms are similar each time that he has become ill, you know.

Q. In other words, there were a number of factors present which could have caused the decompensation?

A. No, that isn't what I wanted to say. What I wanted to say is when he does become acutely ill, he becomes acutely ill in other situations at other times that there are other possible factors that could cause him to be ill from time to time. This particular incident seemed to be very definitely related in time to his, you know, confrontation with the commissioner.

Dr. Shultice pointed out that the later hospitalizations were due to stresses claimant experienced at Coe College.

Claimant saw Dr. Brown, a psychiatrist, on June 20, 1978 for an evaluation at the request of defendants. Upon examination Dr. Brown thought claimant evidenced a paranoid personality and on at least one occasion in the past claimant's condition took on the form of paranoid schizophrenia. Dr. Brown also noted a lifelong condition of personality disorder. Dr. Brown distinguished paranoid schizophrenia and personality disorder in the following testimony:

> The patient has been diagnosed as personality disorder and at other times has been diagnosed as having schizophrenia. Personality disorder is a life-long personality trait present to such an extent as to interfere with meaningful relationships with others.
>
> Schizophrenia is a psychosis proper and its a diagnosis of an entirely different classification than personality disorder. A psychosis is where there is a misinterpretation of reality.
>
> One of the psychoses is schizophrenia. Schizophrenia is a psychosis marked by a disturbance of thoughts, primarily.
>
> One of the subtypes of schizophrenia is paranoid schizophrenia where one has basically a psychosis which is schizophrenic, a mininterpretation of reality. And the most predominant part of that psychosis is morbid suspiciousness frequently amounting to delusions of persecution . . . People with personality disorders are known to decompensate and develop psychosis.

Dr. Brown stated that psychiatric treatment can help schizophrenia but not personality disorder. Dr. Brown defined decompensation as the declining ability to deal with ordinary life. Dr. Brown thought the decompensation claimant suffered in March 1977 was work related but not caused by work. According to Dr. Brown there were many possible causes for claimant's decompensation but no probable causes. Dr. Brown theorized that claimant's union activities may have in themselves been a manifestation of his personality disorder in that they were a method for claimant to resist those people he was suspicious of, and further that it was claimant's own paranoid personality as manifested in his union activities that brought about the conflict and reprimand from Commissioner Phillips. Dr. Brown implied that claimant was capable of working when he received a full release from the hospital and a recommendation for rehabilitation in March 1977.

S.S. Ortega, M.D. examined claimant on April 12, 1978 for determination of disability for social security. Dr. Ortega diagnosed claimant's condition as schizophrenic-paranoid type with some depression. Because of claimant's mistrust of other people and feelings of tension, Dr. Ortega did not think claimant "could be gainfully employed in a competitive situation for any length of time."

The issue requiring determination in this matter of first impression is whether or not the claimant has established by a preponderance of the evidence that the confrontation of January 26, 1977 was and is the cause of his current disability.

Based upon the medical opinion of his attending physician, Dr. Shultice, whose evidence is given the greater weight in this proposed decision, because of such a close, on-going doctor-patient relationship, the claimant has sustained his burden of proof. Having seen and heard the witnesses it is clear that the domineering actions of Richard L. Phillips were of such a nature so as to have been the cause of the claimant's thirty-day period of hospitalization, in March of 1977.

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. *Nicks v. Davenport Produce Co.,* 254 Iowa 130, 115 N.W.2d 812. *Yeager v. Firestone Tire & Rubber Company,* 253 Iowa 369, 112 N.W.2d 299.

This case involves a claim of aggravation of a preexisting neurosis, and appears to fit within the framework of prior decisions involving aggravation of preexisting condition due to physical injury. Professor Larson in his on-going text on Workmen's Compensation deals with this issue in Volume 1B section 42.23(C) at 7-640 in part as follows:

"... it is clear that the majority rule is not weakened by the fact that the claimant may have had a preexisting neurosis or latent nervous weakness on which the employment acted without physical trauma to produce the ultimate injury. This is the standard rule when a physical trauma precipitates a prior condition, and it should be no less so when the stimulus is nonphysical." *Deziel v. Difco Laboratories,* 394 Mich. 466, 232 N.W.2d 146 (1975).

In applying the foregoing legal principles to the case at hand it is clear the claimant has a lengthy medical history. He has not established by competent evidence that his *current* inability to work was caused by Mr. Phillips' conduct. (Emphasis added) Dr. Shultice concluded that the incident precipitated the need for hospitalization; it is further concluded that the claimant was restored to his prior mental condition at the time he enrolled in Coe College to resume his studies last fall (transcript, page 54. line 5) while this record fails to contain testimony concerning the fact date of enrollment. For the purposes of

this decision the date shall be fixed as September 1, 1977.

* * *

WHEREFORE it is ordered that the defendants pay the claimant a period of temporary total disability of 26 weeks and 3 days . . . .

* * *

Signed and filed this 7th day of August, 1979.

HELMUT MUELLER
Deputy Industrial Commissioner

No Appeal.

GARY WAYMAN,

Claimant,

vs.

ANCONA BROTHERS COMPANY,

Employer,

and

LIBERTY MUTUAL INSURANCE COMPANY,

Insurance Carrier,
Defendants.

Order

Be it remembered that on June 19, 1979 the defendants filed a special appearance.

The special appearance alleges that the employer is a foreign corporation with its principal place of business outside of the State of Iowa, that the employment contract was entered into outside the State of Iowa; that the regular employment of the claimant and the alleged injury occurred outside the State of Iowa and that Section 85.71, Code of Iowa is unconstitutional on its face.

Section 85.71, Code of Iowa, reads:

> Employment outside of state. 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 provide 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 workers' 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.

The legislative intent as expressed by the grammatical construction of subparagraph 1 above indicates that employee domicile alone is enough to confer jurisdiction on this agency to determine matters provided for in the Iowa Workers' Compensation Act. Attention to the breakdown of the sentence, as mandated by the placement of the commas, dictates that the sentence be read as follows:

His employment is principally localized in this state, that is,

(a) his employer has a place of business in this state or some other state and he regularly works in this state,

or (b) he is domiciled in this state,

or . . . .

The sentence should not be read as follows:

His employment is principally localized in this state, that is,

(a) his employer has a place of business in this or some other state

and (1) he regularly works in this state,

or if (2) he is domiciled in this state,

or . . . .

If the legislature had wished to express the latter construction subparagraph one would have been altered as follows -- "His employment is principally localized in this state, that is, his employer has a place of business in this or some other state, and (either) he regularly works in this state or ~~if~~ he is domiciled in this state, or . . . ."

WHEREFORE, pursuant to Code section 85.71(1), if the claimant be domiciled in the state of Iowa, he is subject to the Iowa Workers' Compensation Act. The original notice and petition filed herein indicates that the claimant has an Iowa address; and therefore, on its face, the petition states that this agency may have jurisdiction.

Additionally, defendant-employer challenges the constitutionality of the Code section in issue and as applied. This tribunal is without jurisdiction to discuss the constitutionality of various statutes and therefore that issue will not be addressed at this time.

* * *

Signed and filed this 6th day of July, 1979.

LEE M. JACKWIG
Deputy Industrial Commissioner

No Appeal.

HELEN WHITMER,

Claimant,

vs.

INTERNATIONAL PAPER COMPANY, FOLDING CARTON AND LABEL DIVISION

Employer
Self-Insured,
Defendant.

Appeal Decision

This is a proceeding brought by claimant appealing a proposed ruling dismissing claimant's petition for review-reopening.

* * *

On May 23, 1979, more than five years from the date of the last payment of weekly compensation, claimant filed a petition for review-reopening alleging further injuries to the brain, neck and back and inferring an epileptic condition related to the original injury but not discovered until April of 1979.

Defendant moved to dismiss, setting up Code of Iowa section 85.26(2) as a bar to recovery. Although it is debatable whether the bar to recovery would be section 85.26(2), Code 1979 or section 86.34, Code 1971, it is of little consequence as both sections set up a bar to recovery of additional disability benefits unless the action therefor was maintained within three years of the last payment of weekly compensation benefits. See *Secrest v. Galloway Co.*, 239 Iowa 168, 30 N.W.2d 793 (1948) as to the retroactivity of limitation statutes.

Although it is recognized that reopening proceedings can be maintained on a proper showing that facts relative to an employment connected injury existed but were unknown and could not have been discovered by the exercise of reasonable diligence as expounded in *Gosek v. Garmer and Stiles Company*, 158 N.W.2d 731 (1968), it is not shown that such an action may be maintained after the expiration of three years from the last payment of weekly compensation. *Freeman v. Luppes Transport Company, Inc.*, 227 N.W.2d 143, 149 (1975); *Bergen v. Waterloo Register Company*, 151 N.W.2d 469, 472 (1967); *Secrest v. Galloway, supra*, 173, ____ ; *Tebbs v. Denmark Light & Telephone Corp.*, 230 Iowa 1173, 1176 (1941).

Thus claimant's proceeding to obtain additional disability benefits must be dismissed.

Medical benefits which are causally related to the injury, on the other hand, are not barred by either section 86.34, Code 1971 or section 85.26(2), Code 1979 when an award for payments or agreement for settlement has been made. Section 85.27, Code 1971, pertains to the ongoing duty of the employer to provide medical care to an employee determined to have received an injury arising out of and in the course of employment. That section indicated that no statutory period of limitations shall be applicable to the obligation to continue to provide reasonable and necessary medical care related to the injury. Section 85.26(2), Code 1979, were it determined to be applicable, is even more specific regarding the obligation to provide benefits of a continuing nature pursuant to section 85.27.

Signed and filed this 11th day of October, 1979.

ROBERT C. LANDESS
Industrial Commissioner

Appealed to District Court: Pending

CARL WAYNE WHITMORE,

Claimant,

vs.

CUSTODIS CONSTRUCTION COMPANY, DIVISION OF RESEARCH-COTTRELL, INC.,

Employer,

and

AETNA SURETY & CASUALTY,

Insurance Carrier,
Defendants.

Appeal Decision

This is a proceeding brought by Carl Whitmore, claimant, pursuant to Section 86.24 of the Iowa Workers' Compensation Act, appealing an arbitration decision wherein claimant was found not to be a domiciliary of Iowa at the time of the injury.

* * *

On April 1, 1977 claimant received an injury arising out of and in the course of his employment with the defendant-employer when claimant fell through a support deck at the jobsite in Nebraska City, Nebraska. As a result of this injury, surgery was performed on claimant's left knee and left shoulder, and claimant received compensation pursuant to the Nebraska Workers' Compensation Laws. Claimant now seeks permanent partial disability under the Iowa Workers' Compensation Act. The issue to be resolved is whether the claimant was a domiciliary of Iowa at the time of the injury and therefore within the jurisdiction of the Iowa Industrial Commissioner.

Claimant was born in Red Oak, Iowa in 1942, and resided with his father in Coin, Iowa until 1975. In November 1974 claimant became employed in Brownville, Nebraska, commuting daily from Coin, Iowa until October 1975 when claimant began renting a house trailer in Nebraska City, Nebraska. During his several employments within the state of Nebraska, claimant continued to reside in this house trailer until sometime after the April 1, 1977 injury; a period of approximately 19 months.

Claimant became employed with defendant-employer on September 15, 1976, through contacts by the defendant-employer with the local union office in Omaha, Nebraska. The injury and all of claimant's employment with the

defendant-employer were in Nebraska. In 1977, after being treated at a Nebraska hospital for the injuries sustained on April 1 of that year, claimant returned to Coin, Iowa.

Claimant testified that he and his father have been partners in a horse-breeding operation for about the past 11 years, and that for this reason he returned to Coin almost every weekend. Lester Olsen, Hector Conyac and Fred Smith, all of Coin, testified they frequently saw claimant in Coin throughout the time claimant was employed in Nebraska. Claimant further testified that from December 31, 1976 to March 1, 1977, during a cold weather layoff, claimant returned to Coin.

The record shows that, during the relevant time period, claimant maintained an Iowa drivers license, held resident Iowa fishing licenses and maintained a post office box in Coin, Iowa. During this time, claimant did not own any real property nor did he vote in any public elections in either Nebraska or Iowa. The record shows that for the tax years 1975 and 1976, claimant filed income tax returns as a Nebraska resident, amending these returns in 1979 to reflect Iowa residency.

Section 85.71, Code of Iowa (1979), confers jurisdiction on the Iowa Industrial Commissioner for extraterritorial employment if the employee "is domiciled in this state." No part of the Iowa Workers' Compensation Laws specifically define "domicile," and the Iowa Supreme Court has never addressed the question of the meaning of "domicile" as it relates to the workers' compensation statutes.

It is basic Iowa law that "domicile" has a much different definition than "residence," and that a person may have one of three types of domicile: domicile of origin, domicile by choice and domicile by law. *In re Estate of Jones,* 192 Iowa 78, 182 N.W. 227, 16 A.L.R. 1286 (1921). Under Iowa law, in order to change one's domicile there must be a concurrence of three essential elements: "(1) a definite abandonment of the former domicile; (2) actual removal to, and physical presence in the new domicile; (3) a bona fide intention to change and to remain in the new domicle permanently or indefinitely." *Julson v. Julson,* 255 Iowa 301, 302, 122 N.W.2d 329, 331 (1963). There is no question that claimant's domicile of origin was in Iowa. The issue, therefore, can be reduced to whether claimant changed his domicile of origin either by choice or by law when he moved to and resided in Nebraska.

In his arbitration decision, the deputy cited *In re Litterington's Estate,* 130 Iowa 356, 106 N.W. 761 (1906), as to the doctrine that residence coupled with an intention to remain establishes domicile, notwithstanding a floating intention to return to another place at some future time. A more recent analysis of the Iowa law of domicile is found in *Edmundson v. Miley Trailer Co.,* 211 N.W.2d 269 (Iowa 1973).

In *Edmundson, supra,* the Iowa Supreme Court reiterated many longstanding doctrines regarding the meaning of domicile in Iowa when it stated:

> "Residence" and "domicile" are terms of fixed and familiar meaning. Residence may be temporary, transient or permanent. Domicle is a broader term. Residence coupled with the required intent is necessary to acquire domicile but actual residence is not necessary to preserve an established domicile. Domicile, once established, continues until supplanted by the acquisition of a new one. Every person has one and only one domicile but many have no residence, one residence or several residences. [Id. at 270-271.]

The Court, in discussing the intent necessary to change a domicile, went on to state:

> The requisite element of intent to change one's domicile necessarily includes an intention to abandon the former domicile, *and to do so permanently. There must be both an absence of an intent to return and an intent to remain in the place chosen as the new domicile.* To effect a change of domicile, there must be the intent to exchange the prior domicile for another. *If a person establishes a new dwelling place, but never abandons the intention* of returning to the old dwelling place as his only home, the domicile *remains as the old dwelling place.* [Id. at 271. Emphasis in original.]

And, on a related matter, the Court had previously stated that the domicile is "presumed to continue" until sufficient facts are presented establishing domicile elsewhere, and that the burden is upon the defendant to go forward with the evidence in proving a change in plaintiff's domicile. *Julson, supra.*

It should also be noted that domicile is a mixed question of law and fact. *In re Litterington's Estate, supra;* 28 C.J.S. *Domicile* section 19, page 11. Because intent is such an essential element, the determination of the place of domicile depends upon all the facts and circumstances in each case, and factors considered in prior cases are of little assistance. *Julson, supra,* at 302, N.W. at 311.

Defendants contend that the statute conferring jurisdiction based solely upon domicile is unconstitutional. If that be so, it is not within the power of the industrial commissioner to so rule. Legislation has been proposed but not enacted to clarify this issue. Until some determination is made either judicially or legislatively that the commissioner is interpreting the statute incorrectly or that it is unconstitutional or that the legislature intends the law to be otherwise, the industrial commissioner shall remain consistent in the interpretation of Section 85.71(1). Although it is not the desire of the Iowa Industrial Commissioner to be relitigating cases which have been decided by sister states merely because the Iowa laws are more progressive than theirs, the statutes and law would seem to allow this to occur. See *Crider v. Zurich Ins. Co.,* 380 U.S. 39 (1965); *Industrial Commissioner v. McCartin,* 330 U.S. 622 (1947); *Alaska Packers Ass'n. v. Comm'r,* 294 U.S. 532 (1935); Larson 4 *Workmen's Compensation Law,* §§85.20, 86.00 (1980).

WHEREFORE, it is found:

That claimant was a domiciliary of the state of Iowa and that the Iowa Industrial Commissioner has jurisdiction over the claim for workers' compensation benefits.

Signed and filed this 3rd day of June, 1980.

ROBERT C. LANDESS
Industrial Commissioner

Appealed to District Court: Pending.

DIANE T. WINEY, (Widow of LEO PATRICK WINEY), KATHERINE WINEY, MICHAEL WINEY, LINDA WINEY, SUSAN WINEY, and JILL WINEY,

Claimants,

vs.

INTERNATIONAL HARVESTER COMPANY,

Employer,
Self-Insured,
Defendant.

Appeal Decision

This is an appeal by the claimant and a cross-appeal by the defendant from a proposed arbitration decision wherein claimant was denied relief in that the decedent's death did not arise out of his employment.

* * *

On reviewing the record, it is found that the deputy's findings of fact and conclusions of law are proper.

Questions of causal connection are essentially within the domain of expert testimony. *Bradshaw v. Iowa Methodist Hospital,* 251 Iowa 375, 101 NW2d 167 (1960). In this case, one is confronted with conflicting expert medical testimony as to the causation of the increased cranial pressure which led to the acute respiratory failure that caused decedent's death. The problem presented this commissioner by such conflicting expert testimony is illustrated by the language of *Eisentrager v. Great Northern Railway Co.,* 178 Iowa 713, 724 (1916), a noncompensation 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 appear that a theory upon which his adversary would not be liable is just as possible . . . . We concede that, ordinarily, it is for the jury whether a claim is supported by a preponderance. But this is not so when all must agree that the case for him who has the burden is not as strong as, or at any rate is not stronger than, that of his opponent.

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 NW2d 867 (1965); *Lindahl v. L. O. Boggs,* 236 Iowa 296, 18 NW2d 607 (1945). This burden is not discharged by creating an equipoise. It requires a preponderance. *Volk v. International Harvester,* 252 Iowa 298, 106 NW2d 649 (1960); *Griffith v. Cole Bros.,* 183 Iowa 415, 165 NW 577 (1918).

The 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. Accordingly, the claim of the claimant regretfully must be denied.

* * *

Signed and filed this 7th day of January, 1980.

ROBERT C. LANDESS
Industrial Commissioner

No Appeal.

TROY WINTERS,

Claimant,

vs.

ASGROW SEED COMPANY,

Employer,

and

AETNA LIFE & CASUALTY,

Insurance Carrier,
Defendants.

Arbitration Decision

INTRODUCTION

This is a proceeding by claimant for benefits as a result of an injury on July 18, 1977 against Asgrow Seed Company, employer, and Aetna Life & Casualty Company, insurance carrier.

* * *

FACTS

On July 18, 1977 claimant, who was then fifteen years old, broke his leg while working as a corn detassler for the defendant, Asgrow Seed Company. On the day of the injury, about thirty workers were loaded into a bus and taken out to a field to detassel corn. When lunch break commenced, about fifteen of the workers went to the bus to eat while the rest ate close by. The claimant and three of his friends ate in the rear of the bus. After finishing eating, the claimant and two of his friends started tossing little clods of dirt from the bus floor on Don Meier, another

friend, who was trying to take a nap. After about five minutes, Meier got angry and told the claimant, as well as the two other individuals, to stop throwing the clods. Shortly thereafter, a supervisor said it was time to go back to work so the claimant and his three friends headed out the back door of the bus which had a four foot drop to the ground. Claimant was following Meier, who upon reaching the ground, turned around and grabbed claimant's right leg. Claimant was unable to stop and upon hitting the ground, broke his leg. The time lapse between claimant's throwing the clods of dirt and his being tripped was somewhere between one to three minutes. Claimant, on cross-examination, stated he knew Meier would get him back but he didn't think it would be until after he was on the ground.

ISSUES

The issue presented is whether the injury which the claimant sustained arose out of and in the course of his employment.

APPLICABLE LAW

The 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 Company,* 261 Iowa 352, 154 N.W.2d 128 (1967); *McDowell v. Town of Clarksville,* 241 N.W.2d 904 (Iowa 1976).

In *Griffith v. Cole Brothers,* 183 Iowa 415, 424, 165 N.W. 577 (1918) the Supreme Court of Iowa stated: "One is in the 'course of his employment' though he has 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 . . . (citations omitted)". Eating is reasonable and incidental to the performance of work and is one of the necessities imposed by nature. *Walker v. Speeder Mach. Corp.,* 213 Iowa 1134, 240 N.W. 725 (1932), *Crees v. Sheldahl Telephone Co.,* 258 Iowa 292, 139 N.W.2d 190 (1965).

Historically, in Iowa, the issue of horseplay has been treated as an "arising out of" issue. *Whitmore v. Dexter Mfg. Co.,* 204 Iowa 180 214 N.W. 700 (1927). In *Ford v. Barcus,* 155 N.W.2d 507 (Iowa 1968), the court stated: "Horseplay which an employee voluntarily instigates and aggressively participates in does not arise out of and in the course of his employment and therefore is not compensable."

ANALYSIS

In order to determine the issue presented, the first question which needs to be answered is whether or not the claimant was in the course of his employment while on his lunch break. As noted in the authority already cited, an employee does not leave the course of his employment simply because he eats lunch. This is especially true, when as in the case at bar, a claimant is injured on the employer's property.

The second question which needs to be answered is whether or not the claimant's injury, which was the result of horseplay, arose out of his employment. Claimant's testimony connotes that he aggressively participated in throwing the clods of dirt on Meier. Although the testimony presented did not show that the claimant was the instigator of the clod throwing, it can be said that as between the claimant and Meier, claimant started the horseplay. Claimant's throwing of the dirt clods was so close in time to the tripping incident as to make it one act of horseplay. Claimant's testimony as well as that of Mr. Meier revealed that both of them considered the tripping as a retaliatory action and not an independent incident. Claimant in his testimony indicated that he knew Meier was going to get even with him but he thought Meier would wait until he was on the ground.

Claimant has failed to show that he did not aggressively participate in the horseplay or that there were two separate incidents of horseplay, thereby failing to meet his burden of proving by a preponderance of the evidence that his injury arose out of and in the course of his employment.

* * *

Signed and filed this 22nd day of December, 1978.

DAVID E. LINQUIST
Deputy Industrial Commissioner

No Appeal.

GENE LYNN WORSHEK,

Claimant,

vs.

SPORLEDER, INC.,

Employer,

and

TRAVELERS INSURANCE COMPANY,

Insurance Carrier,
Defendants,

Appeal Decision

Defendants have appealed from a proposed review-reopening decision wherein it was found that claimant sustained a thirty percent functional impairment of his left upper extremity and was awarded permanent partial disability accordingly.

* * *

On reviewing the record, it is found that the findings of fact and conclusions of law are proper with the following modification:

Iowa Industrial Commissioner Rule 500-2.4 reads as follows:

> The Guides to the Evaluation of Permanent Impairment published by the American Medical Association are adopted as a guide for determining permanent partial disabilities under section 85.34(2) "a" - "r" of the Code. The extent of loss or percentage of

permanent impairment may be determined by use of this guide and payment of weekly compensation for permanent partial scheduled injuries made accordingly. Payment so made shall be recognized by the industrial commissioner as a prima facie showing of compliance by the employer or insurance carrier with the foregoing sections of the Iowa Workers's Compensation Act. Nothing in this rule shall be construed to prevent the presentations of other medical opinion or guides for the purpose of establishing that the degree of permanent impairment to which the claimant would be entitled would be more or less than the entitlement indicated in the AMA guide.

This rule is intended to implement section 85.34(2) of the Code.

As Rule 500-2.4 is not intended to be an evidentiary rule, its use in determining the quality of expert medical evidence is inappropriate. Use of the AMA guides is not intended to be the preferred method of determining permanent partial disability but merely a method which is suggested for use when ratings of percentage of disability are not obtainable from qualified experts.

In any event, Josef R. Martin, M.D., was the claimant's treating physician and in such capacity saw and examined claimant on more than one occasion and his opinion and the basis thereof is more persuasive than that of William R. Boulden, M.D., who saw and examined claimant only once.

* * *

Signed and filed this 28th day of September, 1979.

ROBERT C. LANDESS
Industrial Commissioner

No Appeal.

ROY T. YOUNGER,

Claimant,

vs.

EBY CONSTRUCTION CO.,

Employer,

and

AETNA LIFE & CASUALTY,

Insurance Carrier,
Defendants.

Review-Reopening Decision

This matter was fully submitted on a stipulated record on February 13, 1979.

* * *

The sole issue for determination is the rate of compensation which is due the claimant.

Claimant received an injury arising out of and in the course of his employment on April 13, 1978. According to the documents on file the injury was a low back injury and the claimant was disabled from employment April 24, 1978 through May 24, 1978, a period of five and six-sevenths (5 6/7) weeks.

The claimant had been employed by the defendant-employer for less than thirteen calendar weeks at the time of his injury. He was employed as an iron worker having supervisory responsibilities and was paid seventy five cents ($.75) an hour more than an iron worker journeyman. His hourly rate of pay was ten and 875/100 dollars ($10.875) and the claimant's gross weekly earnings varied somewhat in accordance with the number of hours worked. The claimant did not receive compensation for the time during which he did not work or was prevented from working due to weather conditions. The claimant commuted on a daily basis to his jobsite approximately one hundred miles in each direction. Claimant received no compensation or reimbursement for the mileage in commuting. He did not receive any payment for those times which he appeared for work but work was unavailable because of weather conditions. Claimant's supervisory responsibilities did not make him a "company foreman". He was a "non-company foreman" and, therefore worked under a different schedule than "company foremen" who were employed by the company as their supervisors.

On the date of the injury, claimant had completed eight weeks of employment with defendant-employer. The gross earnings actually paid to the claimant for each of these weeks are set out below:

Week ending	Hours Worked	Hourly Wage
4/11/78	24	10.875
4/ 4/78	36	10.875
3/28/78	25	10.875
3/21/78	36	10.875
3/14/78	40	10.875
3/07/78	24	10.875
2/28/78	27½	10.875
2/21/78	16	10.875

During the five-week period prior to the claimant's employment with said defendant the iron workers who were not employed as "company foremen" worked the following number of hours:

Week ending	No. of Ironworkers	Total Hrs. for all Ironworkers	Average hrs. for each Ironworker
2/14/78	11	238	22 (excluding
2/07/78	12	292½	24 company
1/31/78	15	302½	20 foremen)
1/24/78	14	328	23
1/17/78	16	341½	21

The company foremen each worked forty hour week and were employed indoors and traveled with the construction company and were in a different classification than the claimant. The employer and insurance carrier calculated the gross average weekly wage of the claimant as follows:

Week ending 4/11/78 $261.00 Actual gross earnings of claimant.
Week ending 4/04/78 $391.50 Actual gross earnings of claimant.
Week ending 3/28/78 $271.87 1/2 Actual gross earnings of claimant.
Week ending 3/21/78 $391.50 Actual gross earnings of claimant.
Week ending 3/14/78 $435.00 Actual gross earnings of claimant.
Week ending 3/07/78 $261.00 Actual gross earnings of claimant.
Week ending 2/28/78 $299.06 Actual gross earnings of claimant.
Week ending 2/21/78 $174.00 Actual gross earnings of claimant.
Week ending 2/14/78 $282.75 Average number of hours of all ironworkers (25.57 rounded up to 26) multiplied by claimant's hourly rate.
Week ending 2/07/78 $342.56 Average number of hours of all ironworkers (27.5) plus four hours multiplied by claimant's hourly rate.
Week ending 1/31/78 $255.56 Average number of hours of all ironworkers (23.5) multiplied by claimant's hourly rate.
Week ending 1/24/78 $288.19 Average number of hours of all ironworkers (26.5) multiplied by claimant's hourly rate.
Week ending 1/17/78 $261.00 Average number of hours of all ironworkers (24) multiplied by claimant's hourly rate.
Total earnings – $3,914.99 1/2

$3,914.99 1/2 divided by 13 = $301.15 in average weekly wages. The claimant is married, claims five exemptions, and the defendant-employer paid $190.98 in temporary total disability compensation based on this gross earnings.

It is the claimant's contention that his weekly earnings for the purposes of determining worker's compensation benefits should be computed on the basis of a 40-hour week (i.e. $435.00). The claimant asserts that he would have worked 40-hour week if the work would have been available and therefore he should be compensated as if it were available during the entire 13 week period.

The employer and the insurance carrier insist that the weekly earnings and the benefit rate were properly determined in view of the nature of claimant's employment on the method of compensation.

Iowa Code Section 85.61(12) states: "Gross earnings" means recurring payments by employer to the employee for employment, before any authorized or lawfully required deduction or withholding of funds by the employer, excluding irregular bonuses, retroactive pay, overtime, penalty pay, reimbursement of expenses, expense allowance, and the employer's contribution for welfare benefits.

§85.36 Basis of computation. 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:

*** 6) In the case of an employee who is paid on a daily, or hourly basis or by the output of the employee, the weekly earnings shall be computed by dividing by thirteen the earnings, not including overtime or premium pay, of said employee earned in the employ of the employer in the last completed period of thirteen consecutive calendar weeks immediately preceeding the injury.

7) In the case of an employee who has been in the employ of the employer less than thirteen calendar weeks immediately preceding the injury, his weekly earnings shall be computed under subsection 6, taking the earnings, not including overtime or premium pay, for such purpose to be the amount he would have earned had he been so employed by the employer the full thirteen calendar weeks immediately preceding the injury and had worked, when work was available to other employees in a similar occupation. ***

It is clear that all other ironworkers employed by defendant-employer worked less than forty hours for the thirteen weeks preceding the injury. These figures are borne out above. Had the claimant been employed as an ironworker by defendant he would have worked less than forty hours during those five weeks. Work would have been available to him as it was to other employees in a similar occupation. The full pay during that period of time was somewhat less than the customary forty hours. It is not the intent of the Workers' Compensation Act to compensate an employee on the basis of salary which he might have earned. It does attempt to equitably base compensation rates on an employee's earnings, relying on earnings of employees similarly situated when necessary to achieve such equity.

Wherefore it is found that earnings for this claimant would have been three thousand nine hundred fourteen and 99 1/2/100 dollars ($3914.99 1/2) during the full thirteen calendar weeks immediately prior to injury had he been employed by this employer in an occupation similar to that in which he was engaged and had worked when work was available. It is further found the basis of compensation be as set out in the Memorandum of Agreement which was filed by defendant-employer.

* * *

Signed and filed this 23rd day of February, 1979.

JOSEPH M. BAUER
Deputy Industrial Commissioner

No Appeal.

DANIEL ZUETLAU,

Claimant,

vs.

M. & J.R. HAKES,

Employer,

and

ZURICH-AMERICAN INSURANCE COMPANIES,

Insurance Carrier,
Defendants.

Ruling

This matter came on for hearing before the undersigned at the Iowa Industrial Commissioner's Office in Des Moines, Iowa, on March 2, 1979. The matter was fully submitted on April 9, 1979.

* * *

The issue is whether the application for partial commutation of 96 weeks of permanent partial disability from the first part of the remaining period of such benefits for the payment of attorney's fees should be approved.

Although the parties have extensively argued both sides of various aspects of the applicability of Code section 85.45 to the present matter, neither party has discussed or explained what from the face of the Form 9A appears to be either an error of some sort or evidence of noncompliance with the award rendered and with the relevant statutory provisions regarding payment of the permanent partial disability.

Review of the file reveals that on March 22, 1978, deputy industrial commissioner Dennis L. Hanssen filed an arbitration decision in which he awarded claimant 97 weeks of healing period and 300 weeks of permanent partial disability on account of an injury claimant sustained on November 10, 1975 arising out of and in the course of his employment. He found that claimant's healing period extended from November 12, 1975 through September 15, 1977. This decision was affirmed by the industrial commissioner and by the District Court.

The first sentence of Code section 85.34(2) reads: "Compensation for permanent partial disability shall begin at the termination of the healing period provided in subsection 1 hereof." Accordingly, permanent partial disability benefits should have commenced as of September 16, 1977 and should have been paid through December 8, 1978, the date upon which claimant's counsel signed the Form 9A -- that is, 64 weeks of permanent partial disability. Yet, said form filed on December 15, 1978 along with a revised Motion for Partial Commutation indicates that 97 weeks of healing period were paid to September 6, 1978 and twelve weeks of healing partial disability were paid to November 27, 1978. Such information viewed in light of the March 22, 1978 award indicates that 52 weeks of permanent partial disability would have accrued-not paid and should have been set forth in part 3 of Form 9A (64 weeks minus 12 weeks; assuming for explanation purposes, that no payment was made for the November 27, 1978 to December 8, 1978 period.) Therefore, the remainder in part 4 would be 236 weeks, not 288 weeks and the remainder after commutation (if approved) in part 7 would be 140 weeks, not 192 weeks.

As indicated above, whether error in computing benefits paid has resulted in the dates and figures reported on the Form 9A or whether such dates and figures evidence non-compliance with Code section 85.34(2) cannot be definitely determined from the record before the undersigned. It is noted, however, that in the November 10, 1978 letter listed above as part of the immediate record the defendants state that one draft in the amount of $518.48 completes the temporary total disability of 97 weeks, another draft in the amount of $1,036.96 covers weekly permanent partial disability starting September 7, 1978 through November 1, 1978 and a third draft in the amount of $129.62 covering the weekly period from November 2, 1978 to November 8, 1978.

In any event, the Form 9A must be corrected and brought up to date to show the true status of the case with respect to benefits paid and benefits accrued-not paid.

WHEREFORE, it is found that the Form 9A viewed in light of the March 22, 1978 award is in error.

THEREFORE, claimant's application for partial commutation is hereby denied.

Signed and filed this 31st day of May, 1979.

LEE M. JACKWIG
Deputy Industrial Commissioner

No Appeal.

DANIEL ZUETLAU,

Claimant,

vs.

M. & J. R. HAKES,

Employer,

and

ZURICH-AMERICAN INSURANCE COMPANIES,

Insurance Carrier,
Defendants.

Ruling

This matter came on for hearing before the undersigned at the Iowa Industrial Commissioner's Office in Des Moines, Iowa on March 2, 1979. In a ruling on partial commutation filed May 31, 1979 claimant's application was denied because the Form 9A was found to be in error and accordingly did not accurately reflect the period during

which compensation is payable.

* * *

The issue is whether the application for partial commutation of 82 weeks of permanent partial disability from the first part of the remaining period of such benefits for the payment of attorney's fees should be approved. Claimant in his most recent application adds to his request the following:

> "or preferably by reducing remaining period proportionately by reducing each weekly check by one-third or net of $83.42 to Claimant to permit weekly checks to come to employee."

Section 85.45(1), Code of Iowa, requires that before a commutation may be granted, the period during which compensation is payable must be definitely determined.

As discussed in the previous ruling, the deputy industrial commissioner's March 22, 1978 arbitration decision, which was affirmed by the industrial commissioner and by the District Court, awarded claimant 97 weeks of healing period extending from November 12, 1975 through September 15, 1977 and 300 weeks of permanent partial disability. It is very important to note that Code section 85.34(2) requires that permanent partial disability benefits commence at the termination of the healing period -- in this case, as of September 16, 1977. Such disability benefits should have been paid through September 12, 1979, the date upon which claimant's counsel and claimant signed the Form 9A. That is, 103 5/7 weeks of permanent partial disability benefits should have been paid by the defendants to the claimant as of the date the application was prepared and signed.

The file contains a letter dated August 30, 1979 addressed to Deputy Industrial Commissioner Moranville and signed by a claim supervisor for defendant-insurance carrier. Said letter indicates that 97 weeks of healing period benefits were paid from November 11, 1975 through June 17, 1977 and (after a rate adjustment downward) from June 22, 1977 through September 6, 1978 at the corrected rate of $129.62. However, the undersigned points out that November 11, 1975 through June 17, 1977 amounts to 83 2/7 weeks and June 22, 1977 through September 6, 1978 amounts to 63 weeks for a total of 146 2/7 weeks. Since the reported total dollar amount paid in healing period benefits is equivalent to 97 weeks and not to 146 2/7 weeks of benefits at the weekly rate, the undersigned suggests that "9/6/78" should read "9/6/77." June 22, 1977 through September 6, 1977 amounts to 11 weeks which added to 83 2/7 equals 94 2/7 weeks. The 2 5/7 weeks discrepancy between 97 weeks and 94 2/7 weeks is resolved when the minor rate adjustment is taken into consideration.

The letter goes on to state that 51 weeks of permanent partial disability benefits have been paid covering a period from September 7, 1978 [again, the award and Code section 85.34(2) mandate permanent partial disability benefits commencing September 16, 1977] through August 30, 1979. According to the defendant-insurance carrier, 249 weeks of permanent partial disability benefits remain to be paid.

As indicated earlier, as of the date he signed the application, claimant should have received 103 5/7 weeks of permanent partial disability benefits. He has received 51. Defendants are in arrears by 52 5/7 weeks. Such amount has accrued-not paid. Appreciation of such fact should explain why the remainder of part 4 and the remainder after commutation (if approved) in part 7 would not be as it is shown on claimant's application.

Claimant has relied upon defendant-insurance carrier's figures which appear incorrect. Hence, the Form 9A filed September 13, 1979 does not reflect the true status of the case with respect to benefits accrued-not paid.

Defendants have also questioned whether the period during which compensation is payable can be determined in this case, but on another theory. Citing *Diamond v. The Parsons Co.,* 256 Iowa 915, 129 N.W.2d 608 (1964), defendants contend that claimant's present condition and life expectancy should be taken into consideration because the claimant's condition may have deteriorated so much that he would not be expected to live as long as the period of time sought to be commuted or because his condition may have improved and "the percentage of disability time thought to be definitely determinable is indefinitely determinable and can be reduced by proper application for Review-Reopening." Defendants suggest that the claimant should have reestablished his extent of disability as of the time of the hearing on the application for partial commutation.

Although the *Diamond* decision does specify that claimant's condition and life expectancy may be considered in determining the merits of an application for commutation, the opinion reasoned " . . . if claimant lives out his expectancy, he will outlive his compensation period and be left with nothing. If he dies prematurely his total weekly payments may be less than the present commuted value." Said decision does not support defendants' latter rationale quoted above. Defendants seem to imply that they will be put at a disadvantage if they are required to pay a lump sum commuted value now and upon subsequent review-reopening they are able to establish the claimant's degree of disability is less than that previously awarded. The Supreme Court touched upon this point in the same decision by stating: "The statute [85.45] says nothing about denying commutation because of expense, hardship or inconvenience to the employer. [as a result of paying a lump sum]."

Section 85.45(2), Code of Iowa, requires that before a commutation may be granted, it must be shown that such commutation will be for the best interest of the person or persons entitled to compensation or that periodical payments will entail undue expense, hardship or inconvenience upon the employer.

The motion for partial commutation filed December 15, 1978 states "WHEREFORE, Claimant, through his Attorney, asks that the Commissioner commute or lump sum sufficient part of the award so as to pay attorney fees herein at the rate agreed between the parties." Claimant signed said motion and the various Form 9As filed to date.

Although the Iowa Supreme Court stated in the *Dia-*

mond decision that seeking a commutation of benefits in order to pay one's bills (the claimant in that case was indebted for medical bills and attorney fees) was "a commendable purpose," the undersigned has some concern over just what the claimant understands regarding the present matter. Claimant was not present at the hearing. No affidavit by the claimant appears in the record. Rather, claimant's counsel in the motion for partial commutation, at the hearing, and in his affidavit, elaborates upon the job he performed for the claimant in securing the award of compensation benefits. Claimant's counsel almost appears to be seeking approval of an attorney's lien pursuant to Code section 86.39 by setting forth factors discussed in *Kirkpatrick v. Patterson,* 172 N.W.2d 259, 261 (Iowa 1969). Such detail is inappropriate in the present matter. It is understood the claimant signed a compensation agreement with his counsel whereby claimant's counsel is entitled to 1/3 of the recovery. What has not been established is whether claimant would benefit by having 82 weeks of benefits commuted so that he could pay his counsel from such amount. Could claimant afford to pay his counsel from some other source of income? What are his daily living expenses? What is his overall financial status? Does claimant realize that if the partial commutation is granted he will be without the $129.62 weekly income from workers' compensation for 82 weeks before said benefits resume? If a proportionate amount of a certain number of weeks of benefits could be commuted to satisfy the amount claimant owes his counsel, would the remainder amount received weekly by the claimant be sufficient to meet claimant's needs in light of whatever claimant's financial status might be? Clearly, the present record does not allow the undersigned to determine whether the partial commutation would be in the claimant's best interest.

Additionally, it is pointed out that the years' worth of permanent partial disability benefits (plus interest), which appear to be accrued-not paid as discussed earlier, might be a source of income the claimant would wish to pursue and could use to pay a substantial portion of his counsel's fees. See Code section 86.42.

* * *

THEREFORE, claimant's application for partial commutation is hereby denied.

Signed and filed this 31st day of October, 1979.

LEE M. JACKWIG
Deputy Industrial Commissioner

No Appeal.

On appeal of the following proposed decisions, held that the proposed decision by the deputy is adopted as the final decision of the agency.

Adams, John, v. Carnation Company, and Continental National Group 5-30-77

Alderman, Dale, v. Wilson & Company (self-insured) 6-25-80
[Appealed to District Court]

Bentson, Richard M., v. Welp & McCarten d/b/a Fort Dodge Limestone, and Employers Insurance of Wausau 8- 3-78
[Appeal to District Court]

Boge, Daniel D., v. Rowley Interstate Transportation Company, and United States Fidelity & Guaranty Company 5-29-79

Boggs, Albert P., Jr., v. Pittsburgh-Des Moines Steel, and Employers Insurance of Wausau 8-21-78
[District Court affirmed]

Briggs, James Robert, v. Firestone Tire & Rubber Co., and The Travelers Insurance Co. and Liberty Mutual Insurance Co. 8-21-78
[Appeal to District Court]

Brown, Bertille, v. CCC Quality Cleaning & Supply and Illinois National Insurance Co. 12- 8-78
[Appeal to District Court]

Buntin, Nellie M., v. The Hubinger Company and American Mutual Insurance Company 1-10-80

Burns, Rosemary, v. Duncan's Motel & Restaurant, and Iowa Mutual Insurance Co. 6-3-80

Camp, Oliver v. Wilson Foods (self-insured) 1-8-80

Carmichael, Orletha, v. Sears Roebuck and Company (self-insured) 8-9-78
[District Court affirmed]

Chapman, Kenneth, v. Umthun Trucking and Great West Casualty Company 10-15-79

Choquette, Roland W., v. Gunderson's Industrial Equipment, Inc., and Western Casualty and Surety Company and The Second Injury Fund of Iowa 8-2-78

Colwell, Sandra Kay, v. Armour-Dial, Inc. (self-insured) 12-29-78

Crawford, Jerry L. v. Matson, Inc., and Farmers Insurance Group 12-27-79

Dankert, Roger, v. Mirco, LTD., d/b/a Midwest Insulation and Roofing Company, and State Farm Fire and Casualty Company 1-31-80

Dickey, Jennie L., v. ITT Continental Baking Company, and Liberty Mutual Insurance Company 3-28-80

Dorman, Linda A. and Rogers, Mary B., v. Carroll County, and Maryland Casualty Company 5-14-80
[Appeal to District Court]

Furay, Joan Ella, v. Flavorland Industries, and Insurance Company of North America 7-17-78
[District Court affirmed; appealed to Supreme Court]

Goetschius, Joseph E., v. Commonwealth Electric Company, and Kemper Insurance Companies 5-31-79

Gomez, Roberto, v. E.C. Ernst Midwest, and The Travelers Insurance Company 9- 5-79

Goodwin, Annabelle, v. Cedar Rapids Community School District, and Bituminous Insurance Company ... 8-17-78

Gross, Barbara Lee, v. Kiowa Corporation, and Employers Insurance of Wausau 8-2-78

Gustafson, John, v. Armstrong Rubber Company, and Liberty Mutual Insurance Company 7-21-78

Hansen, Leonard, v. Livestock Feeders, Ltd., and Iowa Mutual Insurance Company 7-26-78
[Appealed to District Court; dismissed]

Hinderman, John J., v. Standard Forwarding Co., Inc., and Employers Mutual Casualty Company 5-4-79
[Appealed to District Court; dismissed]

Ridgely, William W., v. Hawkeye-Security Insurance Co. 5-29-79
[District Court Affirmed]

Roberts, Lila, v. Siesta Park Manor, Inc., and The St. Paul Insurance Companies 6-4-80
[Appealed to District Court]

Robson, Norman N., v. Wiegel Construction Company, and Employers Mutual Casualty Co. 12-18-78

Rose, Harley Dale, v. James D. Fisk, and Farm Bureau Insurance Company 8-17-79

Sciarrotta, Sam P., v. Westinghouse Credit Corporation, and Liberty Mutual Insurance Co. 9-5-79

Shull, Alette v. L & L Insulation and Supply Co., Iowa Asbestos Company and Central Asbestos and Supply Co., and North River Insurance Co., Westchester Fire Insurance Co., Western Casualty and Surety Company, and Employers Mutual Casualty Co. 6-3-80
[Appealed to District Court]

Siddens, Charles Roger, v. Mid-Iowa Builders, Inc. 6-4-80
[Appealed to District Court]

Six, Carolyn, v. Bloomfield Foundry, Inc., and Hawkeye-Security Insurance 6-1-79

Smith, Melvin A., v. Firestone Tire & Rubber Co., and Liberty Mutual & Travelers Insurance 8-25-78

Sparks, Samuel G., v. Comptroller's Data Processing Division, and State of Iowa 8-18-78
[District Court affirmed; Appealed to Supreme Court; dismissed]

Taylor, Fred L., v. George A. Hormel & Co., and Liberty Mutual Insurance Co. 10-24-79
[Appealed to District Court]

Thompson, Jordan R., v. R. J. Westerman (Drive IN Lumber Mart), and American Mutual Insurance Company 8-24-79
[Appealed to District Court]

Verre, Dennis, v. United Parcel Service, and Liberty Mutual Insurance Company 1-4-80

Ward, Marvis, v. Iowa Department of Transportation and State of Iowa 9-10-79
[District Court affirmed; Appealed to Supreme Court]

Yanney, Mildred E., v. Tri State Janitorial Service, and Aetna Life & Casualty Co. 9-28-79

RESULTS ON CASES APPEALED DURING THE LAST BIENNIUM

Asay, Jim D., v. Industrial Engineering Equipment Company, and Travelers Insurance Company, and Second Injury Fund, State of Iowa. Appealed to District Court; dismissed.

Bennett, Curtis E., v. Armstrong Rubber Co., and Liberty Mutual Insurance Co. Appealed to District Court; affirmed. Appealed to Supreme Court; pending.

Cady, Reginald, v. Cedar Rapids Community School, and Bituminous Casualty Corp. Appealed to District Court; affirmed. Appealed to Supreme Court; affirmed.

Chapman, Mary Anne, v. Paul Walker d/b/a Pastime Lounge, and Aetna Life and Casualty. Appealed to District Court; affirmed.

Christianson, Ronald E., v. John R. Bahr, d/b/a Bob's Grinding. Appealed to District Court; affirmed. Appealed to Court of Appeals; affirmed.

Cross, Richard I., v. Smith's Transfer Corporation, and Transport Insurance Co. Appealed to District Court; affirmed. Appealed to Court of Appeals; affirmed.

Eittrem, Kenneth, v. Farmers Cooperative Elevator Co., and Farmers Elevator Mutual Ins. Co. Appealed to District Court; modified, affirmed, and remanded. Appealed to Supreme Court; pending.

Gady, Oscar, v. Iowa Beer and Liquor Control Commission, and State of Iowa. Appealed to District Court; affirmed.

Gamerl, Dennis J., v. M. K. Eby Construction Company, and United States Fidelity & Guaranty Co. Appealed to District Court; affirmed.

Heald, Larry, v. Great Plains Gas Co., Division of National Propoane Corporation, and Kansas City Fire and Marine Insurance Company. Appealed to District Court; affirmed.

Jensen, Leon, vs. McLaughlin Farms, and Continental Western. Appealed to District Court; affirmed. Appealed to Court of Appeals; affirmed.

Mefferd, Ronald N., v. Ed Miller & Sons, Inc. and United States Fidelity and Guaranty Company. Appealed to District Court; affirmed. Appealed to Court of Appeals; affirmed.

Robinson, George F., v. Second Injury Fund of Iowa. Appealed to District Court; affirmed. Appealed to Supreme Court; pending.

Rose, Ruth, v. Woodward State Hospital School, and the State of Iowa. Appealed to District Court; affirmed and remanded.

Tighe, Charles Edward, III, v. Morton Building and Highlander Inn Supper Club, and Bituminous Casualty Company, and Fireman's Fund. Appealed to District Court; affirmed. Appealed to Court of Appeals; affirmed.

Wagner, Stephen J., v. Finley Hospital, and Insurance Company of North America. Appealed to District Court; reversed. Appealed to Supreme Court; affirmed District Court.

Zwack, William E., v. The Finley Hospital and United States Fidelity and Guaranty Company. Appealed to District Court; affirmed. Appealed to Court of Appeals; affirmed.

DECISION INDEX

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Thirty-Fourth Biennial Report